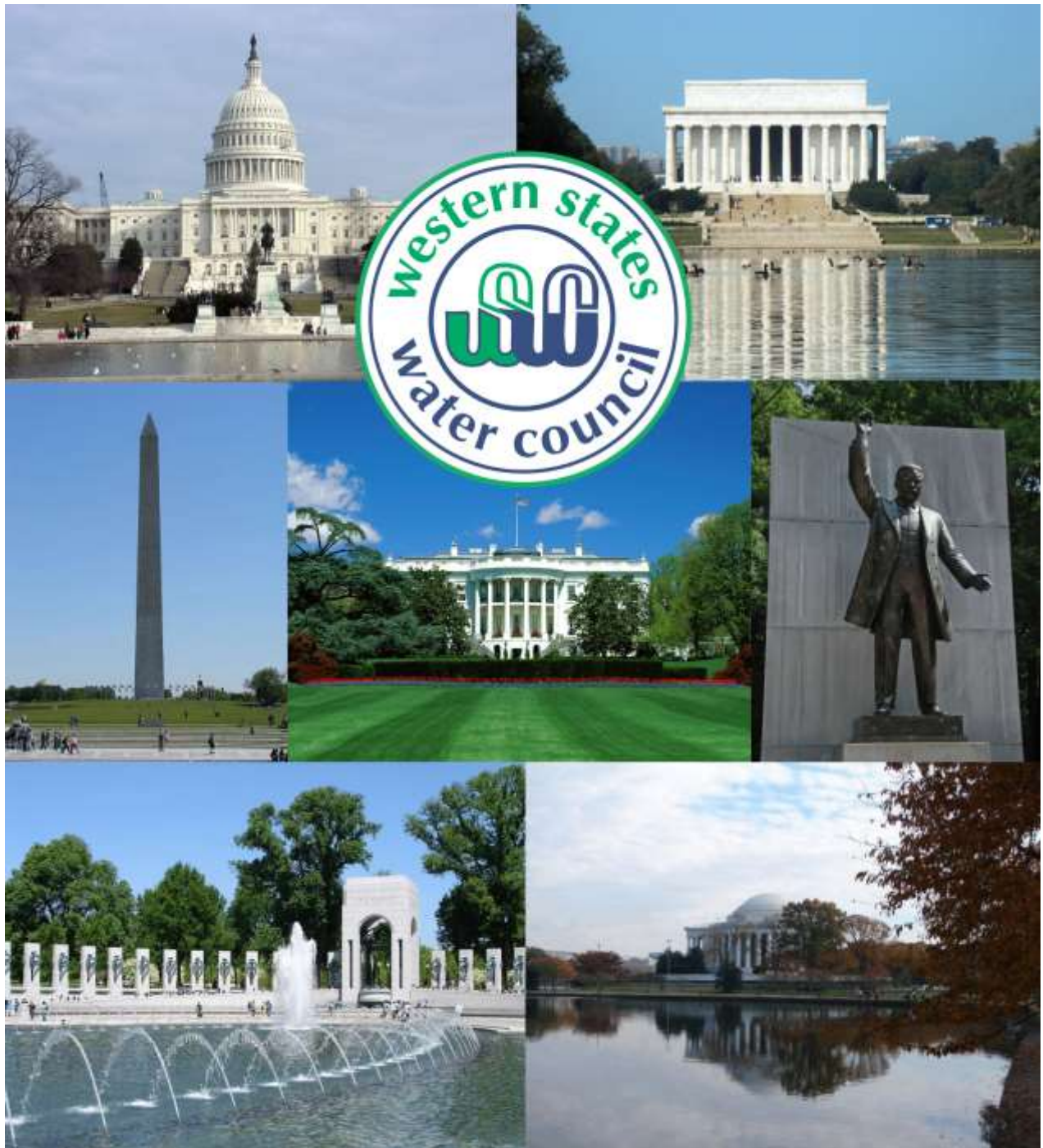


2014 WASHINGTON ROUNDTABLE



**Crystal Gateway Marriott Hotel
Washington, DC
April 1-4, 2014**

Tab A – Schedule of Meetings – Agenda –
30-day Notice

WESTERN STATES WATER COUNCIL
174th COUNCIL MEETING
Arlington, Virginia
April 3, 2014

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A. Schedule of Meetings - Agenda - 30-day Notice

B. Membership List

C. WSWC Policy Positions

Proposed Positions

- supports legislation to standardize and streamline data reporting and processes for managing the U.S. Bureau of Reclamation's infrastructure assets, including an assessment of major repair and rehabilitation needs;
- supports legislation to amend the Reclamation Safety of Dams Act to authorize such sums as may be necessary to carry out its provisions;
- supports legislation directing the Secretary of Interior to establish a program for the transfer of single-purpose federal water projects to non-federal projects sponsors/operators as appropriate

Sunsetting Positions

- #329** - regarding the National Levee Safety Act of 2007 and the Interpretation of Levees and Water Supply Canals (Apr 15, 2011)
- #330** - regarding the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund (Apr 15, 2011)

Internal Policy

Draft Policy on Endorsing Federal Nominees
List of Current WSWC Policy Statements and Sunsetted Positions

D. Budget

E. WGA Water Policy Resolutions

F. National Drought Resiliency Partnership

G. Landsat

H. Water Data Exchange

Draft FY2014-2015 Work Plans

- I. Water Resources Committee
- J. Legal Committee
- K. Executive Committee
- L. Water Quality Committee

M. Hydroclimate Monitoring and Data Workshop

N. Surplus Water Rulemaking

O. Drought

P. Federal Legislation and Litigation Update

Q. WSWC 2013 Activities and Events

R. WSWC Strategic Directions Summary

S. Future Council Meetings

T. WSWC Clean Water Act Work Group Update

U. WSWC Clean Water Act 401 Certification Authority Survey

V. Newsletter Index

W. ACWI Ad Hoc Workgroup USGS Water Resources Recommendations

XYZ. Sunsetting Positions for Summer 2014 Meeting (#330.5 - #334)

SCHEDULE OF MEETINGS

WESTERN STATES WATER COUNCIL 174th COUNCIL MEETINGS

Crystal Gateway Marriott
Washington, D.C.
April 1-4, 2014

<u>Date</u>	<u>Time</u>	<u>Meeting</u>	<u>Room</u>	<u>Adjournment</u>
<u>Tuesday, April 1</u>				
	9:00 am	ICWP Water Resources Planning Workshop	Salons D & E	4:30 pm
	7:00 pm	Management Subcommittee <i>(over dinner)</i>		
<u>Wednesday, April 2</u>				
	8:00 am	Washington, D.C. Roundtable <i>(Lunch, breaks and reception included)</i>	Salons A & B	6:00 pm
	6:00 pm	ICWP & WSWC Reception Sponsors include: <i>Xylem/YSI, Hach Environmental, Chris Heyer, Northwest Pipe Company, Aquatic Informatics, Chris Lowry, Hazen and Sawyer, and Wenck Associates, Inc.</i>	Skyview	7:30 pm
<u>Thursday, April 3</u>				
	8:00 am	Water Resources Committee	Salon A	9:45 am
	10:00 am	Legal Committee	Salon A	11:45 am
	12:00 pm	Executive Committee <i>(over lunch)</i>	Salon D	12:55 pm
	1:00 pm	Water Quality Committee	Salon A	2:45 pm
	3:00 pm	Full Council Meeting	Salon A	5:00 pm
<u>Friday, April 4</u>				
	9:00 am	WSWC and WestFAST Principals Meeting Interior Building Room 5160, 1849 C Street, NW; Washington, DC		10:50 am

AGENDA
WATER RESOURCES COMMITTEE
Crystal Gateway Marriott
Washington, D.C.
April 3, 2014

Called to Order at: 8:00 a.m.
Conducting: Brian Dunnigan, Chair

Room: Salon A

TABS

1. **Welcome and Introductions**
2. **Approval of Minutes**
- C 3. **Proposed and Sunsetting Position**
 - a. Reclamation Safety of Dams Act Reauthorization
 - b. U.S. Bureau of Reclamation Project Title Transfer Legislation
 - c. USBR Infrastructure Repair and Rehabilitation Needs Assessment

#329 - Regarding the National Levee Safety Act of 2007 and the Interpretation of Levees and Water Supply Canals (April 15, 2011)
- E 4. **WGA's 2013 Water Resolutions/2014 Workplan** – Carlee Brown, WGA
5. **Department of the Interior Principles and Requirements Update** – Tom Iseman, Deputy Assistant Secretary of Interior
- F 6. **National Drought Resiliency Partnership** – Roger Gorke, Senior Policy Advisor, Office of Water, Environmental Protection Agency and WestFAST Vice-Chair
- G 7. **The Future of Landsat and the National Land Imaging Program** – NASA/USGS
- H 8. **The Environmental Data Exchange & WSWC's WaDE Update** – Dwane Young, EPA & Sara Larsen (via phone)
- I 9. **FY2014-2015 Committee Work Plan and WSWC Priorities** – Tony Willardson
10. **NOAA Congressional Briefing Report** – Tony Willardson
- M 11. **CDWR/WSWC Hydro Climate Monitoring & Data Workshop** – Tony Willardson
12. **Other Matters/Adjourn**
- W a. ACWI Ad Hoc Workgroup USGS Water Resources Recommendations

AGENDA
LEGAL COMMITTEE
Crystal Gateway Marriott
Washington, D.C.
April 3, 2014

Called to Order at: 10:00 a.m.
Conducting: Maria O'Brien, Chair

Room: Salon A

TABS

1. **Welcome and Introductions** – Maria O'Brien
2. **Approval of Minutes** – Maria O'Brien
- J 3. **2014-2015 Draft Committee Workplan** – Maria O'Brien
 - a. Federal Non-Tribal Water Rights Workshop – Nathan Bracken and Eric Stevens
 - b. Legal and Institutional Analysis of Water and Energy – Nathan Bracken
 - c. Water Conservation Report – Nathan Bracken
- O 4. **Department of the Interior Update** – Jennifer Gimbel, Deputy Commissioner of the Bureau of Reclamation for External and Intergovernmental Affairs
 - a. Bureau of Reclamation Drought Authorities
 - b. Indian Water Rights Settlements
5. **Department of Defense Update** – Capt. Dean Leech, U.S. Navy, Office of the Secretary of Defense, Office of General Counsel; Becky Patton, Climate Change Adaptation Policy Program Manager, Office of the Deputy Under Secretary of Defense (Installations & Environment) Environment, Safety, & Occupational Health
- N 6. **U.S. Army Corps of Engineers Surplus Water Rulemaking** – Michelle Klose
7. **Report on March DC Visits** – Nathan Bracken
- P 8. **Litigation/Legislation Update** – Nathan Bracken
9. **Other Matters** – Maria O'Brien

AGENDA
EXECUTIVE COMMITTEE

Crystal Gateway Marriott

Washington, D.C.

April 3, 2014

Call to Order at: 12:00 p.m.
Conducting: Phil Ward, Chair

Room: Salon D

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
- D 3. **Report on Budget and Finances** – Jerry Rigby
 - a. WGA DOE Grant Status Report
 - b. CA DWR Hydroclimate Monitoring & Data Workshop
 - c. 2014/2015 Proposed Budget
- C 4. **Proposed & Sunsetting Positions** – Tony Willardson
- C 5. **WSWC Policy on Endorsing Federal Political Appointees/Nominees** – Phil Ward
- Q 6. **WSWC 2013 Activities and Events Highlights**
- R 7. **WSWC Strategic Directions** – Phil Ward/Tony Willardson
8. **WestFAST Principals Meeting** – Tony Willardson
9. **FY 2013-2014 WestFAST Discussion** – Tony Willardson
- E 10. **WGA/WSWC Activities** – Tony Willardson
 - a. WGA Winter Meeting (Water Resolutions)
 - b. WGA Annual Meeting – Colorado Springs (June 8-9)
- K 11. **Executive Committee Draft FY2014-2015 Work Plan** – Phil Ward
12. **WSWC Water Management Symposium** – Phil Ward
- S 13. **Future WSWC Council Meetings**
 - a. 2014 Summer Meetings – Helena, Montana – July 15-18, 2014
 - b. 2014 Fall Meetings – Phoenix, Arizona – October 7-10, 2014
 - c. 2015 Spring Meetings – North Dakota
 - d. 2015 Summer Meetings & 50th Anniversary –
 - e. 2015 Fall Meetings
- XYZ 14. **Summer 2014 Meeting Sunsetting Positions**
 - #330.5 - Letter commenting on EPA and COE *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (July 29, 2011)
 - #331 - Opposes Preemption of State Water Law in Federal Legislation (July 29, 2011)
 - #332 - Supporting Federal Research and Development of Updated Hydroclimate Guidance for Extreme Meteorological Events (July 29, 2011)
 - #333 - Regarding the Reclamation Fund (asks Congress to fully use the fund for authorized water projects and programs in the West) (July 29, 2011)
 - #334 - Supporting the Water Resources Research Institutes (requesting Congress to reauthorize and appropriate funds for the WRI program) (July 29, 2011)
15. **Other Matters**

AGENDA
WATER QUALITY COMMITTEE
Crystal Gateway Marriott
Washington, D.C.
April 3, 2014

Called to Order at: 1:00 p.m.
Conducting: J.D. Strong, Chair

Room: Salon A

TABS

1. **Welcome and Introductions:** J.D. Strong
2. **Approval of Minutes:** J.D. Strong
- C 3. **Sunsetting Position:**

#330 – Regarding the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund
- L 4. **2013-2014 Draft Committee Workplan** – J.D. Strong
 - a. Hydraulic Fracturing
 - b. Water Quality/Quantity Nexus Workshop
5. **EPA Update** – EPA Representatives
- T 6. **WSWC Clean Water Act Workgroup Update** – J.D. Strong and Nathan Bracken
- U 7. **WSWC 401 Survey Results** – Tony Willardson
8. **Other Matters** – J.D. Strong

AGENDA

174th COUNCIL MEETING

Crystal Gateway Marriott
Washington, D.C.
April 3, 2014

Call to Order at: 3:00 p.m.
Conducting: Phil Ward, Chair

Room: Salon A

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
3. **NASA Missions and Water Resources Programs** – Dr. Michael Freilich
4. **WestFAST Report** – Becky Fulkerson, Bureau of Reclamation, WestFAST Chair
5. **Committee Reports** – Action Items
 - C A. Water Resources Committee – Brian Dunnigan
 - C B. Executive Committee – Pat Tyrrell
 - C C. Water Quality Committee – J.D. Strong
 - D. Legal Committee – Maria O’Brien
6. **State Reports**
- S 7. **Future Council Meetings**
8. **Other Matters**



WESTERN STATES WATER COUNCIL

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MEMORANDUM

TO: Council Members

FROM: Tony Willardson, Executive Director

DATE: March 4, 2014

RE: **30-Day Notice of Spring (174th) Council Meetings in Washington, D.C. and Minutes**

This memorandum is notice that in 30 days the 174th meetings of the Western States Water Council will be held in the Washington, D.C. area at the Crystal Gateway Marriott, located at 1700 Jefferson-Davis Highway in Arlington, Virginia. If you have not yet made your hotel reservations, we would urge you to do so at your earliest convenience. The Group **cutoff date is March 10, 2014**. Call 1-800-228-9290 and note that you are with the ICWP group to obtain the \$229 room rate. A WSWC meeting schedule is attached for your reference, and agenda will be posted on our [website](http://www.westernstateswater.org).

Three new policy positions have been proposed for consideration. The first supports legislation to standardize and streamline data reporting and processes for managing the U.S. Bureau of Reclamation's infrastructure assets, including an assessment of major repair and rehabilitation needs. The second supports legislation to amend the Reclamation Safety of Dams Act to authorize such sums as may be necessary to carry out its provisions. The third supports legislation directing the Secretary of Interior to establish a program for the transfer of single-purpose federal water projects to non-federal projects sponsors/operators as appropriate. We will also review two sunseting WSWC policy positions: (1) Position #329, regarding the National Levee Safety Act of 2007 and the definition of levees and water supply canals; and (2) Position #330 regarding the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund. All proposed and sunseting positions are attached.

Also attached for consideration is an internal policy proposal related to WSWC endorsements of federal political appointments, which may be considered to be appropriate in rare occasions.

We are providing a copy of the WGA Staff Advisory Council contact information (attached) so that you may consult your respective Governor's adviser with respect to the aforementioned policies. Also, please feel free to invite your governors representatives located in DC to attend and participate in our meetings.

Please note that Council members are invited to participate with the Interstate Council on Water Policy (ICWP) on Tuesday morning in a water planners' workshop.

On Wednesday morning, the Council will join with ICWP for a roundtable discussion featuring Administration leaders and key Congressional committee staff. Registration is required and may be paid on-site. The discussion will begin at 8:00 a.m. with speakers from the Administration providing overviews of priorities for their agency's water resources programs and initiatives. There will be time for questions following each speaker.

Members and guests are invited to attend a reception Wednesday evening at the hotel from 6:00 to 7:30 p.m. Reception and meeting sponsors include: *Xylem/YSI, Hach Environmental, Chris Heyer, Northwest Pipe Company, Aquatic Informatics, Chris Lowry, Hazen and Sawyer, and Wenck Associates.*

Council Members

March 4, 2014

Page 2

On Thursday, abbreviated WSWC Committee and Council meetings will be held sequentially. We will begin at 8:00 a.m. with the Water Resources Committee meeting, followed by the Water Quality Committee at 10:00 a.m., the Executive Committee at noon, and the Legal Committee at 1:00 p.m. Each of the committees will be reviewing their draft work plans for FY2014-2015. The Full Council meeting will begin at 3:00 p.m. and conclude by 5:00 p.m. On Friday morning, Council members are invited to meet with WestFAST agency principals at the Interior Building in Room 5160 at 9:00 a.m.

An email will be sent to notify you of the webinar and teleconference information, together with the briefing books the week prior to the meetings. Members who wish to receive a hard copy of the briefing books should **notify Julie Groat no later than March 21** at jgroat@wswc.utah.gov.

Again, the meeting schedule, agenda, and registration information are all available with updates on our [website](#).

As is Council policy, an Executive Committee and Committee Chairs conference call will be held to discuss the proposed and sunseting policy positions, as well as other matters. **The conference call is scheduled for Monday, March 10, at 2:30 pm Mountain Time** (3:30 pm Central Time; 1:30 pm Pacific Time). A call-in number will be provided Executive Committee members, designated alternates, and the Committee Chairs in a separate email.

For the purpose of the conference call and the meetings themselves, the Council has adopted an internal policy specifying the process for establishing credentials for participation by persons who are not appointed Council representatives. That policy requires written notification of any designee to act on behalf of a member, either in person or via conference call. An email is sufficient notice. As always, each state has only one vote, and the Executive Committee member or a designee is responsible for voting on any proposed Council action.

The minutes from the meetings held in Deadwood, South Dakota last October are available [online](#) at the Council's website for your review and reference.

If we can be of any assistance or answer any questions regarding the foregoing, please call our office.

cc: WGA Staff Council and WGA Staff

Attachments: Schedule of Meetings

Proposed Positions (3)

Internal Policy on Political Appointments Endorsement

WSWC Sunseting Positions (2)

WGA Staff Council List

Tab B – Membership List

WESTERN STATES WATER COUNCIL

MEMBERSHIP LIST

March 24, 2014

OFFICERS

Chair - **Phil Ward**
Vice-Chair - **Patrick Tyrrell**
Secretary-Treasurer - **Jerry Rigby**

STAFF

Executive Director - **Tony Willardson**
Assist. Director/Gen. Counsel - **Nathan Bracken**
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Hydrologist/Programmer - **Sara Larsen**
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**Executive Committee Member

†Council members denoted by this symbol are listed by virtue of their office, pending receipt of a letter of appointment by their Governor.

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Michael Lacey - Arizona
Mark Cowin - California
Jeanine Jones - California
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James Eklund - Colorado
Hal Simpson - Colorado
(Alternate)*
Jerry Rigby - Idaho
David Barfield - Kansas
Tim Davis - Montana
Brian Dunnigan - Nebraska
Roland Westergard - Nevada
Leo Drozdoff - Nevada
(Alternate)*
Scott Verhines - New Mexico
Todd Sando - North Dakota
J.D. Strong - Oklahoma
Phil Ward - Oregon
(Chair)
Steve Pirner - South Dakota
Kent Woodmansey - South Dakota
(Alternate)*
Carlos Rubinstein - Texas
Walt Baker - Utah
Maia Bellon - Washington
Patrick T. Tyrrell - Wyoming
(Vice-Chair)

Management Subcommittee

Phil Ward - Oregon
(Chair)
Patrick Tyrrell
(Vice-Chair)
Jerry Rigby
(Secretary/Treasurer)
Tony Willardson
(Executive Director)

Nominating Subcommittee

Roland Westergard **(Chair)** - Nevada
Hal Simpson - Colorado

Ex-Officio Representatives

*For purposes of Committee rosters, the designation as an “alternate” only reflect the person’s function on the Committee.

Endangered Species Act Subcommittee

Roland Westergard - Nevada
Phil Ward - Oregon
Herman Settemeyer - Texas
Sue Lowry - Wyoming

Ex-Officio Representatives

FWS - Andrew Hautzinger
David Cottingham

Shared Water Vision Subcommittee

Sue Lowry - **(Chair)** - Wyoming
Hal Simpson - Colorado
Mike Volesky - Montana
Scott Verhines - New Mexico
Carlos Rubinstein - Texas
Pat Tyrrell - Wyoming

Ex-Officio Representatives

USBR - Dionne Thompson
Corps - John Grothaus
Ray Russo
Stu Townsley
EPA - Roger Gorke
USGS - Pixie Hamilton

Water Resources Infrastructure Subcommittee

Jeanine Jones - California **(Chair)**
Hal Simpson - Colorado
Mike Volesky - Montana
DL Sanders - New Mexico
Scott Verhines - New Mexico

Ex-Officio Representatives

USBR - Dionne Thompson
Corps - Elliot Ng
EPA - Steve Albee
NRCS - Keith Admire
Doug Toews

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William Staudenmaier - Arizona
Cynthia Chandley - Arizona
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Jeanine Jones - California
James Eklund - Colorado
Jerry Rigby - Idaho
John Simpson - Idaho
(Alternate)*
Vacant - Kansas
Anne Yates - Montana
Jay Weiner - Montana
(Alternate)*
Vacant - Nebraska
Roland Westergard - Nevada
Jason King - Nevada
(Alternate)*
Maria O'Brien - New Mexico
(Chair)
DL Sanders - New Mexico
(Alternate)*
Jennifer Verleger - North Dakota
Jerry Barnett - Oklahoma
Phil Ward - Oregon
Vacant - South Dakota
John Elliott - Texas
Norman Johnson - Utah
(Vice-Chair)
Alan Reichman - Washington
Chris Brown - Wyoming

Non-Tribal Federal Water Needs Subcommittee

Melissa Hornbein - Montana
Ed Bagley - New Mexico
Dwight French - Oregon
Herman Settemeyer - Texas

Ex-Officio Representatives

BLM - Lee Koss
USFS - Christopher Savage
FWS - Andrew Hautzinger
DOD - Marc Kodack

Tribal Reserved Water Rights Subcommittee

William Staudenmaier - Arizona
Cynthia Chandley - Arizona
Jay Weiner - Montana
Bidtah Becker - New Mexico
DL Sanders - New Mexico
Norman Johnson - Utah

Water Transfers and the Public Interest

Jerry Rigby - Idaho
Scott Verhines - New Mexico
DL Sanders - New Mexico
Phil Ward - Oregon
Pat Tyrrell - Wyoming

Natural Flows Subcommittee

Michelle Klose - North Dakota
J.D. Strong - Oklahoma
Jennifer Verleger - South Dakota
Carlos Rubinstein - Texas
Herman Settemeyer - Texas

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Mike Fulton - Arizona
Thomas Howard - California
Betty Olson - California
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Darlene Ruiz - California
(Alternate)*
Trisha Oeth - Colorado
Steve Gunderson - Colorado
(Alternate)*
Curt Fransen - Idaho
Tom Stiles - Kansas
George Mathieus - Montana
Tracy Stone-Manning - Montana
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Patrick Rice - Nebraska
Colleen Cripps - Nevada
Ryan Flynn - New Mexico
David Glatt - North Dakota
J.D. Strong - Oklahoma
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Maia Bellon - Washington
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NASA - Brad Doorn
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Tab C – WSWC Policy Positions

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
BUREAU OF RECLAMATION'S
MAINTENANCE, REPAIR AND REHABILITATION NEEDS
Arlington, Virginia
April 3, 2014

WHEREAS, the Bureau of Reclamation operates hundreds of dams, reservoirs, and related infrastructure in the West, supplying water and power to millions of people, irrigating millions of acres for food and fiber, providing flood control and recreation, and supporting wildlife and habitat; and

WHEREAS, the importance of maintaining these projects cannot be overstated; and

WHEREAS, many of Reclamation's facilities are nearing, or have already exceeded, their design lives and are in need of maintenance, repair, and/or rehabilitation (MR&R), threatening public safety as well as private and public property; and

WHEREAS, Reclamation's funding has not kept pace with its MR&R needs; and

WHEREAS, Reclamation estimates that the backlog of projects needed to address its MR&R needs is \$2.6 billion; and

WHEREAS, Congress and the Administration must have access to consistent and accurate information on Reclamation's MR&R needs to address these needs through investments that are based on long-term capital budgeting efficiencies rather than annual incremental choices; and

WHEREAS, state water managers require this information to carry out their water planning and other water administration activities; and

WHEREAS, in recent years, Reclamation has made progress in developing and improving estimates of MR&R needs for infrastructure under its jurisdiction; and

WHEREAS, notwithstanding these improvements, much of the currently available information regarding Reclamation's MR&R needs is inconsistent and difficult to obtain, including the basis for Reclamation's MR&R backlog estimates; and

WHEREAS, a process is needed to evaluate Reclamation MR&R needs pursuant to standard asset management criteria that evaluate risks to: (1) human health and safety; (2) economic growth; and (3) the environment.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council urges Congress and the Administration to work together to develop a standardized process to provide the most up-to-date, consistent, and accurate information regarding Reclamation's MR&R needs, including the estimated costs of those needs and the relative priority or importance of addressing those needs; and

BE IT FURTHER RESOLVED that Reclamation should ensure that appropriate information on its MR&R needs is readily accessible and easy to understand by Congress, state policy makers, and the public.

DRAFT

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
RECLAMATION SAFETY OF DAMS ACT OF 1978
Arlington, Virginia
April 3, 2014

WHEREAS, the Bureau of Reclamation's dams and reservoirs are the primary source of water for numerous regions and communities throughout the West; and

WHEREAS, Reclamation's dams and reservoirs provide essential benefits such as drinking water, irrigation, hydropower, flood control, and recreation, while also supporting wildlife and habitat; and

WHEREAS, the safe operation and maintenance of Reclamation's dams is critical to sustaining these benefits and preventing dam failure, which threatens lives as well as private and public property; and

WHEREAS, many of Reclamation's dams are nearing, or have already exceeded, their design lives and are in need of rehabilitation or modernization; and

WHEREAS, maintaining and rehabilitating dams and related infrastructure is one of the most serious problems that Reclamation currently faces; and

WHEREAS, the Reclamation Safety of Dams Act of 1978 provides Reclamation with authority to preserve and maintain the structural safety of dams under its stewardship; and

WHEREAS, current authorizations for the Act will soon be exhausted; and

WHEREAS, failure to authorize such sums as are necessary for Reclamation's dam safety activities under the Act will increase the chances of dam failures by hindering the agency's ability to carry out critical dam safety rehabilitation and modernization efforts.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council urges the Administration and Congress to ~~authorize work together and determine~~ such sums as ~~are may be~~ necessary for Reclamation to carry out the purposes of the Reclamation Safety of Dams Act of 1978.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
THE TRANSFER OF FEDERAL WATER AND POWER PROJECTS
AND RELATED FACILITIES
Arlington, Virginia
April 3, 2014

WHEREAS, past and present proposals have been made to transfer ownership of various federal agencies' water and power projects and related facilities to non-federal entities; and

WHEREAS, such transfers may offer important benefits, but many are necessarily very complex and involve many different interests, including important public and third-party interests protected under various state and federal laws; and

WHEREAS, many of these projects serve multiple purposes and were built (and their capital costs are being repaid) under longstanding agreements with water, power, and other users; and

WHEREAS, some single-purpose projects might be appropriately transferred under an expedited review process to their non-federal sponsors/operators by mutual agreement; and

WHEREAS, the many potential public benefits and costs related to transfers involve state and local governments and other interests, in addition to the federal government; and

WHEREAS, present and potential benefits may be lost unless there is a careful analysis of the transfer of individual projects; and

WHEREAS, federal project transfers require a careful project-by-project analysis of expected costs and benefits; and

WHEREAS, states have the primary responsibility for the comprehensive development, administration, and protection of their water resources for all purposes.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports the careful evaluation of the transfer of federal water and power assets and urges the Administration and Congress to work together to establish a process and develop appropriate criteria and guidelines for a project-by-project review of transfer proposals, with strong state involvement and protections for state water laws and water rights.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
THE NATIONAL LEVEE SAFETY ACT OF 2007
and the
INTERPRETATION OF LEVEES AND WATER SUPPLY CANALS**

~~Santa Fe, New Mexico~~

~~April 15, 2011~~

Arlington, Virginia

April 3, 2014

WHEREAS, Congress enacted the National Levee Safety Act of 2007 (the Act) in the aftermath of Hurricane Katrina and the failure of the levees and flood water conveyance canals in New Orleans, Louisiana;¹ and

WHEREAS, the Act created the “National Committee on Levee Safety” (NCLS) to develop recommendations for a national levee safety program, including a strategic plan for implementation of the program; and

WHEREAS, in January 2009, the NCLS released a draft report, “Recommendations for a National Levee Safety Program – A Report to Congress from the National Committee on Levee Safety;” and

WHEREAS, the report’s core recommendation calls for the creation of an independent National Levee Safety Commission to: (1) develop national safety standards for levees for common, uniform use by all federal, state, and local agencies; (2) inventory and inspect all levees on a periodic basis; and (3) develop national tolerable risk guidelines for levees; and

WHEREAS, Section 9002(3) of the Act defines the term “levee” as embankments that provide protection from weather events and are subject to water loading for only a few days or weeks a year, but also includes “structures along canals that constrain water flows and are subject to more frequent water loadings that do not constitute a barrier across a watercourse;” and

WHEREAS, the NCLS concluded that water supply canals are “... canals that constrain water flows and are subject to more frequent water loadings [than are levees] ...” and therefore treats the embankment sections of water supply canals as “structures along canals;” and

WHEREAS, the NCLS’s recommendations for a national program of safety standards and tolerable risk guidelines for levees ~~would-might~~ therefore ~~be inappropriately applied~~ to water supply canals throughout the West, including both non-federal facilities and federal facilities managed by the U.S. Bureau of Reclamation and state and local agencies; and

¹ 121 Stat. 1288, P.L. 110-114.,

WHEREAS, Reclamation already has authority under the Aging Water Infrastructure and Maintenance Act, which Congress enacted as part of the Omnibus Public Lands Management Act of 2009,² to address the canals it owns, and inspections of those embankment sections of canals located in urban areas ~~are in process~~; and

WHEREAS, ~~the Water Resources Development Act currently in conference would create a National Levee Safety Program to encourage establishment of State and Tribal levee safety programs, recognizing States and Tribes are uniquely positioned to regulate local and regional levee systems; and~~

~~WHEREAS, the purpose of the program is to promote sound technical practices in levee design, construction, operation, maintenance, inspection, assessment, and security; and~~

~~WHEREAS, the program definitions for “canal structures” should specifically exclude water supply canals, which are fundamentally different from flood risk reduction systems that may include floodways and canals providing protection by moving floodwaters associated with precipitation accompanying hurricanes and other similar extreme weather-related events; and~~

~~the NCLS is now in the process of drafting proposed legislation that would implement the recommendations in its report; and~~

~~WHEREAS, the Act’s definition of the term “levee” in no way binds the NCLS, which is free to recommend new definitions in any legislation it may propose; and~~

WHEREAS, all 50 states confront levee issues, but the issues associated with water supply canals are essentially confined to the 17 western states; and

WHEREAS, there are major institutional differences between levees and water supply canals ~~in the West~~ and the “political systems” commonly used to govern levees that warrant treating them separately; and

WHEREAS, water supply canals are essentially standalone features whose integrity is not dependent on the performance of other canals, and therefore do not share the potential for systemic failure; and

WHEREAS, levees are designed to provide protection from flooding and make development behind them possible, while water supply canals serve a separate and distinct purpose; and

WHEREAS, the stakeholder communities and interests involved in addressing the issues related to levees and water supply canals are different, and addressing them jointly through a single national program would not be conducive to effectively addressing either set of issues; and

² 123 Stat. 991, P.L. 111-11.

WHEREAS, potential public safety problems involving water supply canals do not often involve a lack of engineering expertise or design standards, but the ability to finance necessary improvements; and

WHEREAS, Reclamation and the states are in the best position to address the public safety issues presented by water supply canals because such issues are localized and minor in comparison to the risks associated with inadequately designed and maintained levees.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council supports the development of a national program of safety standards for levees and flood water conveyance canals; and

BE IT FURTHER RESOLVED, that any proposed legislation creating a national program of safety standards for levees and flood water conveyance canals should not apply to federal or non-federal water supply canals; and

BE IT FURTHER RESOLVED, that the Western States Water Council encourages the Administration ~~should request~~ and Congress ~~should appropriate to work together and determine the level of~~ adequate funding for the Aging Water Infrastructure and Maintenance Act; and

BE IT FURTHER RESOLVED, that the Administration and Congress should work together to encourage implementation of Title II of the Rural Water Supply Act of 2006,³ and provide for the use of federal loan guarantees for addressing extraordinary maintenance needs related to the operation of federal Reclamation projects.

³ 120 Stat. 3345, P.L. 109-451.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding the
CLEAN WATER STATE REVOLVING FUND
and the
DRINKING WATER STATE REVOLVING FUND**

~~Santa Fe~~Arlington, New MexicoVirginia
~~April 153, 2011~~2014

WHEREAS, the economies of every state and the Nation as a whole depend upon sufficient water supplies of suitable quality, which require adequate water and sewer infrastructure; and

WHEREAS, the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund and Drinking Water State Revolving Fund (SRF programs) provide states with capitalization grants that are leveraged with state contributions to offer financial assistance to cities, towns, communities, and others for the planning, design, construction and rehabilitation of drinking water and wastewater-related infrastructure; and

WHEREAS, ~~each state administers the both~~ SRF programs ~~are administered by each State~~ in coordination with EPA, and these programs are one of the principal tools that states use to pursue the goals of the Clean Water Act and Safe Drinking Water Act; and

WHEREAS, the nation's wastewater and drinking water infrastructure is aging and in need of repair and replacement; and

~~**WHEREAS**, public investment in water infrastructure yields significant economic benefits, as evidenced by U.S. Department of Commerce estimates that one dollar invested in water infrastructure generates \$2.62 in economic output in other industries and that each job created in the local water and sewer industry creates 3.68 jobs in the national economy; and~~

WHEREAS, the Environmental Protection Agency's (EPA) most recent estimates show estimates a total capital investment need of \$298.4 billion for wastewater quality and stormwater infrastructure and \$334.8 billion for drinking water infrastructure nationwide over the next 20 years; and

WHEREAS, the EPA has identified a significant funding gap of nearly \$55 billion under current spending and operation practices; and

WHEREAS, the American Society of Civil Engineers has reported that failure to address this funding gap could lead to \$206 billion in increased costs for businesses and households by 2020, as well as a potential loss of up to 700,000 jobs; and

Comment [NB1]: These figures are from the American Society of Civil Engineers' (ASCE) 2013 Infrastructure Report Card (<http://www.infrastructurereportcard.org/>) and another 2013 ASCE report titled "Failure to Act" (http://www.asce.org/uploadedFiles/Infrastructure/Failure_to_Act/Failure_to_Act_Report.pdf).

The EPA estimates are from 2007 but appear to be the most recent - ASCE cited them in its 2013 report card.

WHEREAS, ~~federal federal budget requests that propose significant reductions appropriations and budget requests that would reduce in~~ SRF funding ignore the multitude of needs as identified by EPA, particularly given that many states and communities are struggling to meet their water and wastewater challenges in the face of growing populations and aging infrastructure; and

WHEREAS, to the extent federal law has established certain nationwide levels of treatment for drinking water and wastewater, the federal government has an obligation to provide states with the necessary financial and technical assistance needed to comply with such requirements, including the appropriation of adequate funding for SRF capitalization grants; and

WHEREAS, EPA's Clean Water and Drinking Water Infrastructure Sustainability Policy ~~burdens mandates that~~ state SRF programs ~~with the exclusive responsibility of promoting promote~~ sustainable systems; and

WHEREAS, the SRF Programs already have measures in place to ensure system sustainability and ~~which~~ account for individual state needs and priorities; ~~and, making~~

WHEREAS, the SRF programs are one of the most successful delivery mechanisms for federal assistance; and

~~**WHEREAS,** every federal dollar that EPA directs away from addressing the primary goal of the SRF programs—addressing public health and water quality protection—reduces the capacity of a state to leverage their programs and address infrastructure needs; and~~

~~**WHEREAS,** the more federal requirements that are placed on State SRF programs the less attractive the SRFs become to local entities~~**WHEREAS,** Congress has approved a number of additional restrictions on the states' management and use of SRF funds, including but not limited to: (1) mandating the use of between 20% and 30% of appropriated funds for principal forgiveness, negative interest loans, grants, or a combination thereof; (2) setting aside 10% of funds for green infrastructure, water or energy efficiency, or other environmentally innovative activities; and (3) "Buy American" provisions that limit the use of SRF funds to purchase certain types of materials and services; and

WHEREAS, although often well-intended, these types of restrictions are generally aimed at advancing policy objectives that are unrelated or contrary to the SRFs' primary purpose of providing funding for basic water infrastructure; and

WHEREAS, these types of restrictions reduce flexibility, increase administrative burdens and capital costs, and hinder the states' ability to manage the SRFs in the most cost effective manner; and

WHEREAS, additional restrictions on state SRF management represent unfunded federal mandates that impose significant regulatory burdens and make state SRF programs less attractive to local entities; and

WHEREAS, every federal dollar directed away from addressing the primary goal of the SRF programs reduces the capacity of a state to leverage their SRF programs and address infrastructure needs.

NOW, THEREFORE, BE IT RESOLVED, that the Administration and Congress should work together to ensure that stable and continuing federal appropriations, ~~increased annually by a construction inflation index~~, are made to the SRF capitalization grants at funding levels that are adequate to help states address their water infrastructure needs; and

BE IT FURTHER RESOLVED, that the SRF programs should provide for greater flexibility and fewer restrictions on state SRF management.

Federal Political Appointments – WSWC Endorsement Policy

The Western States Water Council is a nonpartisan advisory body serving the Western Governors in an expert advisory capacity. As such, it is generally inappropriate for the Council to take a position in support of federal political appointments. However, such appointments can have a significant effect on issues of importance to the Council and the Governors.

Therefore, on occasion, the Council may find it appropriate and expedient to endorse federal political appointments, provided that such endorsements:

- (1) Shall be limited to any nominee put forward by the President for Senate confirmation; and
- (2) Shall be adopted pursuant to the procedures set forth in Article X of the Council's Rules of Organization for external Council policy positions; or
- (3) At the discretion of the Council's Chair, in those instances where circumstances warrant expedited consideration, endorsements may be approved by electronically polling the Council's Executive Committee and the Executive Director of the Western Governors' Association (WGA), provided that no objections are raised [within three working days?].

Once approved, the Chairman may communicate the Council's endorsement as appropriate.

[This policy may be adopted as an internal Council policy by majority vote, and does not require amendment of the Council's rules of organization.]

WSWC Policy Statements

The WSWC policy statements are posted on its website at <http://www.westgov.org/wswc/policy.html>. Policy positions will be deactivated three years after their adoption, unless extended by formal action of the Council. The following is a brief description of all current positions, listed by date of adoption and corresponding number.

2013

- Regarding pesticide applications and National Pollutant Discharge Elimination System discharge permits (October 3, 2013) - #359
- Urging Congress to reaffirm its deference to state water law, provide for the waiver of the United States' immunity to participation in state administrative and judicial proceedings, and provide for payment of fees required by state law (October 3, 2013) - #358
- In the form of a letter to Senate Energy and Natural Resources Committee leaders expressing continued support for implementation of the SECURE Water Act (October 3, 2013) - #357
- Regarding NASA's applied science research program (October 3, 2013) - #356
- Urging the Administration and the Congress to support water research and development programs at the Department of Energy National Laboratories. (June 26, 2013) - #355
- In the form of a letter to House Water Resources and Environment Subcommittee leaders in opposition to H.R. 1460, which would remove "fish and wildlife" as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System (June 26, 2013) - #354
- Notes that the WSWC "...opposes any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing." (June 24, 2013 - #353
- Supports federal efforts to prepare for and respond to extreme weather events, including an expanded and enhanced west-wide extreme precipitation monitoring system. (June 26, 2013) - #352
- Supports federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs (April 5, 2013) - #351
- Supporting implementation of the Rural Water Supply Act of 2006 (April 5, 2013) - #350
- Urging the Administration and the Congress to give a high priority to federal programs, such as the National Oceanic and Atmospheric Administration's Regional Integrated Science and Assessments (RISA) program (April 5, 2013) - #349

2012

- Regarding States' water rights and natural flows (October 12, 2012) - #348

- Supporting legislation to reauthorize the Reclamation States Emergency Drought Relief Act (October 12, 2012) - #347
- Supporting legislation to reauthorize the National Integrated Drought Information System (NIDIS) Act, and accompanying letter to NOAA Administrator Lubchenco (October 12, 2012) - #346
- Regarding federal water and climate data collection and analysis programs (October 4, 2012) - #345
- WSWC Vision on Water (June 8, 2012) - #344
- Supporting legislative action to establish a dedicated funding source for completion of federal rural water projects authorized by Congress (June 8, 2012) - #343
- Regarding water transfers and National Pollutant Discharge Elimination System (NPDES) discharge permits (June 8, 2012) - #342
- Addresses proposed changes to Reclamation's policy manual and requests Reclamation enter into a dialogue with the WSWC (March 15, 2012) - #341
- Supports state primacy over groundwater (March 15, 2012) - #340
- Supports federal applied research and hydroclimate data collection programs (March 15, 2012) - #339
- Commending the introduction of S. 1343, the Energy and Water Integration Act of 2011 (March 15, 2012) - #338

2011

- Stating that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with statutory authorities (October 7, 2011) - #337
- Supporting Indian water rights settlements (October 7, 2011) - #336
- Recommending policy changes at the federal level to expedite state general stream adjudications (October 7, 2011) - #335
- Supporting the Water Resources Research Institutes (requesting Congress to reauthorize and appropriate funds for the WRI program) (July 29, 2011) - #334
- Regarding the Reclamation Fund (asks Congress to fully use the fund for authorized water projects and programs in the West) (July 29, 2011) - #333
- Supporting Federal Research and Development of Updated Hydroclimate Guidance for Extreme Meteorological Events (July 29, 2011) - #332
- Opposes Preemption of State Water Law in Federal Legislation (July 29, 2011) - #331
- Letter commenting on EPA and COE *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (July 29, 2011) - #330.5

- Regarding the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund (Apr 15, 2011) - #330
- Regarding the National Levee Safety Act of 2007 and the Interpretation of Levees and Water Supply Canals (Apr 15, 2011) - #329

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Sunsetted Positions

2013

#323 A Shared Vision on Water Planning and Policy (*superceded by more recent position*)

2012

#313 Letter Regarding National Water Research and Development Initiative Act. (*There is no current legislation*)

#315 Letter to House Transportation and Infrastructure Committee leaders raising concerns regarding a draft bill entitled the Sustainable Watershed Planning Act. (*outdated, not reintroduced*)

#317 Supporting the Bureau of Reclamation's Field Services Program. (*outdated*)

#318 Offering general comments to CEQ on the Principles and Guidelines. (*outdated*)

#319 Describing principles that are important to the Western states in considering a "national vision" for water policy. (*superceded by more recent position*)

2011

#297 Strong support for legislation to establish a National Drought Council to improve national drought preparedness, mitigation, and response efforts. (*There is no current legislation*)

#298 In cooperation with the Interstate Council on Water Policy expressing strong support for increased funding for the Cooperative Water Program and the National Streamflow Information Program. (*superceded by more recent position statements and letters*)

#299 Supporting S. 2842, the Aging Water Infrastructure and Maintenance Act. (*enacted*)

#300 Regarding introduction of the Cooperative Watershed Management Act of 2008 (S. 3085). (*enacted*)

#301 Commenting on H.R. 135, the "21st Century Water Commission," specifically declaring that the WSWC be involved in the selection of members and that it include State and Native American involvement. (*Bill has not been reintroduced*)

#302 Supporting the enactment of S. 895 to provide the Bureau of Reclamation with authority to assess rural water supply needs and for sufficient funding. (*enacted*)

#303 Revised resolution in support of the Weather Modification Research and Technology Transfer Act. (*No federal research program or legislation has been reintroduced*)

#306 Urging support for full funding of the USGS National Streamflow Information Program (NSIP) and sufficient funding for the Cooperative Water Program to match non-USGS contributions. (*outdated*)

#307 Letter to Senator Bingaman, Senate Energy and Natural Resources Committee, expressing interest in S. 3231, the Omnibus Public Lands Management Act. (*outdated*)

- #311 Letter to Steve Stockton offering assistance to the Corps in their water planning initiative. *(outdated)*

2010

- #287 Setting forth the Council's past perspectives on a proposed "Twenty-First Century Water Commission." *(outdated - see #301 above)*
- #289 Support of the proposed Water Conservation, Efficiency and Management Act, to specifically authorize the Bureau of Reclamation's water conservation programs. *(separately authorized)*
- #290 Concern over the Administration's decision to zero out funding for the U.S. Bureau of Reclamation's Technical Assistance to States (TATS) Program. *(outdated)*
- #291/#292 Regarding the proposed Agricultural Water Enhancement Program. *(enacted)*
- #295 Concern over budget request for federal funding for water and wastewater treatment, specifically EPA's State Revolving Fund (SRF) Capitalization Grants. *(combined with #296 and replaced with #330 – Apr 15, 2011)*
- #296 Concern with OMB directive to EPA disallowing the use of SRF revenues to repay bonds. *(combined with #295 and replaced with #330 – Apr 15, 2011)*

2009

- #276 Urging the Congress and Administration to Continue to Recognize State Primacy Regarding Water Rights and Water Quality Certification in the Federal Licensing of Hydroelectric Projects. *(supplanted by WGA resolution)*
- #277 Letter commending the American Indian Environmental Office of EPA for its efforts in establishing the Tribal Water Program Council and expressing a hope that it would "offer an ongoing opportunity for state-tribal cooperation on issues of mutual interest." *(outdated)*
- #279 Support for legislation (S. 2751 and H.R. 5136) to create a National Integrated Drought Information System within the National Oceanic and Atmospheric Administration. *(authority enacted)*
- #280 Strong support for federal legislation, the National Drought Preparedness Act, to establish a national policy for drought and coordinate "proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought." *(deferred to WGA resolution)*
- #281 Support for Reclamation's Water Conservation Field Services Program and "Bridging-the-Headgate" Partnerships. *(outdated)*
- #282 Regarding Federal Non-Tribal Fees in General Adjudications asking the Congress to pass legislation requiring the Federal government, when a party to a general water rights adjudication, to pay fees for costs imposed by the state to conduct the proceedings to the same extent as all other users. *(deferred to WGA resolution)*
- #283 Reiterating strong support for maintaining a thermal band as part of the Landsat Data Continuity Mission, and the necessary funding. *(separately updated)*

2008

- #262 Support for the U.S. Geological Survey's Cooperative Water Program (CWP) and opposes any effort to force the privatization of related USGS services. (*separately updated*)
- #268 The Western States Water Council endorses policy resolutions adopted by the Western Governors' Association, and will allow these policies to guide the Council in matters relevant to implementation and potential reauthorization of the Clean Water Act. (*deferred to WGA resolution*)
- #269 Water Efficiency Standards for Plumbing Products (*subsequently enacted*)
- #270 Reauthorization of the Farm Bill. (*reauthorized*)
- #271 Support for the National Aeronautics and Space Administration's Landsat Data Continuity Mission and calling for continued funding to include a thermal infrared sensor. (*superceded by 2009 WSWC Position No. 283*)
- #273 Support for the Nonpoint Source Grant program administered by the U. S. Environmental Protection Agency under Section 319 of the Clean Water Act. (*outdated*)

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Tab D – Budget

W S W C Proposed FY15 Budget

		Approved Budget FY2014	Actual thru 1/31/14	Estimated Inc/Exp for Remaining FY	Estimated Total Income / Expense		Proposed Budget FY2015	% Change from FY2014 Estimated Expenditures
<u>INCOME</u>								Over / -Under
Member States Assessments		\$ 510,000.00	\$ 480,000.00	\$ 30,000.00	\$ 510,000.00	1	\$ 510,000.00	0.00%
Newsletter		\$ 4,500.00	\$ 2,700.00	\$ 1,100.00	\$ 3,800.00		\$ 3,800.00	0.00%
WGA / WSWC Contracts		\$ 104,600.00	\$ 55,146.00	\$ 39,587.00	\$ 94,733.00		\$ 99,600.00	5.14%
Other Contracts	5	\$ -	\$ 12,000.00	\$ -	\$ 12,000.00		\$ 5,000.00	-58.33%
Corporate Sponsorships		\$ 5,500.00	\$ -	\$ 2,000.00	\$ 2,000.00		\$ 1,500.00	-25.00%
Symposium (AWMS)		\$ -	\$ -	\$ -	\$ -		\$ 10,000.00	100.00%
Symposium (CDWR)	2	\$ 16,000.00	\$ 16,000.00	\$ -	\$ 16,000.00	2	\$ 13,000.00	-18.75%
Symposium (NIDIS)		\$ -	\$ -	\$ -	\$ -		\$ -	
Symposium (WQ/WQ)		\$ 10,000.00	\$ -	\$ -	\$ -		\$ 5,000.00	-50.00%
Symposium (WSWC / NARF)	2	\$ 25,000.00	\$ 28,619.00	\$ -	\$ 28,619.00		\$ -	-100.00%
Symposium Sponsors	4	\$ -	\$ 16,575.00	\$ -	\$ 16,575.00		\$ 3,000.00	-81.90%
Savings Interest		\$ 4,500.00	\$ 2,304.00	\$ 1,345.00	\$ 3,649.00		\$ 4,000.00	9.62%
Other		\$ -	\$ -	\$ -	\$ -		\$ -	
TOTAL INCOME		\$ 680,100.00	\$ 613,344.00	\$ 74,032.00	\$ 687,376.00		\$ 654,900.00	-4.72%
<u>EXPENSE</u>								
Accounting		\$ 8,100.00	\$ 4,725.00	\$ 3,375.00	\$ 8,100.00		\$ 8,700.00	7.41%
Annual & Sick Leave Funding		\$ 1,500.00	\$ 875.00	\$ 625.00	\$ 1,500.00		\$ 1,500.00	0.00%
Audit	3	\$ 8,500.00	\$ -	\$ 8,500.00	\$ 8,500.00	3	\$ -	-100.00%
Contingencies		\$ 5,400.00	\$ 1,948.00	\$ 3,000.00	\$ 4,948.00		\$ 5,400.00	9.14%
Contract Services		\$ 10,000.00	\$ -	\$ 2,400.00	\$ 2,400.00		\$ 10,000.00	0.00%
Equipment Replacement Fund		\$ 3,000.00	\$ 1,750.00	\$ 1,250.00	\$ 3,000.00		\$ 3,000.00	0.00%
Furniture-Equipment		\$ 2,500.00	\$ 160.00	\$ -	\$ 160.00		\$ 1,500.00	837.50%
Insurance		\$ 1,000.00	\$ 763.00	\$ -	\$ 763.00		\$ 1,000.00	31.06%
Maintenance Contracts		\$ 7,500.00	\$ 4,025.00	\$ 2,000.00	\$ 6,025.00		\$ 7,500.00	24.48%
Meeting Expenses		\$ 25,000.00	\$ 5,341.00	\$ 5,000.00	\$ 10,341.00		\$ 22,300.00	115.65%
Office Supplies		\$ 4,000.00	\$ 587.00	\$ 2,400.00	\$ 2,987.00		\$ 3,500.00	17.17%
Payroll Benefits		\$ 145,000.00	\$ 85,992.00	\$ 60,000.00	\$ 145,992.00		\$ 148,000.00	1.38%
Payroll Salaries		\$ 275,800.00	\$ 159,419.00	\$ 111,000.00	\$ 270,419.00		\$ 282,900.00	4.62%
Payroll Taxes		\$ 23,000.00	\$ 13,502.00	\$ 7,500.00	\$ 21,002.00		\$ 24,000.00	14.27%
Pension Management		\$ 3,500.00	\$ 2,835.00	\$ 650.00	\$ 3,485.00		\$ 3,600.00	3.30%
Postage & Freight		\$ 5,000.00	\$ 2,863.00	\$ 2,000.00	\$ 4,863.00		\$ 5,000.00	2.82%
Printing & Reproduction		\$ 12,000.00	\$ 6,161.00	\$ 3,800.00	\$ 9,961.00		\$ 10,000.00	0.39%
Rent Expense		\$ 34,300.00	\$ 20,063.00	\$ 14,350.00	\$ 34,413.00		\$ 35,500.00	3.16%
Reports & Publications		\$ 5,000.00	\$ 711.00	\$ 4,000.00	\$ 4,711.00		\$ 5,000.00	6.13%
Symposium (AWMS)		\$ -	\$ -	\$ -	\$ -	2	\$ 10,000.00	100.00%
Symposium (CDWR)	2	\$ 16,000.00	\$ 6,132.00	\$ 7,000.00	\$ 13,132.00	2	\$ 13,000.00	-1.01%
Symposium (NIDIS)		\$ -	\$ -	\$ -	\$ -		\$ -	
Symposium (WQ/WQ)	2	\$ 10,000.00	\$ -	\$ -	\$ -	2	\$ 5,000.00	100.00%
Symposium (WSWC / NARF)	2	\$ 25,000.00	\$ 44,649.00	\$ -	\$ 44,649.00		\$ -	
Telephone		\$ 4,000.00	\$ 1,539.00	\$ 1,300.00	\$ 2,839.00		\$ 3,500.00	23.28%
Travel		\$ 45,000.00	\$ 26,141.00	\$ 17,250.00	\$ 43,391.00		\$ 45,000.00	3.71%
TOTALS EXPENSES		\$ 680,100.00	\$ 390,181.00	\$ 257,400.00	\$ 647,581.00		\$ 654,900.00	1.13%
NET RESERVE GAIN(LOSS)		\$ -			\$ 39,795.00		\$ -	

1 Full dues from 17 states

2 Memo entries only -- projected income equals projected expense

3 Management subcommittee approved change to biannual audit

4 Current year decision to break out

5 NOAA contract

Western States Water Council
Pro Forma Balance Sheet
As of March 31, 2014

	<u>Mar 31, 14</u>
ASSETS	
Current Assets	
Checking/Savings	
1000 · Cash	
1030 · Wells Fargo	13,574.20
1050 · Petty Cash	240.98
1130 · Investments Assess	509,337.76
1140 · Leave Payout Sinking Fund	123,102.47
1150 · Equip Replacement Fund	37,242.82
Total 1000 · Cash	<u>683,498.23</u>
Total Checking/Savings	683,498.23
Other Current Assets	
1300 · Prepaid Expenses	
1310 · Insurance	676.04
1320 · Postage	200.00
Total 1300 · Prepaid Expenses	<u>876.04</u>
Total Other Current Assets	<u>876.04</u>
Total Current Assets	684,374.27
Fixed Assets	
1500 · Fixed Assets	
1505 · Purchase amount	57,516.92
1510 · Accumulated Depreciation	(46,819.41)
Total 1500 · Fixed Assets	<u>10,697.51</u>
Total Fixed Assets	10,697.51
Other Assets	
1800 · Deposits	2,807.51
1900 · Amt for Compensated Absences	142,077.51
Total Other Assets	<u>144,885.02</u>
TOTAL ASSETS	<u>839,956.80</u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Other Current Liabilities	
2200 · Payroll Liabilities	
2220 · FICA	632.45
2230 · FICAE	633.11
2240 · FITW	1,060.00
2260 · MEDI	147.92
2270 · MEDIE	147.92
2280 · SITW	1,006.00
2290 · SUTA	269.47
2310 · AD&D	23.88
2320 · CU Savings	100.00
2330 · Dental	319.22
2340 · Disability	162.61
2350 · Life	315.32
2360 · Medical	7,750.46
2370 · Pension	3,677.86
2380 · Pension Loans	80.00

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Accrual Basis

Western States Water Council
Pro Forma Balance Sheet
As of March 31, 2014

	Mar 31, 14
2390 · PrePaid P/R Liabilities	(4,473.08)
2395 · Workers Comp Ins	95.73
Total 2200 · Payroll Liabilities	11,948.87
Total Other Current Liabilities	11,948.87
Total Current Liabilities	11,948.87
Long Term Liabilities	
2500 · Oblig for Compensated Absences	132,077.51
2520 · Current Yr Budget Offset / Comp	1,125.00
2550 · HRA - Willardson	1,251.76
2600 · Investment in Fixed Asset	
2605 · Current value	48,015.44
2610 · Adjust for depreciation	(46,819.41)
Total 2600 · Investment in Fixed Asset	1,196.03
2670 · Current Yr Budget Offset / F/A	2,250.00
Total Long Term Liabilities	137,900.30
Total Liabilities	149,849.17
Equity	
3900 · Retained Earnings	522,335.81
Net Income	167,771.82
Total Equity	690,107.63
TOTAL LIABILITIES & EQUITY	839,956.80

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Accrual Basis

Western States Water Council
Pro Forma Profit & Loss Budget Performance
March 2014

	Mar 14	Budget	Jul '13 - Mar 14	YTD Budget	Annual Budget
Ordinary Income/Expense					
Income					
4000 · Revenues					
4100 · Member States Assessments	0.00		480,000.00	510,000.00	510,000.00
4200 · Newsletter	600.00	375.00	3,300.00	3,375.00	4,500.00
4400 · WGA / WSWC Contracts					
4402 · WGA / DOE Grant	0.00		83,602.82		
4400 · WGA / WSWC Contracts - Oth...	0.00	8,716.67	0.00	78,449.99	104,600.00
Total 4400 · WGA / WSWC Contracts	0.00	8,716.67	83,602.82	78,449.99	104,600.00
4550 · Council Meeting Sponsors	500.00	458.33	500.00	4,125.01	5,500.00
4600 · Miscellaneous Income	0.00		12,000.00		
4800 · Interest Income					
4810 · Savings	0.00		2,048.64		
4820 · Sinking Fund	0.00		414.36		
4830 · Equipment Fund	0.00		123.87		
4800 · Interest Income - Other	0.00	375.00	0.00	3,375.00	4,500.00
Total 4800 · Interest Income	0.00	375.00	2,586.87	3,375.00	4,500.00
Total 4000 · Revenues	1,100.00	9,925.00	581,989.69	599,325.00	629,100.00
Total Income	1,100.00	9,925.00	581,989.69	599,325.00	629,100.00
Expense					
6010 · Contingencies	0.00	450.00	2,499.21	4,050.00	5,400.00
6020 · Contracted Services	0.00	833.33	0.00	7,500.01	10,000.00
6030 · Equip Replacement Fund	250.00	250.00	2,250.00	2,250.00	3,000.00
6040 · Furniture & Equipment	0.00	208.33	160.25	1,875.01	2,500.00
6060 · Insurance	0.00		763.00	1,000.00	1,000.00
6090 · Annual & Sick Leave Funding	125.00	125.00	1,125.00	1,125.00	1,500.00
6110 · Maintenance Contracts	0.00	625.00	4,230.28	5,625.00	7,500.00
6160 · Meetings & Arrangements	158.17		5,658.08	8,000.00	25,000.00
6300 · Office Supplies	0.00	333.33	662.40	3,000.01	4,000.00
6400 · Payroll - Salaries	21,634.46	22,983.33	203,920.87	206,850.01	275,800.00
6490 · Payroll Taxes & Benefits					
6500 · Benefits					
6510 · Dental Insurance	247.32		2,885.40		
6520 · Life Insurance	30.50		274.50		
6530 · LT Disability Insurance	162.41		1,517.54		
6540 · Medical Insurance	6,536.50		69,603.58		
6550 · Pension Plan	3,677.86		34,666.51		
6500 · Benefits - Other	0.00	12,083.33	0.00	108,750.01	145,000.00
Total 6500 · Benefits	10,654.59	12,083.33	108,947.53	108,750.01	145,000.00
6600 · Taxes					
6610 · FICAE	1,341.35		12,643.11		
6630 · MEDIE	313.70		2,956.85		
6640 · SUTA	86.54		395.61		
6650 · Worker's Comp	95.73		1,286.62		
6600 · Taxes - Other	0.00	1,916.67	0.00	17,249.99	23,000.00
Total 6600 · Taxes	1,837.32	1,916.67	17,282.19	17,249.99	23,000.00
Total 6490 · Payroll Taxes & Benefits	12,491.91	14,000.00	126,229.72	126,000.00	168,000.00

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Accrual Basis

Western States Water Council
Pro Forma Profit & Loss Budget Performance
March 2014

	Mar 14	Budget	Jul '13 - Mar 14	YTD Budget	Annual Budget
6700 · Pension Management	0.00	291.67	3,275.05	2,624.99	3,500.00
6750 · Postage & Freight	0.00	416.67	3,859.01	3,749.99	5,000.00
6780 · Printing & Reproduction	0.00	1,000.00	6,160.30	9,000.00	12,000.00
6800 · Professional Fees					
6810 · Accounting	0.00	675.00	5,400.00	6,075.00	8,100.00
6830 · Auditing	0.00		0.00	8,500.00	8,500.00
Total 6800 · Professional Fees	0.00	675.00	5,400.00	14,575.00	16,600.00
6850 · Rent	2,646.35	2,858.33	25,573.15	25,725.01	34,300.00
6890 · Reports & Publications	0.00	416.67	841.80	3,749.99	5,000.00
7020 · Telephone	0.00	333.33	1,778.31	3,000.01	4,000.00
7040 · Travel	4.98	3,750.00	30,244.34	33,750.00	45,000.00
Total Expense	37,310.87	49,549.99	424,630.77	463,450.03	629,100.00
Net Ordinary Income	(36,210.87)	(39,624.99)	157,358.92	135,874.97	0.00
Other Income/Expense					
Other Income					
8800 · Symposium Income					
8820 · CDWR	0.00		0.00	16,000.00	16,000.00
8840 · NARF	0.00		28,619.00	25,000.00	25,000.00
8870 · WQ/WQ	0.00		0.00		10,000.00
8890 · Sponsors	0.00		32,574.83		
Total 8800 · Symposium Income	0.00		61,193.83	41,000.00	51,000.00
Total Other Income	0.00		61,193.83	41,000.00	51,000.00
Other Expense					
9100 · Symposium Expenses					
9120 · CDWR	0.00		6,131.53	16,000.00	16,000.00
9140 · NARF	0.00		44,649.40	25,000.00	25,000.00
9170 · WQ/WQ	0.00		0.00		10,000.00
Total 9100 · Symposium Expenses	0.00		50,780.93	41,000.00	51,000.00
Total Other Expense	0.00		50,780.93	41,000.00	51,000.00
Net Other Income	0.00		10,412.90	0.00	0.00
Net Income	(36,210.87)	(39,624.99)	167,771.82	135,874.97	0.00

Tab E – WGA Water Policy Resolutions



WESTERN
GOVERNORS'
ASSOCIATION

Western Governors' Association Policy Resolution 2014 - 03

Water Resource Management in the West

A. BACKGROUND

1. The scarce nature of water in the West makes it a crucial resource for the communities, industries, habitats, and farms it supports. Clean, reliable water supplies are essential to maintain and improve quality of life.
2. States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology.
3. Many communities in the West anticipate challenges in meeting future water demands. Supplies are nearly fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on those limited water resources. Sustainability of our natural resources, specifically water, is imperative to the foundations upon which the West was developed. Growth and development can only continue upon our recognition of continued state stewardship of our unique resources and corresponding responsibilities.
4. Strong state, regional and national economies require reliable deliveries of good-quality water, which in turn depend on adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West. Repairs to aging infrastructure are costly and often subject to postponement.
5. Western Governors recognize the essential role of partnership with federal agencies in Western water management and hope to continue the tradition of collaboration between the states and federal agencies.
6. Tribal governments and Western states also share common water resource management challenges. The Western Governors Association and Western States Water Council have had a long and productive partnership with tribes, working to resolve water rights claims.

B. GOVERNORS' POLICY STATEMENT

1. **State Primacy in Water Management:** As the preeminent authority on water management within their boundaries, states have the right to develop, use, control and distribute the surface water and groundwater located within their boundaries, subject to international treaties and interstate agreements and judicial decrees.

- a. **Federal Recognition of State Authority:** The federal government has long recognized the right to use water as determined under the laws of the various states; Western Governors value their partnerships with federal agencies as they operate under this established legal framework.

Nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources.

Reauthorization of the Water Resources Development Act, proposed federal surplus water rulemakings, and/or storage reallocation studies should recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their waters, including but not limited to state storage and use requirements.

- b. **Managing State Waters for Environmental Purposes:** States and federal agencies should coordinate efforts to avoid, to the extent possible, the listing of water-dependent species under the Endangered Species Act (ESA). When ESA listings cannot be avoided, parties should promote the use of existing state tools, such as state conservation plans and in-stream flow protections, to conserve and recover species.
2. **Infrastructure Needs:** Aging infrastructure cannot be ignored; infrastructure investments are essential to our nation's continued economic prosperity and environmental protection, and they assist states in meeting federally-mandated standards.
 - a. **Federal Support for Infrastructure Investment:** Congress should provide adequate support for the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) State Revolving Funds. Further, Congress should fully utilize the receipts accruing to the Reclamation Fund for their intended purpose in the continuing conservation, development and wise use of western resources to meet Western water-related needs, including the construction of Congressionally-authorized Bureau of Reclamation rural water projects and facilities that are part of a Congressionally-authorized Indian water rights settlement.

Congress should reauthorize Water Resource Development Act (WRDA) legislation on a regular schedule and include adequate funding so all projects and studies authorized in WRDA can be completed in a timely manner.

Congress also should consider facilitating greater investment in water infrastructure, utilizing such tools as loan guarantees, revolving funds, infrastructure banks and water trust funds.

Capital budgeting and asset management principles should be used to determine funding priorities based on long-term sustainability and not annual incremental spending choices. It should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.

- b. **Alternatives to Direct Federal Investment:** Federal and state policymakers should also consider other tools to promote investment in water infrastructure and reduce financing costs, including: public-private partnerships; bond insurance; risk pooling; and credit enhancements.

Congress should remove the state volume caps for private activity bonds used for water and wastewater projects, provide guaranteed tax-exempt status for bonds issued by state or local agencies to finance water infrastructure, provide loan guarantees, and otherwise support and encourage alternatives to direct federal investment of limited general funds.

- c. **Hydropower:** Congress and the Administration should authorize and implement hydropower projects and programs that enhance renewable electric generation capacity and promote economic development through streamlined permitting processes, while appropriately protecting environmental resources.
- d. **Infrastructure Planning and Permitting:** Infrastructure planning and permitting guidelines, rules and regulations should be coordinated, streamlined and sufficiently flexible to: 1) allow for timely decision-making in the design, financing and construction of needed infrastructure; 2) account for regional differences; 3) balance economic and environmental considerations; and 4) minimize the cost of compliance.

- 3. **Western States Require Innovative and Integrated Water Management.** Western Governors believe solutions to water resource challenges require an integrated approach within states and with federal, tribal and local partners. Water resource planning should occur within a framework that preserves states' authority to manage water through policies which recognize state law and the financial, environmental and social values of the water resource to citizens of the western states today and in the future.

- a. **Water Transfers:** Western Governors recognize the potential benefits of market-based water transfers, meaning voluntary sales or leases of water rights. The Governors support water transfers that avoid or mitigate damages to agricultural economies and communities while preventing injury to other water rights.
 - b. **Energy Development:** Western Governors recognize that energy development and electricity generation may create new water demands. Western Governors recommend increased coordination across the energy and water management communities, and support ongoing work to assess the interconnection of energy and water through the Regional Transmission Expansion Planning Project for the Western interconnection and similar efforts.
 - c. **Conservation and Efficiency:** Western Governors encourage adoption of strategies to sustain water resources and make existing water supplies go further in light of diminished water resources and declining and inconsistent snowpack, including the use of water conservation, water reuse and recycling, desalination and reclamation of brackish waters, and reductions in *per capita* water use. The Governors encourage the use of and research into promising water-saving strategies.
 - d. **Local Watershed Planning:** Western Governors encourage federal agencies and Congress to provide resources such as technical support to states and local watershed groups. States can choose to empower these watershed groups to deal with local water issues associated with water quality, growth and land management as best complements state water needs.
 - e. **Intergovernmental Collaboration and Conflict Resolution:** Western Governors support the negotiated settlement of interstate water disputes, Indian water rights claims, and other federal water needs and claims, the settlement of which are in the best interest of Western states.
 - f. **State-Federal Coordination:** Western Governors recognize the important role of federal agencies in advancing sound water resource management in the Western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities, particularly through the Western States Water Council, and support the continuation of these key state-federal partnerships.
4. **Western States Need Reliable Water Resource Information:** Basic information on the status, trends and projections of water resource availability is essential to sound water management.
- a. **Basic Water Data:** Western Governors support the U.S. Geological Survey's Cooperative Water Program and National Streamflow Information Program (NSIP), the Natural Resources Conservation Service's Snow Survey and Water Supply

Forecasting Program, the National Oceanic and Atmospheric Administration's weather and hydrology-related data collection, monitoring, and drought information programs, and the National Aeronautics and Space Administration's National Land Imaging (Landsat) Program with its thermal infrared sensor. Western Governors support federal efforts to coordinate water data gathering and information programs across multiple agencies.

- b. **Drought Information and Planning:** Western Governors encourage federal agencies to partner with states in the gathering, coordination and effective dissemination of drought-related data between the federal government and states. The National Integrated Drought Information System (NIDIS) is a successful model of state-federal collaboration in the development of information services.
 - i. Governors recommend Congressional reauthorization of the NIDIS program, particularly with respect to implementation of regional drought early warning systems.
 - ii. Governors support a comprehensive national policy that promotes a coordinated and integrated approach to future drought, including improved forecasting and monitoring, drought preparedness and planning, and efficient delivery of drought programs.
 - iii. Governors believe that drought preparedness and contingency plans – created through partnerships of states, federal agencies and local communities – provide a proactive approach to addressing drought.
- c. **Extreme Weather Events Planning:** Western Governors recognize the significant potential impacts of extreme weather variability and change on water supplies. Western Governors urge Congress and the Administration to work closely with states and other resource managers to improve predictive and adaptive capabilities for extreme weather variability and related impacts.
- d. **Water Data Exchange:** The Western Governors' Association and the Western States Water Council have worked together to create the Water Data Exchange, an online portal that will enable states to share their water data with each other, federal agencies, and the public via a common platform. The Governors encourage the use of state water data in planning for both the public and private sectors.

C. GOVERNORS' MANAGEMENT DIRECTIVE

- 1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.

2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.



Western Governors' Association Policy Resolution 2014 - 04

Water Quality in the West

A. BACKGROUND

1. Clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.
2. States have federally-recognized authority to manage and allocate water within their boundaries. The Clean Water Act (CWA) Section 101(g) expressly says that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."
3. States and the Environmental Protection Agency (EPA) work together as co-regulators under the CWA and the Safe Drinking Water Act (SDWA). The U.S. Congress has provided for, by statute, the authority for states to obtain approval to implement certain federal program responsibilities. When a state has been approved to implement a program and the state is meeting minimum program requirements, the role of federal agencies like EPA should be funding, technical assistance and research support. States should be free to develop, implement and enforce those requirements using an approach that makes sense in their specific jurisdiction, subject to the minimum requirements of the federal acts.
4. The CWA was last reauthorized in 1987; attempts to reauthorize the Act since then have failed. Current federal regulations, guidance and programs pertaining to the CWA do not always recognize the specific conditions and needs of most of the West, where water is scarce and even wastewater becomes a valuable resource to both humans and the environment. The West includes a variety of waters; small ephemeral washes, large perennial rivers, effluent-dependent streams, and wild, scenic rivers. In addition to natural rivers, streams and lakes, there are numerous man-made reservoirs, waterways and water conveyance structures. States need more flexibility to determine how to best manage these varying resources.

B. GOVERNORS' POLICY STATEMENT

Clean Water Act (CWA)

1. **State Authority and Implementation of CWA:** States have jurisdiction over water resource allocation decisions and are responsible for how to balance state water resource needs within CWA objectives. New regulations, rulemaking, and guidance should

recognize this state authority.

- a) **CWA Jurisdiction:** Western Governors urge EPA and the Corps to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.
 - b) **Total Maximum Daily Loads (TMDLs)/Adaptive Management:** States should have the flexibility to adopt water quality standards and set total maximum daily loads (TMDLs) that are tailored to the specific characteristics of Western water bodies, including variances for unique state and local conditions.
 - c) **Anti-degradation:** CWA Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA oversight. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new anti-degradation policies or implementation requirements, EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.
 - d) **Groundwater:** States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders and are primarily responsible for allocating, protecting, managing, and otherwise controlling the resource. The regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources. The federal government should not develop a groundwater quality strategy; instead, it must recognize and respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities.
2. **Permitting:** Actions taken by EPA in its CWA permitting processes should not impinge upon state authority over water management or the states' responsibility to implement CWA provisions.
- a) **State Water Quality Certification:** Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. Section 401 of the CWA is operating as it should and states' mandatory conditioning authority should be retained without amendment.
 - b) **General Permits:** Reauthorization of the CWA must reconcile the continuing administrative need for general permits with the site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance that

better support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.

- c) **Water Transfers:** Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors generally support EPA's current water transfers rule, which exempts water transfers between waters of the United States from NPDES permitting requirements.
 - d) **Pesticides:** Western Governors generally support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public health related pesticide applications to waters of the U.S. and will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies.
3. **Nonpoint Source Pollution:** Nonpoint source pollution requires state watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy that maintain the non-regulatory and voluntary nature of the program. In general, the use of point source solutions to control nonpoint source pollution is also ill-advised.
- a) **Forest Roads:** Stormwater runoff from forest roads has been managed as a nonpoint source of pollution under EPA regulation and state law since enactment of the CWA. Western Governors are concerned about efforts to treat forest roads as point sources under the NPDES program and support solutions that are consistent with the long-established treatment of forest roads as nonpoint sources, provided that forest roads are treated equally across ownership within each state.
 - b) **Nutrient Pollution:** Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the nation, and continued cooperation between states and EPA is needed. However, nutrients produced by non-point sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

States should be allowed sufficient flexibility to utilize their own incentives and

authorities to establish standards and control strategies to address nutrient pollution, rather than being forced to abide by one-size-fits-all federal numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches.

4. **CWA Reauthorization:** The Western Governors support reauthorization of the CWA, provided that it recognizes the unique hydrology and legal framework in Western states. Further, any CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources.
5. **Good Samaritan Legislation:** Congress should enact a program to protect volunteering remediating parties who conduct authorized remediation of abandoned hardrock mines from becoming legally responsible under the CWA and/or the Comprehensive Environmental Response, Compensation, and Liability Act for any continuing discharges after completion of a remediation project, provided that the remediating party – or “Good Samaritan” – does not otherwise have liability for that abandoned mine or inactive mine site.
1. **Stormwater (Wet Weather) Pollution:** In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. The Western Governors emphasize the importance of state primacy in water management, including management of ephemeral streams. State water agencies are well-equipped to provide tailored approaches that reflect the unique management needs of ephemeral streams.
2. **State-Tribal Coordination:** Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective and consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA.

Safe Drinking Water Act (SDWA)

3. **Federal Assistance in Meeting SDWA Standards:** Western Governors believe that the SDWA and its standards for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for the nation. It is essential that the federal government, through EPA, provide adequate support to the states and water systems to meet federal requirements. Assistance is particularly needed for small and rural systems, which often lack the resources needed to comply with federal treatment standards.

4. **Drinking Water Standards:** Contaminants such as arsenic, chromium, perchlorate and fluoride often occur naturally in the West. Western Governors support EPA technical assistance and research to improve both the efficiency and affordability of treatment technologies for these contaminants. In any drinking water standards that the EPA may revise or propose for these and other contaminants, including disinfection byproducts, EPA should consider the disproportionate impact that such standards may have on Western states and give special consideration to feasible technology based on the resources and needs of smaller water systems.
5. **Risk Assessments:** Analysis of the costs of treatment for drinking water contaminants should carefully determine the total costs of capital improvements, operation and maintenance when determining feasible technology that can be applied by small systems. These costs should be balanced against the anticipated human health benefits before implementing or revising drinking water standards.
6. **Emerging Contaminants/Pharmaceuticals:** The possible health and environmental impacts of emerging contaminants and pharmaceuticals are of concern to Western Governors. Although states have existing authorities to address possible risks associated with emerging contaminants and pharmaceuticals, there is a need for more reliable science showing impacts on human health as more information regarding these contaminants becomes available.
7. **Hydraulic Fracturing:** States currently employ a range of effective programmatic elements and regulations to ensure that hydraulic fracturing does not impair water quality, including but not limited to requirements pertaining to well permitting, well construction, the handling of exploration and production waste fluids, the closure of wells, and the abandonment of well sites.

Federal efforts to study the potential impacts of hydraulic fracturing on water quality should leverage state knowledge, expertise, policies, and regulations. Such efforts should also be limited in scope, based upon sound science, and driven by the states. Western Governors oppose efforts that would diminish the primary and exclusive authority of states over the allocation of water resources necessary for hydraulic fracturing.

Compliance with Federal Water Quality and Drinking Water Requirements

8. **State Revolving Funds:** Western Governors support EPA's Clean Water State Revolving Fund (SRF) and Drinking Water SRF as important tools that help states and local communities address related water infrastructure needs and comply with federal water quality and drinking water requirements. Western Governors also urge Congress and the Administration to ensure that the SRF Programs provide greater flexibility and fewer restrictions on state SRF management.

9. **Restoring and Maintaining Lakes and Healthy Watersheds:** Historically, the Section 314 Clean Lakes Program and the Section 319 Nonpoint Source Management Program provided states with critical tools to restore and maintain water quality in lakes and watersheds. Western Governors urge the Administration and Congress to support these programs. Such support should not come at the expense of other federal watershed protection programs.
10. **EPA Support and Technical Assistance:** The federal government through EPA should provide states and local entities with adequate support and technical assistance to help them comply with federal water quality and drinking water requirements. EPA should also collaborate with states to identify priority areas and focus on programs that provide the largest public health and environmental benefits.
11. **EPA Grant Funding for Primary Service: Rural Water Programs:** Some rural communities still lack basic water and sanitary services needed to assure safe, secure sources of water for drinking and other domestic needs. Adequate federal support, including but not limited to the Rural Utilities Service programs of the Department of Agriculture and State Revolving Funds through EPA, are necessary to augment state resources.

Water Quality Monitoring and Data Collection

12. **Water Data Needs:** Western water management is highly dependent upon the availability of data regarding both the quality and quantity of surface and ground waters. EPA should provide support to the states in developing innovative monitoring and assessment methods, including making use of biological assessments, sensors and remote sensing, as well as demonstrating the value to the states of the national probabilistic aquatic resource surveys.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Tab F – National Drought Resiliency Partnership

National Drought Resilience Partnership

As part of the President's Climate Action Plan, the Administration is launching a National Drought Resilience Partnership (the Partnership). The Partnership will make it easier for communities to access the drought assistance they need by promoting strong partnership and information sharing at all levels of government. It will also build on existing efforts to provide States, Tribes and local communities risk-informed decision making tools for drought preparedness planning. Participating agencies include the National Oceanic and Atmospheric Association (NOAA), the United States Department of Agriculture (USDA), the Department of the Interior (DOI), Assistant Secretary for the Army Civil Works (ASA-CW), the Federal Emergency Management Agency (FEMA), the Environmental Protection Agency (EPA), and the Department of Energy (DOE).

The 2012 drought had an adverse effect on more than two-thirds of the continental United States and carried an estimated cost of \$30 billion to the agricultural sector alone. During the summer and fall of that year, wildfires in the western half of the country, which were heavily influenced by drought, resulted in estimated costs of \$1 billion (<http://www.ncdc.noaa.gov/billions/events>). During a series of public listening sessions in 2012, including the National Drought Forum, stakeholders recommended that Federal policies for drought needed to be better aligned and there was a need to help communities navigate the number of Federal agencies.

The Partnership aims to align Federal drought policies across the government and help communities manage the impact of drought by linking information (monitoring, forecasts, outlooks, and early warnings) with drought preparedness and long-term resilience strategies in critical sectors such as agriculture, municipal water systems, energy, recreation, tourism and transportation. Senior agency officials have been named to the Partnership and a singular point of contact has been identified who can direct and help communities seeking long-term drought planning and technical assistance navigate the various Federal agencies and programs.

The Partnership will serve as an early model for the Council on Climate Preparedness and Resilience, established by the President's Executive Order on Preparing the United States for the Impacts of Climate Change, to modernize Federal programs and identify opportunities to support and encourage resilience investments by States, Tribes and local communities.

Immediate and early efforts of the Partnership will focus on Federal policy coordination. Actions to be completed within Fiscal Year 2014 include:

1. Federal Points of Contact: At the national level, Partnership agencies will identify single policy points of contact for drought to facilitate transparency regarding agency roles and responsibilities, connect available expertise, and help align Federal policy. Further, each agency will contribute to a National Drought Implementation Working Group for the Partnership that will work with the National Integrated Drought Information System (NIDIS) Executive Committee and others to align Federal agencies around their individual roles in drought planning and risk mitigation.
2. Drought Preparedness and Water Resources Planning: The Partnership will undertake a pilot effort in a vulnerable watershed with Tribal, State, and local government representatives, key Federal agencies, and private sector representatives to develop a model plan or approach for building drought preparedness and resilience. The pilot will aid these various entities with long-term drought

planning by connecting them with the appropriate Federal preparedness efforts as is necessary. It will also model the ability of diverse water users and interests to prepare and implement a community or watershed-based drought preparedness program. The pilot will identify obstacles to community drought preparedness and will provide the Partnership with feedback on its successes and areas that need improvement.

3. Interactive Clearinghouse: The Partnership will collaborate to organize a web based “front door” clearinghouse of Federal government drought recovery and assistance programs. The clearinghouse will link to other planning and preparedness resources and information (such as drought.gov) to support stakeholders in their efforts to manage future drought impacts. The clearinghouse portal will incorporate existing web portals to the extent practicable.
4. Increase Frequency and Regional Specificity of Drought Outlook Forums: The Partnership will contribute to the NIDIS Drought Outlook forums that integrate the best information from various experts on current drought conditions and impacts, national climate trends, and water supply and wildfire conditions. A high priority will be given to those areas where drought early warning systems and indicators show that drought conditions are developing or intensifying.
5. Coordinate a National Soil Moisture Network: The Partnership will participate in efforts underway to better organize ongoing soil moisture monitoring in support of decision-making for water supply and infrastructure, agriculture, fire risk management, and ecosystem health, to support Tribes, States, and local communities.

This Partnership will further the goals set forth in the President’s Climate Action Plan while strengthening our Nation’s preparedness and resilience to drought. For more information, please visit <http://drought.gov/drought/> to email the Partnership or contact (202) 564-8086.

Frequently Asked Questions

National Drought Resilience Partnership

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Q. What is the National Drought Resilience Partnership?

A. The National Drought Resilience Partnership (NDRP, or the Partnership) is a partnership made up of Federal departments and agencies that have roles or responsibilities in planning for and/or responding to drought. The purpose of the Partnership is to harness and coordinate distinct efforts by individual agencies already underway to assist in building resilience to drought on the ground. Two distinct roles are envisioned: one, as a policy coordinating body, and two, as an entity to align Federal agencies around their individual roles in drought planning and risk mitigation. This will help the Federal government to deliver Federal expertise and resources to facilitate community preparedness and strengthen the Nation’s resilience to drought.

Q. Which Federal agencies are involved in the National Drought Resilience Partnership?

A: The Federal agencies/departments involved in the Partnership are:

- United States Department of Agriculture (USDA)
- Department of the Interior (DOI)
- Department of Commerce — National Oceanic and Atmospheric Administration (NOAA)
- Environmental Protection Agency (EPA)
- Assistant Secretary of the Army – Civil Works (ASA-CW)
- Department of Energy (DOE)
- Federal Emergency Management Agency (FEMA)

Q. Why do we need a National Drought Resilience Partnership?

A. The drought in 2012 affected nearly two-thirds of the country and resulted in nearly \$30 billion in agricultural impacts alone. Impacts were also felt by communities through losses due to reduced water and energy resources, recreation revenue, increased wildfires, and dust-borne diseases, among others. Climate change is likely to exacerbate the length and severity of droughts in many regions of the United States. There will also be long-term reductions in water availability in some parts of the United States. The need for a Partnership as a policy coordinating body and as a mechanism to facilitate access to Federal programs was identified from feedback we gained during public listening sessions conducted during the drought of 2012 and the National Drought Forum in late 2012.

Q. Who is calling for a National Drought Resilience Partnership?

A. There have been many requests for a more cohesive “front door” to engage the Federal government for both drought assistance and preparedness planning. These requests have come from participants of the [2012 National Drought Forum \(NDF\)](#), as well as from Congress, governors and states, businesses, and local communities. For example, during the NDF listening sessions, Federal agencies heard from a variety of interests on the role that improved Federal coordination could play in addressing the needs of States, Tribes, businesses and communities facing drought(s). The Partnership is designed to improve our understanding and coordination of existing capabilities and networks, to better support decisions that improve drought preparedness and risk management over the long-term.

Q. How does the National Drought Resilience Partnership relate to the President’s Climate Action Plan?

A. The Partnership is one of many specific actions identified under the President’s Climate Action Plan to help the nation prepare for the impacts of climate change. While droughts are natural weather phenomena, we also recognize that climate change has already begun to exacerbate the severity and duration of severe weather in some regions of the United States. Major events with economic and environmental impacts, such as the 2012 drought and its long-term effects, offer lessons on planning and practices for anticipating, managing, and reducing future risks.

Additionally, President Obama signed an Executive Order on November 1, 2013 entitled “Preparing the United States for the Impacts of Climate Change.” This Executive Order established a Resilience Council composed of many Federal agencies that will develop and recommend Federal actions related to climate preparedness and resilience, as well as support similar action at State, Tribal, and local levels of government. The Partnership is an early model of the type of coordination efforts that the Executive Order seeks to promote. Drought planning is a natural entry point for the kind of information that many stakeholders need, and therefore the Partnership is uniquely positioned to contribute recommendations to the Resilience Council.

Q. Does the National Drought Resilience Partnership envision or plan to propose any changes to the involvement of the Federal government in water rights or allocations?

A. No. The Partnership is a vehicle for better collaboration within the Federal government and between the Federal government, States, Tribes, and local communities. The sovereign rights of states for the allocation of water within their boundaries remains a fundamental principle as we move forward.

Q. What is the relationship between the National Drought Resilience Partnership and the National Disaster Recovery Framework?

A. The National Disaster Recovery Framework (NDRF) is a guide that enables effective recovery support to disaster-impacted States, Tribes, territorial and local jurisdictions, and provides a flexible structure to support coordination of the Federal government’s response to disasters—both Stafford and Non-Stafford Act alike. In 2012, with USDA as the coordinating agency, the NDRF was used to highlight Federal programs and resources in support of recovery from the drought. While long-term interagency coordination of issues will continue, the current NDRF drought efforts have concluded (as finalized in the September 2013 NDRF Report, “Federal Drought Recovery Coordination and Approaches for Interagency Collaboration”). This marks an important transition to the Partnership, which will carry forward these preparedness and resilience recommendations identified through the NDRF and other related processes.

Q. What is the relationship between the National Drought Resilience Partnership and the National Integrated Drought Information System?

A. The National Integrated Drought Information System (NIDIS) was created by law in 2006 to “enable the Nation to move from a reactive to a more proactive approach to managing drought risks and impacts.” An effective drought early warning system is at the heart of this effort and requires sustained activities such as collection and integration of key indicators of drought severity and impacts, and the production of timely information that reflects local, regional and state differences. NIDIS relies on its network of Federal, State, local and tribal agency partners, academic researchers, and other stakeholders to coordinate and provide integrated outlooks of drought impacts and regional drought early warning information for specific regions, states and watershed.

The Partnership will work toward a seamless link between drought risk assessment and drought risk planning and management. It completes the Nation’s drought resilience portfolio by building on the NDRF, NIDIS coordination and information, and other water-related information and tools, (e.g. USGS Water Census, EPA Climate Resilience Evaluation and Awareness tool), but with more emphasis on improving drought planning and risk management to secure long-term economic investments, protect natural resources, and increase efficiencies in government drought-related service delivery. Moreover, the Federal members of the NIDIS Executive Committee will work closely with the Implementation

Working Group of the Partnership to provide ongoing communication and collaboration across participating Federal agencies.

Q. The Federal government provides a lot of drought assistance already. What is NEW about the National Drought Resilience Partnership?

A. The top-line items of the Partnership are that it is:

- Easier - The Partnership makes it **easier** for stakeholders to navigate what Federal resources are available and access information about these Federal resources by providing a single point of contact. This contact will be able to connect stakeholders to Federal agencies and resources through the National Drought Implementation Working Group, NIDIS and others.
- More proactive – the emphasis of the Partnership is on **preparing** for drought (planning and risk management) rather than **responding** to drought.
- Policy coordination – The Partnership aims to help communities become more resilient by improving Federal coordination through more effective government coordination.

Q. How does the National Drought Resilience Partnership work?

A. The Partnership organizes seven Federal agencies in an effort to improve coordination of Federal policy for future droughts. The seven agencies have identified *policy* points of contact that will meet regularly (anticipate quarterly) to discuss policy matters. At the same time, the National Drought Implementation Working Group, consisting of *agency* points of contact, has formed to better organize and integrate monitoring and forecasting, risk assessment and drought planning and management. Taken together, this will make it easier for communities seeking drought information and assistance. For example, take a Mayor that is concerned about future water supply planning due to increased drought frequency. He or she can direct the city's utility to contact the Partnership (single POC) for help finding the best Federal agency or agencies to address these specific planning needs. The Partnership, through internal coordination, will then connect the water utility with the appropriate regional, state or local agency programs or entities on the ground. More specifically in this example, the Partnership could connect the water utility with the regional NIDIS contact for information on drought conditions, EPA for the latest on water quality or water quality infrastructure, as well as a Bureau of Reclamation regional drought coordinator to help with their water infrastructure concerns, thus making it easier for the community to get the help it seeks.

Q. Who within the National Drought Resilience Partnership do communities contact to get assistance?

A. The Partnership currently has a central Point of Contact (POC) that receives stakeholder questions and works with the other Partnership agencies and the NIDIS Executive Committee at a Federal level to coordinate responses. The POC also works with other agencies to direct stakeholders to the appropriate regional or local representative. Having a single POC for the Partnership helps streamline responses and cut through some of the difficulty in finding the right assistance. If you have questions or to get drought planning assistance for your community or business, please contact (202) 564-8086 or visit drought.gov for more details.

Q. How do States, Tribes, businesses and communities engage with the National Drought Resilience Partnership?

A. The Partnership will be hosting a number of regional drought forums over the coming months to engage communities. These forums will build upon efforts undertaken by and incorporate lessons learned from the NIDIS Drought Outlook forums that integrate the best information from various experts on current drought conditions and impacts, national climate trends, and water supply and wildfire conditions. A high priority will be given to those areas where drought early warning systems and indicators show that drought conditions are developing or intensifying.

Q. What near-term actions is the National Drought Resilience Partnership planning?

A. Key First Year Actions:

1. Federal Points of Contact: At the national level, Partnership agencies will identify single policy points of contact for drought to facilitate transparency regarding agency roles and responsibilities, connect available expertise, and help align Federal policy. Further, each agency will contribute to a National Drought Implementation Working Group for the Partnership that will work with the National Integrated Drought Information System (NIDIS) Executive Committee and others to align Federal agencies around their individual roles in drought planning and risk mitigation.
2. Drought Preparedness and Water Resources Planning: The Partnership will undertake a pilot effort in a vulnerable watershed with Tribal, State, and local government representatives, key Federal agencies, and private sector representatives to develop a model plan or approach for building drought preparedness and resilience. The pilot will aid these various entities with long-term drought planning by connecting them with the appropriate Federal preparedness efforts as is necessary. It will also model the ability of diverse water users and interests to prepare and implement a community or watershed-based drought preparedness program. The pilot will identify obstacles to community drought preparedness and will provide the Partnership with feedback on its successes and areas that need improvement.
3. Interactive Clearinghouse: The Partnership will collaborate to organize a web based “front door” clearinghouse of Federal government drought recovery and assistance programs. The clearinghouse will link to other planning and preparedness resources and information (such as drought.gov) to support stakeholders in their efforts to manage future drought impacts. The clearinghouse portal will incorporate existing web portals to the extent practicable.
4. Increase Frequency and Regional Specificity of Drought Outlook Forums: The Partnership will contribute to the NIDIS Drought Outlook forums that integrate the best information from various experts on current drought conditions and impacts, national climate trends, and water supply and wildfire conditions. A high priority will be given to those areas where drought early warning systems and indicators show that drought conditions are developing or intensifying.
5. Coordinate a National Soil Moisture Network: The Partnership will participate in efforts underway to better organize ongoing soil moisture monitoring in support of decision-making for water supply and infrastructure, agriculture, fire risk management, and ecosystem health, to support Tribes, States, and local communities.

Q. Why do we need a pilot preparedness effort, and how will it work?

A. Coming out of the 2012 drought, Federal agencies heard from communities about the need for assistance in planning for drought mitigation and risk reduction. The Partnership will pilot this concept and test its efficacy on a watershed within the Central-Southern portion of the Great Plains region, as this region is still experiencing impacts from the 2012 drought and will therefore present a model ripe for drought preparedness assistance. The pilot will leverage existing programs to prepare for drought, and as a result will not require any new dedication of funds.

The pilot will facilitate collaboration among the varied water interests and, ultimately, identify appropriate and effective measures to enhance their preparedness and resilience to drought. This collective effort will be unique in its scope as it tests the ability for a community or watershed to

develop an inter-agency and inter-sector drought preparedness plan. The pilot will also present a portfolio of lessons learned for the Partnership and its stakeholders, as it will test the opportunities and identify the barriers and challenges to such an approach. EPA Region 8 will take lead in organizing the pilot over the coming months.

Q. How often will the National Drought Resilience Partnership meet?

A. Currently, all Federal agency members of the Partnership are scheduled to meet quarterly after the initial launch of the Partnership. It is anticipated that the Partnership members will be in more frequent contact as they coordinate drought assistance questions from regional members.

Tab G – Landsat

National Geospatial Advisory Committee – Landsat Advisory Group

Comments on NRC Report: *Landsat and Beyond: Sustaining and Enhancing the Nation's Land Imaging Program*ⁱ

Preface: This review of the National Research Council (NRC) report *Landsat and Beyond: Sustaining and Enhancing the Nation's Land Imaging Program*ⁱⁱ was prepared by the National Geospatial Advisory Committee Landsat Advisory Group (LAG) at the request of Federal Geographic Data Committeeⁱⁱⁱ. The review focuses specifically on the findings and recommendations of the NRC Committee on Implementation of a Sustained Land Imaging Program that pertain to the current and future role of Landsat as part of a comprehensive national land imaging program.

Major LAG Finding: The LAG concurs with the report's findings and recommendations and finds the report to be well reasoned and thorough in scope.

Major NRC Recommendations:

- “The committee recommends key elements of a successful Sustained and Enhanced Land Imaging Program (SELIP) no matter where the federal government decides it should reside.”
- “The top priorities for the Sustained and Enhanced Land Imaging Program should be to assure that the core program provides for continuity of Landsat products and coverage on a secure and sustainable path.”
- “For the Sustained and Enhanced Land Imaging Program to be successful, the division of program responsibilities between the USGS and NASA should be designated such that the agency responsible for balancing science requirements with mission complexity and cost is also provided with the necessary budget. Both agencies should participate in an iterative process to design missions that meet the needs of research and operational communities, but final decisions should be made by the agency that has been given the budget.”

Specific Recommendations

- Develop a plan for a comprehensive, integrated program that capitalizes on the strengths of USGS and NASA, maintains current capability and the existing archive, and enhances the program as technology enables new imaging capabilities and data products;
- Ensure acquisition of land imaging data continuously from orbital platforms, and periodically from airborne platforms, to respond to the needs of producers and consumers of derived data products along with users who analyze imagery;
- Establish partnerships with commercial firms and international land imaging programs to leverage enhanced capabilities;
- Coordinate land imaging data buys across the U.S. government; and
- Include a research and development component to improve data products based on core measurements and to develop new measurement methods and consider evolving requirements.

Important content pertaining to Landsat:

1. Clear statement that the USGS currently has a limited role in the development of any successive Landsat missions.
2. The NRC committee views Landsat as part of a comprehensive land imaging program that consists of an extensive array of other sensors and data.
3. The NRC committee found that the major value of the medium resolution Landsat data is the continuity of the record for monitoring change.
4. The NRC committee provides a list of applications that require higher resolution data than is provided by cannot be supported by Landsat.
5. The NRC committee states that there is limited commercial interest in Landsat 30 meter data.
6. The NRC committee believes that there are commercial data sources that might be used to augment the Landsat data stream.
7. The NRC committee suggests that if the Landsat program is considered an operational system (rather than research) then the goal should be to continue the existing data stream with the lowest possible cost.
8. The NRC committee believes that there are several low cost alternatives to the deployment of a clone of Landsat 8. These include a block buy of specialized small satellites that capture the existing bands at 30 meters. It also includes a wider scan swath, employing a constellation of smaller satellites and flying as a secondary payload on another mission.
9. The NRC committee notes that Landsat is a global asset that is used to support several programs such as Australia's National Carbon Accounting. They note that while other nations are or will be in a position to provide data that will complement Landsat, none of them will provide a substitute for the fundamental data stream.

ⁱ This paper was approved by the NGAC Landsat Advisory Group on December 3, 2013 and adopted by the NGAC as a whole on December 11, 2013. The members of the Landsat Advisory Group are: Kass Green, Kass Green & Associates (Co-Chair); Roger Mitchell, MDA Information Systems, Inc. (Co-Chair); Peter Becker (ESRI); John Copple, Sanborn Map Co.; David Cowen, Univ. of South Carolina; Joanne Irene Gabrynowicz, Univ. of Mississippi; Rebecca Moore, Google, Inc.; Tony Spicci, State of Missouri; Cory Springer, Ball Aerospace & Technologies Corp.; Darrel Williams, Global Science & Technology, Inc.; Tony Willardson, Western States Water Council.

ⁱⁱ http://www.nap.edu/catalog.php?record_id=18420

ⁱⁱⁱ Federal Geographic Data Committee, Initial 2013 Guidance to the National Geospatial Advisory Committee, March 2013 (<http://www.fgdc.gov/ngac/meetings/april-2013/2013-fgdc-guidance-to-ngac.pdf>)

National Geospatial Advisory Committee – Landsat Advisory Group

CLOUD COMPUTING: Potential New Approaches to Data Management and Distributionⁱ

Background: Landsat imagery provides the U.S. and the world with a continuous, consistent multispectral image archive used to monitor global resources. Landsat imagery supports a multitude of applications across scientific, societal and economic domains and is an essential national asset contributing to economic, environmental, and national security interests. The amount of data being downloaded by users has grown substantially since free, open access to the Landsat image archive was provided by the USGS EROS Center in late 2008. The EROS Center has been innovative in satisfying the needs of this rapidly increasing user base. Continued innovations in data handling and distribution will be necessary to keep pace with the increasing user demand, coupled with the fact that the digital content of a data set has grown significantly since the launch of Landsat 8 (e.g., more spectral bands having higher radiometric fidelity (12 bit vs. 8 bit quantization)).

The Federal Geographic Data Committee (FGDC) requested that the Landsat Advisory Group provide advice on “potential new approaches to data management and distribution.”ⁱⁱ Included in the request was specific mention of “use of the cloud” and “investigation of the many technological advances relating to ‘Big Data.’” This report focuses on recommendations to USGS relative to use of cloud computing to improve access to and use of Landsat imagery.

Introduction: Cloud Computing, Big Data and the Opportunity for Landsat – Cloud computing services could be implemented to provide data users with an effective way to view, select, and download desired image data. Cloud computing has become a feasible option because the necessary infrastructure is mostly in place, along with high capacity network services having enough bandwidth to provide a distributed data center service with acceptable performance characteristics. Using cloud computing as an extension of a data center is a viable method to store data in close proximity to large computing resources that are available and scalable on demand. In a traditional data center, computer resources are often over provisioned to satisfy peak demand requirements. Cloud infrastructure would enable the sharing of the same resources over multiple applications, thereby providing the elasticity to allocate more infrastructure to quickly complete a computation-intensive task where the processing load varies with time. This sharing of resources over multiple tasks has the potential to reduce infrastructure/overhead/data hosting costs.

There are many cloud services, including:

- ✓ Data Storage: Short and long term data storage from a few kilobytes to 10’s of petabytes. Cloud storage may be online (on spinning disk, for fast access), nearline, or offline/archival.
- ✓ Computing Resources: On-demand processing capability for small to very large jobs requiring a few CPU cores to thousands of cores.
- ✓ Application Services: Web services, map services.
- ✓ Computing center services including DNS (domain name servers), mail servers, web servers, etc.

Each of these cloud technologies has relevance to the management of Landsat data and provision of related data services. Cloud storage is relevant because the Landsat data archive is quite large, comprising millions of scenes and multiple petabytes of data, and is growing by more than a terabyte per day. The bulk of the Landsat archive is currently offline at EROS, and therefore not readily available for provision of large-scale data services; only the most recent, and/or highest demand, scenes are readily available on spinning disk. Cloud computing resources are relevant because the processing of this ‘Big Data’ can be computationally intensive, from orthorectification and other pre-processing steps, to more advanced derivative product generation. The historic lack of access to scalable computation over

large portions of the Landsat archive has stymied the user community in unlocking the true potential of this treasure trove of data. With the advent of the cloud, it is now possible for the first time to mine the entire Landsat archive and extract an unprecedented amount of meaningful information about our planet and how it is changing over time.

As an example of what is now possible, a team of academic, government and industry researchers published a study in the Nov. 15, 2013 issue of *Science*, "[High-Resolution Global Maps of 21st-Century Forest Cover Change](#)"^[1]. Based upon analyses of massive quantities of Landsat data co-located in cloud storage (e.g., 650,000 Landsat 7 scenes or 20+ trillion pixels), this study produced the first global 30m maps of forest cover and change from 2000-2012, quantifying forest dynamics related to fires, tornadoes, disease and logging, worldwide. The analyses required over one million hours of CPU and would have taken more than fifteen years to complete on a single computer. But because the analyses were run on 10,000 CPUs in parallel in the cloud, they were completed in less than four days. The study results were made freely-available to the public online, via a cloud-hosted interactive map, presenting more than a terabyte of data at full 30m resolution^[2].

Cloud Computing and Landsat: Additional considerations – As demonstrated above, cloud computing can facilitate new approaches to the storage, viewing, analysis and public distribution of Landsat data and derived products. However, cloud computing is not particularly useful for applications where sustained computing services are required 24/7. In such cases purchasing and running an operational data center dedicated to computing, storage, and communication services will typically be cheaper. But, cloud services can be of help to an operational center in meeting data durability and system availability requirements, as storage costs are minimal and one only pays for the storage and communication services as needed.

Security is also an important consideration. There is often tension between those who advocate using the cloud approach to cut costs and increase user access versus those who are concerned that use of the cloud will expose the services, or the data served, to vulnerabilities from outside parties. (See **Recommendation 6.**)

Some Concepts for Cloud-enabled Landsat Data Services: There are four main ways or 'models' for making Landsat image data accessible:

1 – **Data Download** – Data is downloaded from one storage location to another and then processed at the new location (e.g., FTP download or Zip, Clip & Ship services). Currently, the USGS EROS Center provides image accessibility via this 'model' only, which does not follow the 'cloud' paradigm since the imagery is moved to the location of processing. Although there are advantages in this method for traditional imagery workflows, it results in massive redundancy in data storage and data transfer.

2 – **Interactive Online Visualization** – Imagery is pre-processed and mosaicked at various zoom levels, and cached into tiles that serve as background imagery. This is the most scalable way to serve imagery, but it can only be used as a background image and cannot be processed for analysis/information extraction. This approach is very applicable for a number of commercial organizations that want to serve base maps (e.g., Google Maps, Bing Maps and ArcGIS online), but there is no requirement for USGS to provide this service.

3 – **Interactive Online Analysis** (on-demand interactive analysis for simple requests) – Dynamic image services allow the client application to make a request and the server extracts and processes the data before returning the required imagery or product. Such dynamic image services need to run synchronously and provide an image within a few seconds, typically as the user is panning or zooming an interactive map.

4 – **Batch-processing Analysis** (longer-running analyses for complex requests, *a.k.a.* geoprocessing)
– Geoprocessing services enable the user to request an application to be performed by a server asynchronously; requested tasks can be very complex and incorporate the integration of many different data sources, as defined by the client. The output may be an image, set of values, or geometric features.

Major Recommendations: It is recommended that the USGS EROS Center seek to leverage cloud computing in several areas, as follows:

1. **Facilitate Landsat cloud implementations by third-party cloud providers.** In order to foster innovation, the EROS Center should create a policy and framework for supporting third-party cloud providers, most importantly by providing a bulk Landsat data download capability that is timely, comprehensive, reliable, and high-bandwidth. There is precedent for this: EROS today supports bulk download via FTP and HTTP.
2. **Facilitate the implementation (by EROS and/or third-parties) of methods that provide fast and simple accessibility to imagery, such as Interactive Online Analysis (Model 3 above).** Multiple services can be defined from the same data source that will return specific products processed directly from the Landsat L1T products, such as different band combinations, imagery in ‘radiance’ or ‘reflectance’ values, or a wide range of vegetative indices. Such services will significantly improve access to imagery by enabling users of various levels of sophistication to request and receive specific higher-level data products. This concept leverages the efficiency of the cloud by co-locating data and processing; processing only takes place on demand, when the client applications make the requests to the servers, which then process the data and return only the required information.
3. **Facilitate the implementation (by EROS and/or third-parties) of methods that provide Batch-processing Analysis (Model 4 above), as there are many scientific tasks that cannot be handled by Interactive Online Analysis alone.** Tasks such as the recent global forest cover change analyses are too large in extent to be executed in a short time frame and/or can require access to massive volumes of data. There are many different such services that could be envisaged to run on Landsat data, and most of these services would require access to a large number of scene equivalents. Currently, users wanting to perform such analyses would need to first download all the required data. An optimal model would be one in which users can define the required processing to be performed on the imagery and then transmit the model to the cloud where processing can be spread across multiple CPUs. Given the need to periodically recalibrate large groups of scenes (e.g., all Landsat 8 scenes will need to be re-processed at least once in 2014), such a cloud-based batch-processing service would support efficient, timely reprocessing.
4. **The EROS Center should investigate modification of their existing Data Download (Model 1) to enable subsets of L1T products to be downloaded.** Certain types of analyses need only operate over a time-series stack covering a small geographic area of pixels. Note that there is good synergy here with implementation of **Interactive Online Analysis** (Recommendation 2), as one way to facilitate access to such image subsets.
5. **Special attention should be given to the use of open software standards when designing any future system(s) to avoid tying any of these services to proprietary software.**
6. **Although security is an important consideration, security solutions need to be streamlined so as not to slow things down appreciably and/or make things more complicated to implement.** Given that Landsat is a public dataset of broad relevance to society, it would be unfortunate if potential innovations and beneficial applications were thwarted by excessive focus on security.

SUMMARY

The USGS EROS Center has done a commendable job in keeping up with the rapidly increasing demand for Landsat images using traditional, scene-based data management and distribution practices. However, there appears to be a need for a paradigm shift in their data management and distribution practices in order to keep pace with projected increases in user community demands and related data volumes. A top-level investigation of cloud computing was conducted, limited by time and resources, but performed by a group of individuals with up-to-date knowledge and experience relevant to this topic. More in-depth discussions of cloud computing and 'Big Data' can be found in other recently completed studies referenced below. The consensus opinion is that adaptation of the recommended cloud computing approaches is warranted at the EROS Center, whose people are charged with the responsibility of serving a very large, diverse, and growing user community.

References:

1. Hansen, M. C., et al. "High-Resolution Global Maps of 21st-Century Forest Cover Change." *Science* 342.6160 (2013): 850-853. <http://www.sciencemag.org/content/342/6160/850>
2. Hansen, M.C., et al., Global Forest Change Data Portal. *Science* 342.6160 (2013): 850-853. <http://earthenginepartners.appspot.com/science-2013-global-forest>
3. The Magellan Report on Cloud Computing for Science, US DOE Office of Advanced Scientific Computing Research (ASCR) December 2011
4. NOAA CLASS Cloud Computing White Paper, March 2011, Document ID 1340.
5. Redefining the possibility of digital Earth and geosciences with spatial cloud computing, by C. Yang, Y. Xu, and D. Nebert, 2013, International Journal of Digital Earth, 6:4. 297-312.

ⁱ This paper was approved the NGAC Landsat Advisory Group on December 6, 2013 and adopted by the NGAC as whole on December 11, 2013. The members of the Landsat Advisory Group are: Kass Green, Kass Green & Associates (Co-Chair); Roger Mitchell, MDA Information Systems, Inc. (Co-Chair); Peter Becker (ESRI); John Copple, Sanborn Map Co.; David Cowen, Univ. of South Carolina; Joanne Irene Gabrynowicz, Univ. of Mississippi; Rebecca Moore, Google, Inc.; Tony Spicci, State of Missouri; Cory Springer, Ball Aerospace & Technologies Corp.; Darrel Williams, Global Science & Technology, Inc.; Tony Willardson, Western States Water Council.

ⁱⁱ Federal Geographic Data Committee, Initial 2013 Guidance to the National Geospatial Advisory Committee, March 2013 (<http://www.fgdc.gov/ngac/meetings/april-2013/2013-fgdc-guidance-to-ngac.pdf>)

National Geospatial Advisory Committee – Landsat Advisory Group

PRODUCT IMPROVEMENT: Advise USGS on potential means of modifying the current products to make them more useful to commercial information providers and value-added analystsⁱ

Landsat imagery provides the United States and the world with continuous, consistent monitoring of critically important global resources. Supplying an unprecedented record of global land cover status and change for the last 40 years, Landsat imagery is an essential “national asset” which has made and continues to make critical “contributions to U.S economic, environmental, and national security interests.”ⁱⁱ Additionally, Landsat imagery is the ‘Gold Standard’ in remote sensing data, providing the standard against which other satellites and imagery are measured and calibrated.

To date the products from the USGS are used mostly by government agencies as well as the science community. The science community are more adapt at working with the often complex imagery and formulas to derive their models, vs. the users in many government and commercial organizations where the expertise is more in integrating the measurements with other data sources.

Accordingly the Federal Geographic Data Committee requested that the Landsat Advisory Group of the National Geospatial Advisory Group review ‘current and future Landsat data and information product characteristics, including potential means of modifying the current products to make them more useful to commercial value-added information providers’ⁱⁱⁱ. The aim of this document is to provide USGS with recommendations on how the products from the USGS can be improved so as to further increase the utilization and value of Landsat imagery for science, government and commercial organizations.

It is recommended that USGS further improve Landsat products to both enhance the scientific value of the imagery, but also to provide additional value to the commercial and government organizations wishing to extract the maximum value from the imagery. Such organizations need guidance on how best to use Landsat data and the ability to reference standardized products from which their business processes are derived. The LAG recommends that the USGS:

- Must strike a balance between the products created by the USGS and those created by commercial organizations. The USGS should clearly define the level of products it will produce and avoid competition with commercial organizations.
- Refine Landsat geometric accuracy to enable better change detection and refinement of the radiometric measurements so that they can be better associated with known quantities. Improved accuracy is a primary interest of science, commercial and government organizations.
- Continue to improve the existing L1G product by refining both the geometric and radiometric accuracy through the use of additional control and terrain models used to geometrically correct the imagery as well as through continual calibration of the instruments against ground truth. In addition to geometric accuracy, USGS should seek to improve the co-registration of L1T products. Co-registration is key to reducing artifacts in change analysis. While the current process is very good, it can be improved. USGS should consider additional computational techniques and source data such as a better DEM to improve the co-registration.
- Define a standard surface reflectance product by documenting and publishing a standardized method for the creation of Surface Reflectance products from Landsat and collecting and distributing the parameters (such as elevation, weather, temperature & humidity) required to compute these from the L1T.

- Help consolidate scientific research and publish best practices on how to create a range of products including different indices of vegetation and soil types and Climate Variables. USGS should clearly define these products along with the associated validation criteria for such products, so that multiple commercial and government organizations can create and distribute the products backed by well-defined standards. Where such products are dependent on other sources (such as elevation, or other variables) then these source products should also be made accessible. Such standardization of the product will help establish the more wide spread use of the products.

Provide documented samples of the derived products against which organizations can test their product processing. There is little need for USGS to actually create and distribute such products as they can typically be quickly computed from the provided L1T, so long as the algorithms and parameters for their computation are published. Multiple organizations would create the products and be able to reference the USGS defined standards or refine them to create higher level products that are still based on these documented standards. There is an analogy with the production of different fuels and gasoline. These are all created from crude oil. Standards exist for different grades of gasoline and fuels, although they are created by many companies. For some users of high performance cars or planes the specific octane rating is important. For the majority of users, the ability to obtain fuel of a specified grade from multiple sources has led to massive use and been an enabler for some of the world's largest industries.

- Provide the facilities to certify or validate derived products generated by other organizations. This can be achieved in a similar manner that standards organizations check for compliance.
- Make the L1T product simpler to access. The existing products from USGS are currently accessible only via FTP type services that require the complete scene to be downloaded. It is suggested that new APIs (Application Programming Interface) are investigated that enable the subsets of imagery to be downloaded to multiple cloud processing environments which are likely to be used in the near future for the creation and distribution of multiple products created from Landsat imagery. A similar recommendation is provided in the Cloud recommendations (separate LAG document).

The recommendations provided will enable the Science community to continue to refine and develop high grade products, but also enables the commercial organizations to use a well-defined standard that will enable clearer comparison of products and increase their use.

ⁱ This paper was approved by the NGAC Landsat Advisory Group on December 3, 2013 and adopted by the NGAC as a whole on December 11, 2013. The members of the Landsat Advisory Group are: Kass Green, Kass Green & Associates (Co-Chair); Roger Mitchell, MDA Information Systems, Inc. (Co-Chair); Peter Becker (ESRI); John Copple, Sanborn Map Co.; David Cowen, Univ. of South Carolina; Joanne Irene Gabrynowicz, Univ. of Mississippi; Rebecca Moore, Google, Inc.; Tony Spicci, State of Missouri; Cory Springer, Ball Aerospace & Technologies Corp.; Darrel Williams, Global Science & Technology, Inc.; Tony Willardson, Western States Water Council.

ⁱⁱ Marburger, J. 2005. Landsat Data Continuity Strategy Adjustment. Executive Office of the President. Office of Science and Technology Policy. December 23, 2005.

ⁱⁱⁱ Federal Geographic Data Committee, Initial 2013 Guidance to the National Geospatial Advisory Committee, March 2013 (<http://www.fgdc.gov/ngac/meetings/april-2013/2013-fgdc-guidance-to-ngac.pdf>)

The President's Climate Action Plan

Executive Office of the President

June 2013

III. Using Sound Science to Manage Climate Impacts

Scientific data and insights are essential to help government officials, communities, and businesses better understand and manage the risks associated with climate change. The Administration will continue to lead in advancing the science of climate measurement and adaptation and the development of tools for climate-relevant decision-making by focusing on increasing the availability, accessibility, and utility of relevant scientific tools and information.

Specific actions will include:

Developing Actionable Climate Science: The President's Fiscal Year 2014 Budget provides more than \$2.7 billion, largely through the 13-agency U.S. Global Change Research Program, to increase understanding of climate-change impacts, establish a public-private partnership to explore risk and catastrophe modeling, and develop the information and tools needed by decision-makers to respond to both long-term climate change impacts and near-term effects of extreme weather.

Assessing Climate-Change Impacts in the United States: In the spring of 2014, the Obama Administration will release the third U.S. National Climate Assessment, highlighting new advances in our understanding of climate-change impacts across all regions of the United States and on critical sectors of the economy, including transportation, energy, agriculture, and ecosystems and biodiversity. For the first time, the National Climate Assessment will focus not only on dissemination of scientific information but also on translating scientific insights into

practical, useable knowledge that can help decision-makers anticipate and prepare for specific climate-change impacts.

Launching a Climate Data Initiative: Consistent with the President's May 2013 Executive Order on Open Data – and recognizing that freely available open government data can fuel entrepreneurship, innovation, scientific discovery, and public benefits – the Administration is launching a Climate Data Initiative to leverage extensive federal climate-relevant data to stimulate innovation and private-sector entrepreneurship in support of national climate-change preparedness.

Providing a Toolkit for Climate Resilience: Federal agencies will create a virtual climate-resilience toolkit that centralizes access to data-driven resilience tools, services, and best practices, including those developed through the Climate Data Initiative. The toolkit will provide easy access to existing resources as well as new tools, including: interactive sea-level rise maps and a sea-level-rise calculator to aid post-Sandy rebuilding in New York and New Jersey, new NOAA storm surge models and interactive maps from the National Oceanic and Atmospheric Administration that provide risk information by combining tidal data, projected sea levels and storm wave heights, a web-based tool that will allow developers to integrate NASA climate imagery into websites and mobile apps, access to the U.S. Geological Survey's "visualization tool" to assess the amount of carbon absorbed by landscapes, and a Stormwater Calculator and Climate Assessment Tool developed to help local governments assess stormwater-control measures under different precipitation and temperature scenarios.

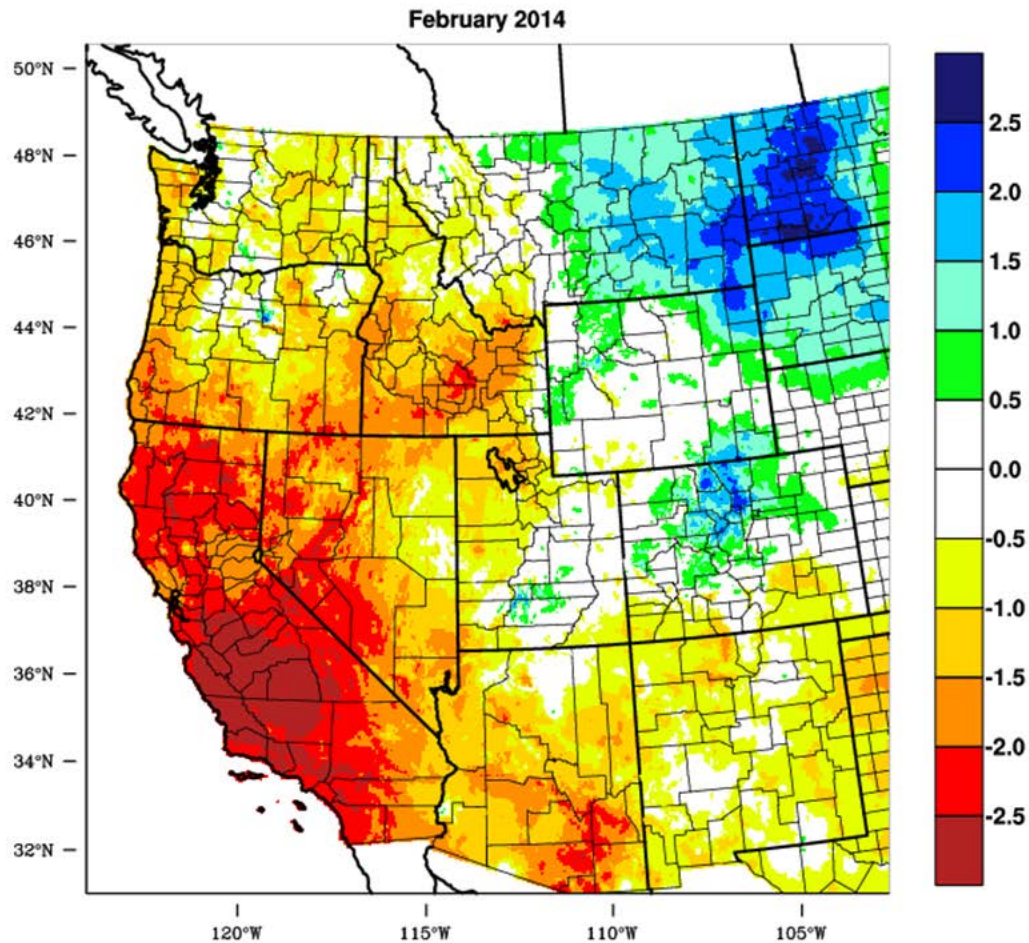
Helping our communities adapt to climate change

Wednesday, March 19, 2014 at 11:16 AM

Today the White House [announced](#) the [Climate Data Initiative](#), aimed at helping organizations and communities use public data to better understand and prepare for the effects of climate change. Up until now, it's been difficult for the public to locate detailed, timely data relevant to climate-related risks such as [extreme weather events](#). To help address this challenge, Google is donating cloud computing storage and access to other tools to support institutions that are driving [climate change resilience](#).

First, we're providing 50 million hours of high-performance computing on the [Google Earth Engine](#) geospatial analysis platform. Earth Engine brings together the world's satellite imagery with tools to help detect changes and map trends on the Earth's surface. Earth Engine has already been applied to unlock valuable information from the 40+ year treasure trove of Landsat satellite data (USGS/NASA), including an [interactive timelapse of the planet](#) from 1984-2012, the [first high-resolution global maps of deforestation](#), and a near real-time [deforestation alert system](#) that allows anyone interested in forest monitoring to take part. We hope that with this new donation, researchers will [focus on applying Earth Engine](#) to address climate-related risks such as managing agricultural water supplies and modeling the impacts of sea-level rise and storm surge.

We're also [partnering with leading researchers](#), allowing them to scale their work with Earth Engine and quickly move from the laboratory into people's hands. Together with academic partners in the western U.S., we'll produce the first high-resolution, near real-time drought monitoring and mapping products for the entire continental United States—and make them freely available to the public.



Traditional static graphic showing record-breaking drought in California in Feb 2014. Red = Dry; Blue = Wet. Source: the Desert Research Institute, University of Idaho and University of Nebraska-Lincoln.

Finally, we're donating one petabyte (one billion megabytes) of cloud storage to house satellite observations, digital elevation data, and climate/weather model datasets. We encourage the global community to work with us on this project by contributing and curating data, and developing public-benefit applications. We're already collaborating with researchers at NASA Jet Propulsion Laboratory, University of Bristol U.K. and the government of Australia.



See how Google Maps Engine was used to highlight the vulnerabilities associated with rising sea levels, storm surges, and coastal inundations in the Republic of Vanuatu. The darker blue shows present-day inundation of the Efate lagoon during a high astronomical tide, and the lighter blue shows predicted inundation in 2090 due to sea level rise. Source: Australian Government and the Cooperative Research Centre for Spatial Information.

To find out more, visit the [Earth Engine website](#), view a [sample map](#) on the Google Maps Gallery, follow us on [Google+](#) and [Twitter](#), and tune in to [White House live stream](#) today at 5:15pm EDT.

Posted by Tyler Erickson, Developer Advocate, Google Earth Engine



Press Release

March 19, 2014

As the current ongoing drought highlights, in the West water is a critical, vital resource and sound decisionmaking demands sound science and accurate and timely mapping of, and data on, precipitation, temperature and other parameters, including evapotranspiration (ET). The demands for water and related climate data continue to increase and are used by federal, state, tribal, and local government agencies, as well as private entities and individuals to:

- forecast and follow drought and flood occurrence and assist in disaster response;
- project future water supplies for agricultural, municipal, and industrial uses;
- estimate streamflows for hydropower production, recreation, and environmental purposes;
- facilitate water management and administration of water rights (and related transfers), decrees, interstate compacts, tribal water settlements, and international water treaties; as well as
- assess the impacts of climate variability and change.

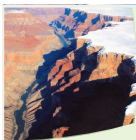
Google and its partners today committed to apply historical plus near real time gridded weather data sets housed on Google Earth Engine's environmental cloud computing platform to produce state-of-the-art drought monitoring products for all of the continental United States. These products will be produced in near real time and made freely available to the public.

Further, Google, in collaboration with the University of Idaho, Desert Research Institute and University of Nebraska, is committing to produce, on Earth Engine, 30 m resolution maps of ET based on the Landsat thermal-imaging-era archive dating to 1984 for all of the United States and globe. The ET maps will be freely processed by and made freely available to the public for use in field scale monitoring of actual amounts of water consumption by agriculture and natural vegetation.

Google's commitment is very significant – one petabyte (1000 terabytes) of cloud storage and 50 million CPU hours of high-performance cloud computing on Google Earth Engine's geospatial analysis platform.

"The Western States Water Council applauds Google's commitment to this outstanding example of a public private partnership, which will undoubtedly lead to further innovation and applications of science to solve real world water problems," said WSWC Chairman Phil Ward, Director of the Oregon Department of Water Resources.

Tab H – Water Data Exchange (WaDE)



► 2013: FINALIZING SANDIA, WADE INFRASTRUCTURE COMPONENTS, AND STATE FUNDING



► SCA: A COMPREHENSIVE SURVEY OF STATE WATER PLANNING PROGRAMS



► NEXT STEPS IN 2014—GETTING THE STATES PLUGGED INTO THE PORTAL

○ WSWC | ○ WaDE | ○ 2014



Western States Water Council

The Water Data Exchange (WaDE) Program will enable the western states to share important water data with each other, federal agencies and the public. It also seeks to improve the sharing of federal water datasets that support state water planning efforts.

2013: WaDE Program

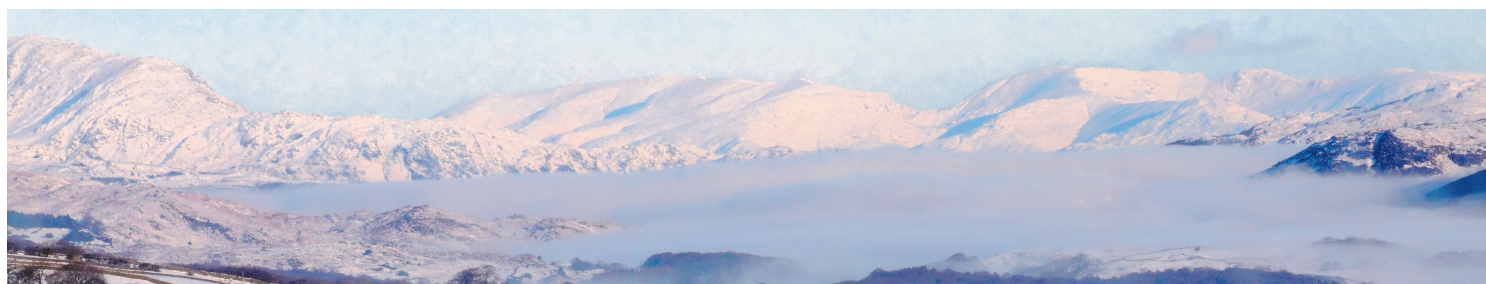
WaDE is a cooperative effort between the Western States Water Council (WSWC), representing 18 Western states, the Western Governors' Association (WGA), the Department of Energy (DOE), and the Western Federal Agency Support Team (WestFAST). The focus of WaDE is to enable the states to share important water data (water availability estimates, water use by sector, and water allocation data) with each other, federal agencies and the public. WaDE is also interested in promoting and incorporating shared federal datasets concerning water management (streamgage data, snowpack and stream-flow forecasts, reservoir storage and gage elevations, etc.) to assist the states, and make their water planning efforts easier.

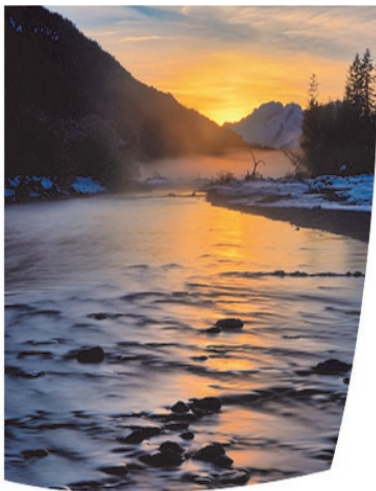
2013 was a busy year for the WaDE program. After an extensive state review process, WSWC's joint effort with Sandia National Laboratory to develop water availability "metrics" came to a close. The study resulted in maps of the western states with the estimated availability, future demand, and cost to develop different water supply sources, including alternative supplies like wastewater effluent and brackish groundwater. These maps will be published on Sandia's "Water and Energy in the Western and Texas Interconnects" project website. The maps link back to WaDE, where original state-provided data will be shared. Sandia hopes to use WaDE data if again called upon to reevaluate water availability in the West.



Other notable 2013 activities and events for the WaDE program include:

- Co-hosting a water-energy nexus workshop for water and electric utility managers in Denver, Colorado. A summary of the workshop is available on the WSWC website.
- Updating the WaDE infrastructure components to the latest schema version (v.0.2) and National Environmental Information Exchange Network (NEIEN) web services specifications.
- Synthesis of survey results gathered from the 18 WSWC member states into a significant publication about their water planning program data and capabilities (see the reverse).





The WaDE Portal: Getting the States Plugged In

Much of the infrastructure for WaDE has been built, but the states also need to plug into the WaDE program for it to function as envisioned.

Databases, web services code, and the front-end mapping application used to find and access WaDE-hosted data have all undergone revisions and testing to ensure a robust and streamlined interface for portal users.

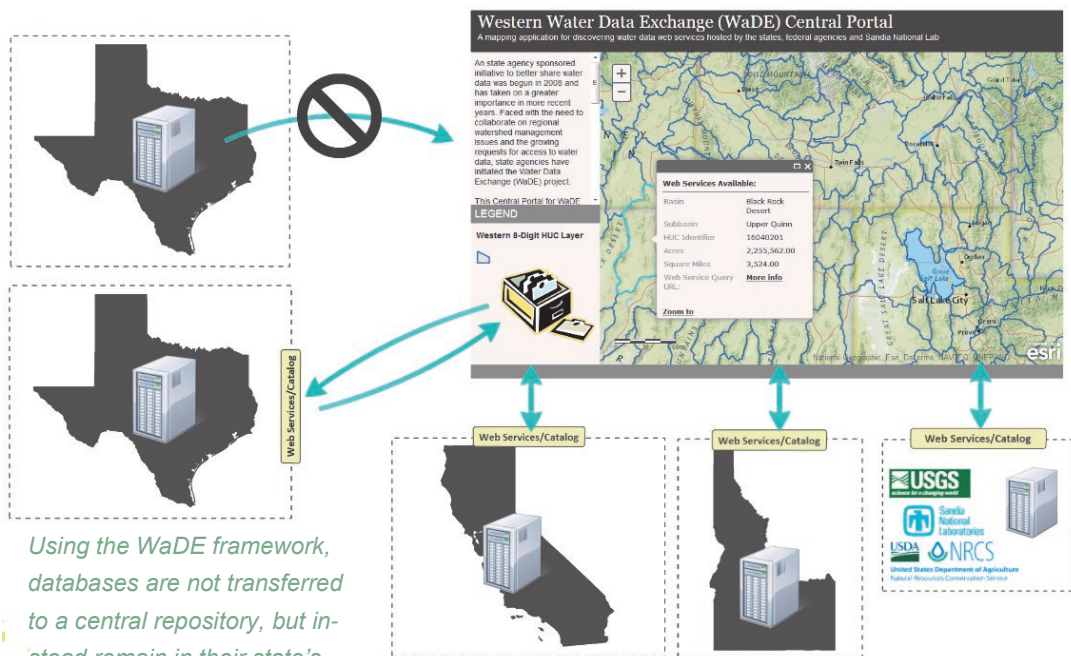
The latest WaDE template databases are now available for download in PostgreSQL (a free enterprise level DBMS for states that have an “open

source” philosophy), and in Microsoft’s SQL Server, with a version in Oracle pending in 2014.

Online documentation that will guide the states through the installation process is under development. This will include step-by-step procedures on how to easily map and migrate information from the state’s native databases into the WaDE database.

In 2013, funding was procured for a grant partnership from the National Environmental Information Exchange Network (NEIEN) to facilitate the deployment process. The original state partners consisted of Washington, Oregon, Idaho, Oklahoma and Texas, with Texas’ TCEQ as the lead state and agency. Utah recently joined this partnership. Wyoming has also begun the deployment process. These states will be the first to “plug into” the WaDE portal and will provide many “lessons learned” for the remaining member states.

WSWC is currently exploring the potential for a second application for NEIEN funding for FY2015. We are looking for states that need additional funding and are interested in partnering on another grant application, to be submitted this fall.



Using the WaDE framework, databases are not transferred to a central repository, but instead remain in their state’s home IT environment. A listing of the data housed by each state is provided via a “Central Catalog.” Once the desired data are found, they are accessed using web services, which looks like a web browser address: <http://www.state.gov/water/webservices/GetCatalog>.

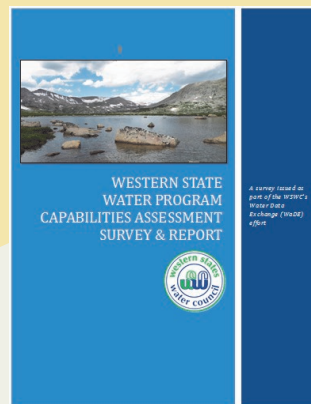
Western State Water Program Capabilities Assessment

In 2012, the WSWC circulated a survey designed to address the states’ water planning program capabilities—include such items as the data gathered, reporting programs, IT systems and programming languages supported—as part of the WaDE program.

After assembling the survey responses from the 18 WSWC member states, a draft report is ready for a final review by the initial survey respondents. After their feedback has been incorporated, a final report will be published, anticipated in May 2014, along with a series of maps that highlight the findings of the report. If you are interested in reviewing the draft, please ask for a copy from WSWC staff members.

Western States Water Council

5296 South Commerce Drive, Ste 202
Murray, UT 84107
Phone: 801-685-2555
Fax: 801-685-2559
<http://www.westernstateswater.org>



For more information about WaDE, please visit <http://www.westernstateswater.org/wade> or contact Sara Larsen (email: saralarsen@wswc.utah.gov)

PROGRESS REPORT

Awardee Name: Western Governors' Association

Award Number: OE0000422

Sub-Award Number: 30-230-70

Sub-Recipient: Western States Water Council

Project Name: Interconnection Transmission Planning and Analysis

Project Director: Tony Willardson

Date of Report: April 1, 2014

Period Covered (by the report): 07/01/13 to 12/31/13

Comparison of Accomplishments to Goals and Objectives: See attached.

Cost Status: Modified budget: \$ 353,445.00

Total sub-award funds received: \$ 218,303.54

Remaining unobligated balance: \$ 135,141.46

Schedule Status: See attached.

Changes in Approach: None.

Actual/Anticipated Problems or Delays: Additional technical infrastructure development needed (creation of a methodology schema and additional database refinement and testing, additional programming for states that use Microsoft's IIS web servers). See enclosed for more information.

Any Absence or Changes of Key Personnel: None for the reporting period discussed in this report; however, Sara Larsen has scheduled a maternity leave of absence in early 2014, estimated to be February 3rd to March 31st.

Description of Product: Please see the enclosed for more information about program progress, schedules and deliverables. Also, detailed information can be found on the WSWC website (<http://www.westernstateswater.org/wade>).

WSWC/WADE PROGRESS REPORT

July 1, 2013 – January 1, 2014

The following answers correspond to the specific tasks for the “Resource Assessment and Interconnection-Level Transmission Analysis and Planning” grant project (the Project) as set forth in the WSWC Scope of Work, which is found in Exhibit A of WGA Contract Number 30-230-70.

Task 1(a): The Western States Water Council (WSWC) has continued to work with member states, the Western Governors’ Association (WGA) and Sandia National Laboratory to refine the state water data that Sandia has acquired over the past two years (pertinent to subtasks 3.1 and 4.1 of the national laboratories’ scopes of work). In Spring 2012, the Sandia research team developed a series of water availability metrics that could be incorporated into long-term electricity transmission planning models. A multidisciplinary group of state and federal water agency staff assisted in the vetting of the preliminary water metrics and these were then made available to the Western Electricity Coordinating Council (WECC) and for incorporation into their long-term planning models.

In fall of 2012, WSWC members expressed a desire to review the estimates more closely. To facilitate this, WSWC developed a Sandia Data Review online mapping application where state agency staff members could review Sandia’s data and provide feedback and corrections. Seventeen of the WSWC’s member states have finalized a review of the data for their state. One state declined to perform the review, but may still opt to supply new data to Sandia in the future. WSWC staff have coordinated with the Sandia research team throughout the review process, as well as with Argonne National Lab’s “Ecorisk Tool,” to discuss how the resulting water availability and water-related environmental risk datasets may be hosted and published. Further discussions have involved custom tools or applications to be built based on the data.

As the review was finalized in the fall of 2013, WSWC members expressed concern over accuracy and long-term maintenance of the Sandia water availability metric results. Members were primarily concerned that Sandia data would be manipulated and misconstrued as state-generated water data. Moreover, changes could be added to Sandia data in conflict with the information to be shared by member states using the Water Data Exchange (WaDE) portal (see below).

As a result, at the WSWC Fall Council Meeting in Deadwood, South Dakota, members decided that the WSWC would not host the Sandia datasets or maps on WSWC servers, but would instead provide support and training to Sandia, assisting its personnel with uploading, customizing and hosting their own data on Sandia and cloud-based servers. New licensing options made available by the WSWC/Sandia’s GIS software provider ESRI made this an optimal arrangement for long-term data hosting for both parties. It is anticipated that the Sandia results will be linked to and accessible from the WSWC website, but the study results will not be integrated into the WSWC-hosted WaDE infrastructure.

Task 1(a) cont. – Water Data Exchange (WaDE) Project – In order to provide support for the Sandia effort and similar studies in the future, the WSWC has initiated a project to work with its member states to establish a framework that will allow for real-time access to state water allocation, availability, use,

and planning data through a common portal. The project is referred to as the Water Data Exchange or WaDE Project. As a preliminary step, the WSWC has conducted an inventory of the states' current water planning program methodologies and data practices. All member states were asked to fill out a survey describing their programs and approach to hosting and managing water data. All eighteen member states have submitted survey responses back to WSWC and the results have been compiled in the WSWC's State Capabilities Assessment (SCA) Report. This report has been reviewed by the technical workgroup formed to support its development, but it is currently in draft stage.

State agency staff that originally submitted the information will have the chance to review and provide additional feedback. The current draft of the SCA report has also been submitted to the Subcommittee on Water Availability and Quality (SWAQ), a subcommittee within the U.S. Office of Science and Technology Policy. The hope is that highlighting state water data programs would help prioritize funding in FY2015 for WaterSMART grants to the states tied to water data development. The draft report accompanying this progress report will be published on the WSWC's WaDE-related webpages under "Draft Items" (<http://www.westernstateswater.org/wade/draft-items>) after the state respondents have provided their reviews.

The outreach phase of the WaDE project has been largely concluded, although meetings with state agencies, especially pilot states, regarding their participation in WaDE are expected to continue in 2014. Fifteen of the eighteen member states have been personally visited and briefed on the project. The remaining states that could benefit from a WaDE briefing meeting include North and South Dakota, possibly Alaska, and an additional visit with water agency staff in Montana (which would likely coincide with the WSWC 2014 Summer Council Meetings in Helena, Montana on July 15-18th). Outreach visits have been essential for generating support for the project and for the refinement of the schema (format) of the WaDE targeted data. Revisions to the schema have been made to more accurately and easily accommodate the states' data products. These revisions are now available under Version 0.2 (v.0.2) via the WaDE website, under "Draft Items."

Related to the outreach effort, WSWC received an invitation to speak about the WaDE project from the Universities Council on Water Resources (UCOWR)/National Institutes for Water Resources (NIWR) at their annual conference in summer of 2013. The presentation included the submission of a peer-reviewed journal article to the UCOWR Journal of Contemporary Water Research and Education (Issue 153). The journal article describing the WaDE project effort and approach is to be published in March of 2014.

WaDE project infrastructure components have been under continuous development during the most recent reporting period. In 2012, databases that reflected the original v.0.1 data schema were created using SQL Server and PostgreSQL. Software code was written that allowed for the extraction of requested data using an internet browser and a pre-configured browser address link – essentially turning the databases into "live data links." During the early part of 2013, at the suggestion of

Workgroups 3 and 4¹, the web services code was re-written to match the EPA's Exchange Network (EN) Representational State Transfer (REST) service standard specifications. This recommendation stemmed from a desire to have a well-established and standardized URL address format, both for integration into the Exchange Network (EN) (see section on EN Grant) and also for increased discoverability. Other changes to the web service code were made to accommodate requests of the Workgroups, including revisions to the databases' tables and scripts to reflect the v.0.2 schema. In addition, a flow configuration document (FCD) was created and finalized by the workgroups, which serves as a map or set of guidelines for partners who wish to implement the WaDE node within their server environments.

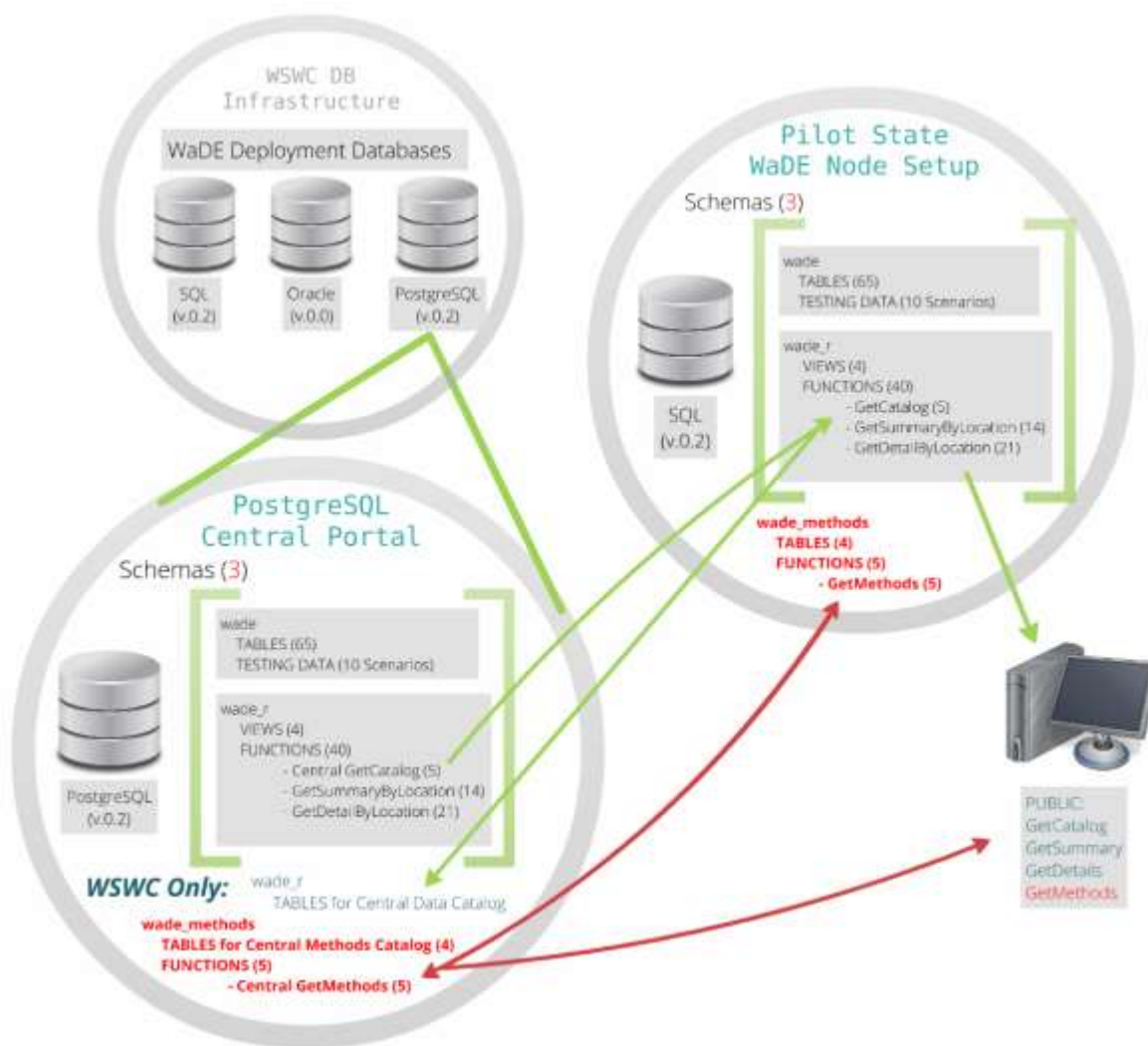


Figure 1. Diagram of WSWC Server and State Node Infrastructure

In the fall of 2013, a discussion among state partners and WaDE developers ensued concerning the housing of methodology data. One of the recommendations of the State Capabilities Assessment Report and workgroup is the creation of a central repository for common terms, definitions and methodologies

¹ Workgroup 3 – Data Exchange Template (Schema Development) Workgroup. Workgroup 4 – Data Exchange Methodology Workgroup.

used by the states. Originally, the states intended to host their own methodology information which would be accessed with the related data, but this approach would not allow for an easy comparison of methodologies between states' planning programs. It was decided that a good solution would be to develop tables and functions within the WaDE database that would house and access the information at the state node, but also allow the WSWC to access the same information and incorporate it into a "Central Methodology Catalog," similar in nature to the "Central Data Catalog" concept. Figure 1 shows the existing infrastructure format for the WSWC central database and also the format for pilot state nodes. The existing web services that extract data and return them to the client or the database are shown in green. The addition of a Central Methodology Catalog and related web service code are shown in red. All volunteer pilot states and EN Grant partners will be using SQL Server databases for their node implementation, with the exception of Oklahoma, which uses Oracle. In addition, most of these states also use Microsoft's IIS web server platform, not a Linux-Apache webserver that was anticipated by WaDE developers. The web services programming has been updated to reflect this change.

Public access to methodology information for all states would be accessed from the WSWC's Central Portal, similar to the Central Catalog. This adjustment in approach has required some additional development not originally planned in the WaDE project timeline. As soon as the WaDE methods-related schemas are finalized, tested and documented, Utah and Wyoming have agreed to proceed with the data mapping effort with minimal financial assistance, with the exception of the purchase of server capacity with Utah's central IT department and a SQL Server database license (funding is being sought for these purchases). Other states that have expressed an interest in deployment without financial assistance will be approached as these initial efforts proceed. WSWC anticipates that the first two states will be in the process of migrating their data into the WaDE databases in early 2014, and a beta portal for the WaDE application will also be available in the spring of 2014. WSWC is continuing to meet with other states in exploratory "scope of work" meetings to estimate their individual costs for deployment. All other infrastructure refinements and draft items are available on the Workgroup's webpage (<http://www.westernstateswater.org/data-exchange-template-schema-development-workgroup/>).

Task 1(a) cont. – Exchange Network (EN) Grant Partnership – During the outreach phase of the WaDE effort, a majority of state agencies expressed their support for the WaDE project and its goals of enabling easy, cost-effective, near real-time water data sharing. However, due to drastic budget cuts and downsized workforces, they expressed concerns about available resources. To address this, the WSWC proposed to assist in finding funding to make the WaDE component deployment less of a burden on states. One option presented was the opportunity to partner on a grant application submitted to the Environmental Protection Agency's (EPA) Exchange Network (EN) program. This program allocates funding of approximately \$10 million each year for the states to establish environmental data 'flows' as data exchanges, similar to those proposed in the WaDE program.

Five partner states were selected – Texas, Oklahoma, Idaho, Oregon and Washington – to participate in the grant application. All partners submitted timelines, staffing requirements, estimates of costs and letters of intent as part of their joint application. In July of 2013, the EN announced that the WaDE grant application and its partners would be fully funded. The five grant partners mentioned above have agreed to the Texas Commission on Environmental Quality (TCEQ) representing them as the grant

partner lead state. EN funding will be disbursed to TCEQ, which will in turn reimburse the states for WaDE-related work as it is completed. The legal agreements needed between TCEQ and the states are currently under review; but once in place, the grant partners will be able to work on WaDE-related tasks and be reimbursed for their time and costs. A steering committee is also in the process of being assembled that will be composed of critical technical and planning program staff members, to ensure that grant partners make continual progress. The grant stipulates that the partners have three years in which to complete the outlined tasks, and the timelines for completion by the partners varies from state to state depending on their current workplans. The WSWC will continue to work with both voluntary pilot states and EN grant partner states to facilitate the WaDE “plug in” process. More information about the progress of the EN partners can be found on their webpage, hosted by the WSWC (<http://www.westernstateswater.org/wade/fy2013-en-grant/>).

The funding of the WaDE data schema as a primary data flow within the EPA’s Exchange Network is likely to establish it as a fully-fledged and rigorously documented web service within EPA’s existing framework. With the news that the WaDE grant application has been funded, the EN has an interest in considering funding of WaDE-related efforts in future years, and may encourage remaining states to plug into the project. WSWC will work to assemble another partnership grant application in late summer of 2014 for the next round of states that have additional funding needs and wish to participate.

Task 1(b): Completed. The water demand and availability models discussed in Tasks 3 and 4 of the National Laboratories’ Scopes of Work accomplished these objectives. The WSWC has continued to assist Sandia in the development of these models and case studies. As indicated above, WSWC developed an application where state agency staff members could review the data, methods and metrics generated by the Sandia research team in 2012 and 2013, then provide them with feedback and requests for adjustments to their estimates, the methodology used, or the parameters used to make assumptions in Sandia’s models. The team of state agency representatives WSWC put together at the onset of 2012 was also reassembled in 2013 to review a particular metric for Argonne National Lab related to impacts of energy development on water for the environment. WSWC, Sandia National Lab, Argonne National Lab and the environmental metric team developed a “straw man” metric for these issues and anticipate publication of their results in the form of a mapping application, called “Ecorisk,” in early 2014 as a subset of the data published by Sandia.

Task 1(c): Completed. In late 2011, Sandia completed an analysis of the potential impact of drought on electric generation availability for input into long term transmission modeling and planning efforts by the WECC and Electric Reliability Council of Texas (ERCOT). Sandia performed the study with support from Argonne National Laboratory, Pacific Northwest National Laboratory, and the National Renewable Energy Laboratory. The study responds to a request that the WGA developed with input from the WSWC and in conjunction with the transmission modeling teams and participating interconnections. (The final report can be found here: <http://energy.sandia.gov/wp/wp-content/gallery/uploads/Drought-Analysis-Report-Final.pdf>).

Task 1(d): See response to Task 3 below.

Task 2: Sandia has worked to incorporate legal and institutional water availability into their metrics as much as possible. They hope to further refine the metrics related to the availability of water in the future, and identify what state-level water rights regulations are in place for surface water and groundwater, the extent to which water rights have been adjudicated, and what additional controls may apply. The WSWC's Legal Committee workplan includes a project that will prepare an analysis of legal and administrative issues associated with new permits or transfers of water for energy development in Texas and the states of the Western Interconnection. A draft of this analysis/report is expected to be issued for review in mid-2014.

Task 3: Throughout the course of the project, WSWC has worked to carry out the policy-related tasks set forth in Task 1(d) and Task 3, and review the status of Sandia's water data gathering effort discussed in the Task 1(a) response above. Some specific tasks are described below:

Task 3(a&b): Ongoing.

Task 3(c): Completed. WSWC hosted a Water/Energy Nexus Workshop on April 2nd, 2013 in Denver, Colorado. The meeting convened water managers, electricity generators and regulators and served as an information exchange, and as a means of evaluating how electricity and water providers can better coordinate and integrate their planning activities. A summary of the meeting and the initial discussion results and recommendations has been published and can be found on the WSWC website (<http://www.westernstateswater.org/wswc-wga-waterenergy-symposium-april-2-2013-denver-colorado/>).

Task 4(a): WSWC Executive Director Tony Willardson serves as an alternate to WECC's State Provincial Steering Committee (SPSC) and as a member of the Environmental Data Task Force (EDTF) and has participated in various meetings during the reporting period. The WSWC will continue to coordinate with the SPSC and EDTF throughout the duration of the Project.

Task 4(b): The WSWC's Water Resources and Energy Subcommittee, under its Water Resources Committee, will continue to assist the WGA and the national laboratories in developing the water demand and availability models discussed above. The Subcommittee consists of appointed WSWC members and water managers from Arizona, California, Idaho, North Dakota, Texas, and Wyoming. Among other things, the Subcommittee has continued to work with Sandia to develop and carry out the concept for the models and the data gathering effort discussed in Task 1(a). Separately, the WSWC adopted Position No. 355 on June 26th, 2013 – in support of water research and development programs at DOE national laboratories. The Subcommittee's continued support of the WaDE project ensures that if the Sandia analyses are repeated or if similar studies are being conducted that are looking to incorporate states' shared water planning data, these will be supported in a cost effective and efficient manner.

Jan 1, 2014 – Mar 31, 2014 – Interim Progress Report

WSWC staff has continued to assist Sandia with the development of their own Sandia water metrics mapping application and website. Their research team anticipates that these will be made available from the project website in 2014.

The State Capabilities Assessment report is currently under review by the survey respondents. Edits will be incorporated as they are submitted and a final draft will be made available in May 2014. A mapping application that will highlight the survey results is under development.

The WaDE project is also highlighted in the March issue (#153) of the Journal of Contemporary Water Research and Education, a peer-reviewed journal published by the University Council on Water Resources (UCOWR). The article is available for download at the UCOWR website:
<http://www.ucowr.org/journal-of-contemporary-water-research-and-education/issue-153>.

The updated version of Postgres and SQL databases (v.0.2) were finalized and include tables and functions to accommodate the new GetMethods web service calls discussed above. Web service programming code was also updated to be used by states that utilized Microsoft's Internet Information Services (IIS) web server.

The documentation to begin the database deployment within state IT environments has been written and made available as a password-protected WSWC webpage. States interested in reviewing the database may inquire for access to the databases and deployment documentation. Utah and Wyoming have been given access to begin their deployment steps, which will proceed as their staff time allows. Their experience with deployment will provide many "Lessons Learned" for the states that are slated for deployment via the Exchange Network (EN) grant.

Exchange Network WaDE Grant partners have formed a Steering Committee and finalized a Steering Committee Charter. This group is tasked with making decisions regarding funding and overseeing the progress of the partner states with fulfilling grant obligations. Utah was incorporated as a sixth partner state to assist with a software purchase and to incorporate their feedback as one of the first pilot states to implement WaDE.

The legal agreements that allow TCEQ (the lead partner state) to distribute grant funds to the states and also to WSWC for continued WaDE coordination are currently under development. Scoping for a second grant partnership (FY2015) is also underway. WSWC anticipates a second grant application with another partnership will be submitted at the end of 2014.

The WaDE Program Manager, Sara Larsen, took a maternity leave of absence this quarter from Feb. 3rd to Mar. 31st, to have her baby girl, Esme Isobel, born February 3rd, at almost 7lbs and 21in. She is a delightful addition to the WSWC family.



State Capabilities Assessment Report – Executive Summary

Whether addressing population growth, national security, drought, climate change, or meeting our growing energy needs, questions surrounding water availability in the West will only increase and become more important in the coming years. In 2011, the Western States Water Council (WSWC), in coordination with the Western Governors' Association (WGA), the Department of Energy (DOE) National Laboratories, and the Western States Federal Agency Support Team (WestFAST), initiated the Water Data Exchange (WaDE) project to enable the exchange of water planning, water use and water allocation data between state water agencies, federal agencies, tribal and local governments and the public. The goals of the project involve establishing a governance structure, evaluating current capabilities and methods used by state water agencies, and designing a common format that specifically targets the desired data. The Water Information and Data Subcommittee, which directly oversees the WaDE project, agreed to create four workgroups to lay the groundwork for the development of the data exchange. The State Capabilities Assessment Workgroup was charged with the task of evaluating the current mechanisms and tools used by the state agencies charged with overseeing the allocation and administration of water within their state, regarding their water planning and water rights/permitting programs. This report is the culmination of the workgroup's efforts.

In order to build the framework for the data exchange effectively, a better understanding of how the states collect, generate, manage and share data was needed. To assess this, a survey was sent to each of the states. Some questions addressed policy and planning tasks, while others covered data management. The survey was divided into questions addressing four topics: surface water data, groundwater data, data management, and methodology. The survey was distributed in February of 2012 and collected through the fall of 2013. All eighteen WSWC member states responded. Some states described their programs in great detail, while others were more succinct. This document summarizes the responses and explores the similarities between state water planning programs, finding common points. It also serves to highlight several differences in program approach that may pose a challenge to regional analyses and the comparison of planning and permitting data across state borders. To illustrate these similarities and differences, a table of the primary available data from each state program was generated (see Table 1). Common elements between the state programs include the following:

- Most of the states are managing and maintaining streamgages and streamgage data. Most also rely on the U.S. Geological Survey's (USGS) streamgage network as an important component to their water supply and availability planning and permitting processes.
- Many are managing and maintaining some groundwater monitoring/elevation data.
- Most states manage their water rights using an enterprise-level database management system, with some information available in a geospatial format (such as points of diversion or places of use).
- Generally withdrawals/diversions (and some consumptive use) are tracked, and some states have the ability to summarize these sets of data by a geospatial unit and/or by beneficial use category.

- Most states that have basins, aquifers, or regions that require special management or have institutional/legal restrictions are maintaining these in a database/geospatial format as well.

The table also reveals differences in the state planning program data and identifies data gaps that pose a challenge:

- Some states have physical water supply, water availability, and water use information programs for specific regions. However, these analyses are typically not generated for the entire state on a repeating basis. Also, some of the targeted data generated by state programs are only published in an analog format or as a report on the state's website. These are not yet captured and stored in a database or published digitally.
- Most states analyze physical water supply (establish that water is indeed present at the proposed point of diversion, etc.) and legal and institutional water availability (i.e. determine if water is appropriable within the basin) as part of their permitting processes, but these are generated on an ad hoc and site specific basis. They generally do not summarize the information by watershed, basin, planning area or jurisdictional region. Summary-level information on water availability by basin/aquifer is one of the desired datasets for future decision support; therefore, the lack of data and even a standard and specific definition of the term "water availability" constitutes a challenge for regional comparisons.

Consumptive Use: Various water stakeholders may use different definitions for the term "consumptive use." For the purposes of the WaDE project and this document, consumptive use is defined as the portion of water withdrawn from the natural system for a particular use that is evaporated, transpired, incorporated by products or crops, consumed by humans or livestock, or otherwise removed from the hydrologic cycle, i.e., water not returned to the natural system.

- Most states track allocations and diversions of their waters, but do not have a statewide program for tracking consumptive uses or return flows. Some states do have extensive programs for estimating consumptive use, especially in areas that require additional oversight or data specific to a beneficial use category. For example, they may have robust estimates for agriculture and/or municipal/industrial use, but track self-supplied domestic use to a lesser degree, if at all. Very few states have more comprehensive programs. This adds a degree of uncertainty for estimating current and future demands for water, as well as future availability.

The Consumptive Use Data Gap: Withdrawals of water from the natural environment has been easier to quantify than its consumptive use. Standardized estimates have been lacking since 1995, when USGS ceased its consumptive use reporting. However, it is a significant component to water budget assessments and has been identified as a primary objective of the National Water Census Program. USGS would like to have more frequent compilations of water withdrawn and consumptive use – ultimately tracking water from its point of diversion to its place(s) of use, and thence to its point of return to the hydrologic cycle.

Another challenge to synthesis of state water information is variability in spatial and temporal scale used to estimate and publish data products.

Some states have the ability to summarize data by large watershed, while others use a much finer resolution. Some states even use customized delineations that account for administrative functions, such as a basin that ends on a county boundary. This is a significant barrier to those who need a regional synthesis of comparable water data, such as is proposed for the USGS' National Water Census Program (see side note). WaDE will dovetail with this and other ongoing national water efforts, positioning the states to proactively provide water use estimates and other necessary data when requested.

In addition, some states gather and publish their data by month, some by water year (Oct. 1st – Sep. 30th), and some by calendar year. WaDE supports a wide variety of reporting for both spatial and temporal scales, including custom delineations. However, a regional analysis of similar types of data will remain disjointed until the states incorporate a common spatial/temporal scale into their current workflows, or develop a translation mechanism for the desired output. Similar issues exist with comparison of data products between states that use distinctly different methodologies. An example would be a comparison of Utah and Idaho consumptive use data, where one uses a statewide agricultural land-use survey and the other uses Landsat remotely-sensed imagery as a basis for calculations.

Regarding data management, all states that were surveyed use (or are transitioning to) an enterprise-level database for storing and manipulating some of their data. About two-thirds of the states use Microsoft SQL Server, almost all others use Oracle. Some relevant data are maintained in Microsoft Access and/or Excel. Most states also use .Net as their preferred software application development platform, and the remainder use Java and Python, or a combination of development environments.

Due to the differences in methods used within member states' water planning programs described above, and many other spatial, temporal and methodological differences in practice between the states, it is the intention of the WaDE program to portray the data and methods that the states currently use. However, ultimately WaDE also provides a template for their workflows and/or a water data "goal" for the states that will help to create a more uniform and spatially complete picture of water availability and use in the West in the future. This report presents a comprehensive analysis of where the states currently are in their respective planning and administration efforts, but it also contains recommendations and solutions that have the potential to create a setting for cross-boundary analysis and comparison of water availability and use. The following is a short list of the recommendations made by WSWC staff members, workgroup members and also state agency staff that would facilitate WaDE project goals. A more detail description of these recommendations is available in the "Potential Solutions" section of the report.

Recommendation #1 – Expand water withdrawal and water use reporting programs to include regions and sectors/beneficial use categories within the state that not yet assessed or required to report. Implement or expand consumptive use and return flow estimation programs.

Recommendation #2 – Modify or expand the workflow processes states are already using for reviewing physical and legal water availability to basin-level and statewide scales, and seasonal/annual time intervals.

Recommendation #3 – More generally, encourage states to review the WaDE targeted data schema for possible inclusion in future program efforts. Encourage the adoption of a standard spatial scale for the most common workflow products, such as physical water supply and availability analyses and summaries of water diversions, and also the adoption of a preferred timescale for reporting summary and detailed WaDE data – annually or monthly, using either a calendar or water year.

Recommendation #4 – Facilitate a state-by-state dialogue or repository for a glossary of terms relevant to legal processes behind the state's management of water resources, as well as the physical and environmental reviews.

Table 1. DRAFT - State Water Program Capabilities Assessment Survey - Available Data Matrix

STATE	Water Supply Measurement Data				Summary Level Data (Data summarized by HUC, County or Custom Delineation)								
	Streamgage Data		Groundwater Monitoring Data		Physical Water Supply Summary		Legal/Institutional Water Availability		Withdrawals or Consumptive Water Use Summary		Regulatory Summary		
	Maintaining? Managing?	In a Database/GIS?	Maintaining? Managing?	In a Database/GIS?	Tracking?	In a Database/GIS?	Estimating?	In a Database/GIS?	Estimating?	In a Database/GIS?	Tracking?	In a Database/GIS?	
	AK	Yes	Yes	No	Yes	No	No	No	No	No	No	No	No
	AZ	No	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	CA	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes
	CO	Yes	No	Yes	No	Yes	Yes	No	Yes	No	Yes	Yes	Yes
	ID	Yes	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	KS	No	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	MT	No	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
	NE	Yes (partial)	Yes	Yes	Yes (partial)	Yes (in process)	Yes (partial)	Yes (in process)	Yes (partial)	Yes (partial)	Yes	Yes	Yes
	NM	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	NV	Yes	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	ND	Yes	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	OK	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	No	No	No
	OR	Yes	Yes	Yes	Yes	No	No	No	Yes (nested)	Yes	Yes	Yes	Yes
	SD	No	Yes	Yes	Yes	No	No	No	Yes (partial)	Yes	Yes	Yes	Yes
	TX	Yes	Yes	Yes	Yes	No	No	No	Yes	Yes	Yes	Yes	Yes
	UT	Yes	Yes	No	No	Yes (in process)	Yes	Yes (in process)	Yes	Yes	Yes	Yes	Yes
	WA	Yes	Yes	Yes	Yes	Yes (partial)	Yes (partial)	Yes	Yes (partial)	Yes	Yes	Yes	Yes
	WY	Yes	Yes	Yes	Yes	No	No	Yes (partial)	Yes (partial)	Yes	No	Yes	Yes

STATE	Detailed Allocation & Water Use Data										Data Management		
	Water Allocations		Diversions/Withdrawals		Consumptive Use		Return Flows		DB Environment		Development Platform		
	Managing?	In a Database/GIS?	Tracking?	In a Database/GIS?	Tracking?	In a Database/GIS?	Tracking?	In a Database/GIS?	DB Environment	Development Platform			
AK	Yes	Yes	Yes	Yes	Yes (partial)	Yes	No	No	Oracle, Access	Java, Python			
AZ	Yes	Yes	Yes (partial)	Yes	Yes (partial)	Yes	No	No	Oracle, Access	.Net			
CA	Yes	Yes	Yes (partial)	Yes	Yes (partial)	Yes	No	No	Oracle, MySQL, Hydstra	Java, .Net, Coldfusion			
CO	Yes	Yes	Yes	Yes	No	No	Yes	Yes	SQL Server	.Net			
ID	Yes	Yes	Yes	Yes	Yes (partial)	Yes	Yes (partial)	Yes	SQL Server, Access, ArcGIS	Java, .Net, Python			
KS	Yes	Yes	Yes	Yes	No	No	Yes (partial)	No	Oracle	Java			
MT	Yes	Yes	Yes (partial)	Yes	No	No	Yes (partial)	Yes	Oracle, SQL Server	.Net, Python, PL/SQL			
NE	Yes	Yes	Yes (partial)	Yes	No	No	Yes (partial)	Yes (partial)	SQL Server, Access, ArcGIS	.Net, Python			
NM	Yes	Yes	Yes	Yes	Yes (partial)	Yes (partial)	Yes	Yes	SQL Server, Informix, PostgreSQL, ArcGIS	Java			
NV	Yes	Yes	Yes (partial)	Yes	No	No	No	No	SQL Server, Access, MySQL	Python, PHP, Coldfusion			
ND	Yes	Yes	Yes	Yes	Yes (partial)	Yes	No	No	PostgreSQL, Dimension 4	Python, PHP			
OK	Yes	Yes	Yes	Yes	Yes (partial)	Yes	No	No	SQL Server, Access, ArcGIS	.Net, Python			
OR	Yes	Yes	Yes	Yes (partial)	No	No	No	No	Informix	.Net, Python			
SD	Yes	Yes	Yes	Yes	No	No	No	No	Visual FoxPro, SQL Server	Visual FoxPro			
TX	Yes	Yes	Yes (partial)	Yes	No	No	No	No	SQL Server	Java, .Net, Python			
UT	Yes	Yes	Yes	Yes	Yes (in process)	Yes	Yes (partial)	No	SQL Server, Access, ArcGIS	.Net, Python, ASP			
WA	Yes	Yes	Yes (partial)	Yes	No	No	No	No	SQL Server	.Net			
WY	Yes	Yes	Yes (partial)	Yes	Yes (partial)	Yes	No	No	SQL Server	.Net			

**Tab I – Draft FY 2014-2015 Work Plan –
Water Resources Committee**

**DRAFT
WATER RESOURCES COMMITTEE
WORK PLAN
2014/2015**

1. M3 Initiative: Measuring, Monitoring and Management

The Council has a long history of working to improve the measurement, monitoring and management of western water resources and related data (see Position #320, October 16, 2009, and Position #326, October 29, 2010). Data collection, management, distribution and visualization are critical for sound decisionmaking, but related programs are often underappreciated and underfunded.

2014/15: The Council, in an attempt to better communicate the critical need for water data, will develop a “M3 Initiative,” revising and renewing its message to better bring attention to water data needs and develop strategies to meet those needs. Consistent reliable future funding will be one major focus for the initiative. There are a number of items under this functional area, divided as outlined below. Part of this effort will be to highlight critical measuring and monitoring “tools,” for any water management “toolbox,” and communicating their value for enhancing our ability to wisely manage water resources.

Subcommittee: Phil Ward, Chair (OR); Jeanine Jones (CA); Hal Simpson (CO); Barry Norris (OR); Dr. Robert Mace (TX); and Sue Lowry (WY). Dr. Mace also represents the WSWC on the federal Advisory Committee on Water Information (ACWI), and Sue Lowry is also an ACWI member.

Time Frame: ongoing

A. WATER DATA EXCHANGE (WaDE)

Work to date: This is a collaborative effort between the Western States Water Council (WSWC), the Western States Federal Agency Support Team (WestFAST), the Western Governors’ Association (WGA), and the Department of Energy Labs. These data are important for a number of applications. Some examples include, but are certainly not limited to: (a) state and regional water planning; (b) local watershed and urban planning and development; (c) siting of electric power generation and other energy production facilities; and (d) enabling a better understanding of the links between energy, water quantity and water quality. This effort is in direct support of a Department of Energy study that is evaluating water availability for energy production in the West. Another national effort, the Water Census, which is led by the U.S. Geological Survey (USGS), is also looking for ways to better understand water availability and use. WaDE will support these efforts by laying the groundwork for exchanging the core data that support these studies.

A common ‘schema’ or format that can be used for sharing water availability and data has been completed. A common portal has been created, with a link on the WSWC website. Fifteen states have been interviewed regarding their existing data systems. Moreover, a

mapping tool has been created to allow states to review data, beginning with that gathered from the States by Sandia National Lab. The states are evaluating the resources required for them to participate, and the WSWC has partnered with six states under an EPA Exchange Network grant to help states link up.

The Committee also sponsored a WaDE workshop in conjunction with the April 2013 WSWC meetings in Denver, Colorado. The workshop focused on bringing water and energy managers together to discuss current efforts and consider ways to better integrate water and energy planning, fulfilling a requirement under the DOE contract with WGA.

The Committee, through a Subcommittee and various work groups, will continue to gather information on state water availability and use data and summarize existing state capabilities. Work to help states visualize and review Sandia data on water availability was completed.

2014/15: WSWC staff will continue working to help individual members states build the capacity to connect to WaDE. This will entail a number of site visits, as well as regular communication among members and state information technology staff to gather, input and manage data, testing the schema and refining products for presenting consumptive use and water availability information for decisionmaking.

Timeframe: Ongoing - See WaDE timeline.

B. NATIONAL WATER AVAILABILITY AND USE ASSESSMENT

Work to date: In 2010, the Council staff began working as part of a USGS Ad Hoc Group on a National Water Assessment to develop a strategic plan to improve the acquisition, storage and dissemination of data on existing surface and ground water supplies and uses, both consumptive and non-consumptive, identifying trends and common themes, as well as present and future events and factors that may affect future water supplies, including changing demographics, environmental policies, energy demands, and climate, etc. WaDE will better enable the western states to share water use, water allocation, and water planning data with one another and with the federal government. It will also seek to improve the sharing of Federal data that supports state water planning efforts.

2014/15: The Council will continue working with member states, USGS and various federal agencies to gather and disseminate water resources data using WaDE and other resources. The Council will continue to participate with USGS efforts to advance a National Water Assessment.

Timeframe: Ongoing

C. USGS COOPERATIVE STREAMGAGING

Work to Date: The Council has consistently supported the fully-federally funded USGS National Streamflow Information Program (NSIP) and Cooperative Water Program (CWP), a federal/state streamgaging program partnership. The Council continues to urge the Congress to appropriate sufficient money to restore a 50-50% CWP funding match. As federal program costs have increased, western states have urged USGS to focus on basic data

collection, as opposed to analysis and modeling studies. WSWC representatives are also participating in an ACWI review of the USGS water resources program in general, with a goal of identifying priority needs.

2014/15: The Council, through the Committee, will continue working with the Interstate Council on Water Policy and other interested organizations to represent states' interests in maintaining a viable and useful streamgaging network, focused on gathering basic water data and information. The Council will continue to pursue opportunities to support funding for USGS cooperative streamgaging and other important programs. The Council will continue to participate in the ACWI review, and make recommendations for the FY2014 USGS budget.

Timeframe: Ongoing

D. NRCS SNOW SURVEY AND WATER SUPPLY PROGRAMS

Work to Date: The Council has consistently supported the snow survey program, and urged the Congress to appropriate sufficient money to maintain and modernize the current system. Recent cuts have led to serious declines in program capabilities, with abandoned snow courses and threatening maintenance of SNOTEL sites. Further, sustained reductions in resources threaten the continued viability of the program as it now exists, and will lead to the loss of critical long-term data essential for western water and emergency management.

2014/15: The Committee and Council will continue to pursue opportunities to support funding for the NRCS snow survey program and related soil and climate analysis network (SCAN), as well as upgrading and modernizing the current snow survey and water supply forecasting system. The Council will also work with USDA, NRCS and the states to explore options for maintaining a sustainable system, including any state interest in funding specific SNOTEL sites, with a goal of helping NRCS ensure adequate funding is available for operation and maintenance.

Timeframe: Ongoing

E. LANDSAT 9 and NATIONAL LAND IMAGING PROGRAM

Work to Date: More and more states are using remote sensing, particularly Landsat thermal infrared (TIR) band data, for water rights administration and to better monitor and manage water use, especially agricultural water use. In 2010, following several years of work, the President's budget request to Congress included funding for the thermal infrared sensor (TIRS) as part of LDCM, largely in response to the Council's efforts. On February 11, 2013 LDCM was launched from Vandenberg Air Force Base in California, and has begun sending its first earth images. The Council has been credited with ensuring LDCM/Landsat 8 included TIRS, enabling states to continue to advance the application of the science to western water management and uses.

2014/15: The Committee will continue to work towards the timely and orderly development of future Landsat missions to ensure the continued availability of TIRS data. The Committee

will also work with member states, local and federal agencies to promote the increased use of this data to improve water management and decisionmaking.

Workshop

Timeframe: Ongoing

F. DROUGHT, NIDIS and EXTREME WEATHER EVENTS

Work to Date: Drought is a recurring natural phenomenon, the effects of which can be minimized through appropriate planning and preparedness activities. Much of the West, particularly the Southwest and Southern Plains are again experiencing drought. The Council supported authorization and also expressly supports reauthorizing a National Integrated Drought Information System (NIDIS) which has been reauthorized, to provide timely hydrologic and weather-related information for drought management.

The Council has also supported reauthorization of the Reclamation States Emergency Drought Response Act, to provide the Bureau of Reclamation with continuing drought planning, response and assistance capabilities.

Moreover, the Council recently expressed its support for federal applied research and hydroclimate data collection programs to assist water agencies at all levels of government in adapting to weather extremes and climate variability and change (Position #339, March 15, 2012). The Council also supports development of an improved western observing system for extreme precipitation events and research to better understand hydroclimate processes (Position #332, July 29, 2011). Since 2006, the Council has held a number of workshops related to climate adaptation and extreme events, including future drought and floods.

The Council and California Department of Water Resources hosted a July 2012 workshop on extreme weather events, a September 2012 NIDIS reauthorization workshop, and an April 2013 workshop on improving drought prediction. The Council also collaborated with the National Oceanic and Atmospheric Administration (NOAA) to prepare and present a congressional briefing on the importance of atmospheric research and monitoring programs.

2014/15: The Committee will continue working to improve preparedness and response to drought, floods and other extreme events in cooperation with member states, the WGA and WestFAST. The Council will also continue to support and advise WGA and NOAA with respect to the National Integrated Drought Information System (NIDIS), and other weather/climate monitoring and adaptation efforts (including RISAs work), as WGA seeks to coordinate federal and state efforts to address drought information needs and compile data on related impacts. The Council will also continue to assist California's DWR with its ongoing series of drought and extreme events workshops. The next in this series of workshops will be held in August 2014. The Council will work towards reauthorization of Reclamation's authorities.

Time Frame: Ongoing

G: GROUNDWATER MONITORING

Work to date: The Council supports USGS ground water measurement and monitoring, as expressed in Position #345 (October 12, 2012) regarding federal water and climate data collection and analysis programs. Moreover, groundwater measurement and monitoring are important components of a number of western state water management programs. Further, the Council continues to track federal groundwater efforts related to both quantity and quality (in cooperation with the Water Quality Committee).

2014/15: The Council will consider development of an appropriate groundwater component for its M3 Initiative, as well as working collaboratively with other state and federal interests and non-governmental organizations. The Council will also promote the use of existing state information on groundwater resources.

Timeframe: Ongoing

2 WESTERN WATER INFRASTRUCTURE PROJECTS AND PROGRAM FUNDING

Work to date: Many western states face overwhelming infrastructure financing needs, as well as declining budgets for ongoing services. The Council's origins are associated with challenges to augment and better manage the West's water supply. Augmenting the West's water supply continues to be a priority. The Council has in the past prepared reports on state water resources programs and project cost sharing and financing and analyzed state water use fees. In November 2010, the Council convened a symposium and summarized the proceeding in "Western Water Resources Infrastructure Strategies: Identifying, Prioritizing and Financing Needs." The latest in the series of symposia was held in November 2012 in Phoenix, Arizona. The Council has begun to compile an updated summary of western state infrastructure financing authorities, funding sources, policies and programs.

The Council has also supported expenditures from the Reclamation Fund for authorized project purposes, including specifically authorized rural water supply projects and authorized projects as part of negotiated Indian water rights settlements.

2014/15: The Council will continue to call on the Congress to ensure that revenues raised from the development of western resources, specifically revenues accruing to the Reclamation Fund, are appropriated and expended as intended for the development and management of western water resources (consistent with Position #333, July 29, 2011). The Council will otherwise support efforts to secure adequate federal funding to meet growing western water needs, and work to develop a strategy to communicate important infrastructure needs

The Council, with support from the Water Resources and Water Quality Committees, will hold the next in a series of symposia on infrastructure financing needs and complete an updated summary of western state infrastructure financing authorities, funding sources, policies and programs.

Subcommittee: Jeanine Jones (CA), Chair; Hal Simpson (CO).

Time Frame: Ongoing

3. ENERGY & WATER RESOURCES – INTEGRATED MANAGEMENT

Work to date: The increase in demands for water to meet energy needs is raising interest in the interrelationship between water and power resources, including transportation fuels, and opportunities to better understand the energy-water nexus and maximize efficiencies. The Council has addressed various aspects of energy issues as they relate to water resources as part of its regular meetings, including the demand for water resources created by new energy development. Hydraulic fracturing is a current issue and long standing practice with which the states have considerable experience. (See Water Quality Committee workplan.) The use of water produced by energy development has also been discussed.

Since 2009, the Council has worked with the WGA to look at present and future water needs related to renewable and traditional energy production, and related impacts on water supplies. The Council has also urged the Administration and Congress to support Department of Energy hosted energy-water programs conducted at national laboratories (Position #355, June 26, 2013).

In 2012, the Council completed a review of the water requirements for concentrated solar power development in the Southwest and related institutional issues and permitting requirements. It is working with the National Renewable Energy Lab (NREL) to publish a report.

2014/15: Working with the WGA and the Department of Energy’s labs, the Council will continue to compile existing information through WaDE addressing water availability and anticipated demands for energy resources development (and the implications for water use in the West) Further, the Council will consider and evaluate any federal legislation and other potential collaborative efforts in addressing energy and water needs.

The Council will evaluate as appropriate specific energy and water related issues as they arise, such as hydraulic fracturing and other practices.

Subcommittee: William Staudenmaier (AZ); Jeanine Jones (CA); (CO); John Simpson (ID); Todd Sando (ND); Robert Mace (TX); and Sue Lowry (WY).

Timeframe: Ongoing through 2015

4. WRDA/CORPS POLICIES

Work to date: The Council has in the past supported regular passage of a Water Resources Development Act (WRDA), and has addressed a number of specific policy issues, while not taking any position on specific project authorizations. The Council has raised concerns with the Corps approach to identifying and regulating the use of “surplus waters,” from Corps projects; and is working with the WGA and Congress on legislative options. Similarly, the Council has worked to exclude irrigation water supply canals from any new safety levee safety program.

2014/15: The Council will continue to work with the Congress and Corps on WRDA and Corps-related issues, including the treatment of irrigation canals under the proposed new levee safety program. Further, the Council will continue to work to ensure that state water rights and prerogatives are protected, specifically as it relates to natural flows, Corps storage and other issues.

Subcommittee: Todd Sando and Michelle Klose (ND), Tracy Streeter (KS)?

A. CORPS SURPLUS WATER RULEMAKING

Work to date: A draft Corps surplus water rulemaking is pending. The Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows that would pass through the states in the absence of the Corps of Engineers dams. The federal government has long recognized the right to use water as determined under the laws of the various states. However, the Corps has indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the federal agency and does not recognize the States' right to access natural flows, separate from the captured floodwaters stored within those reservoirs.

In October 2012, the Council adopted a resolution (#348) urging the Corps to recognize the legal rights of the States' to allocate water, wrote the Assistant Secretary of the Army for Civil Works regarding its concerns, and has met with Corps officials on different occasions (most recently in October 2013), as well as discussed legislative clarifications with congressional staff. The Council has also surveyed its member states regarding their definition of stored waters and related storage rights.

2014/15: In consultation with the Legal Committee, the Committee will continue to work to address this issue and explore alternative solutions, including both administrative and congressional action.

Tab J – Draft FY 2014-2015 Work Plan –
Legal Committee

**LEGAL COMMITTEE
WORK PLAN
July 1, 2014 to June 30, 2015**

**1. STATE AND FEDERAL COLLABORATION REGARDING THE
ADJUDICATION OF FEDERAL NON-TRIBAL WATER RIGHTS**

Work-to-Date: The Committee has created a Federal Non-Tribal Water Claims Subcommittee to evaluate ways the WSWC can improve the effective resolution of federal non-tribal water rights claims. The Subcommittee consists of WSWC members and WestFAST members, who serve in an *ex officio* capacity.

The Subcommittee issued a questionnaire in 2012 to WSWC member states, the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. The questionnaire sought information on ways the WSWC and WestFAST could address the issues and challenges involving federal non-tribal water right claims,¹ as well as examples of successful state and federal efforts to resolve these claims. Responses indicated a broad consensus that the WSWC and WestFAST could develop a clearinghouse of information to assist states and federal agencies in the effective resolution of federal non-tribal water rights claims.

2013-2014: The WSWC and WestFAST will hold a one-day workshop on July 15-16 in Helena, Montana to begin the process of developing a clearinghouse of information, as suggested by the survey responses. The workshop will be held in conjunction with WSWC's summer meetings, which will take place in Helena after the workshop on July 16-18.

The workshop will bring together 40-50 state and federal officials to identify the specific issues, tools, and information to be included in a clearinghouse. The meeting will also provide insight into the framework, design, and format of the clearinghouse (e.g., a report, regularly updated website or database, etc.).

In terms of format, the workshop will be a working meeting emphasizing group participation with three brief panel presentations focused on the following broad categories: (1) accommodating federal water needs and interests within state legal frameworks; (2) water uses associated with activities on federal lands; and (3) issues associated with state general stream adjudications. Each panel will be followed by facilitated breakout group discussions that will focus on specific sub-issues.

Ideally, the workshop and the information from the questionnaire responses will provide the Subcommittee with sufficient information to begin the process of developing the clearinghouse.

Time Frame: July 2014 – December 2014

¹ For the purposes of the questionnaire, the term "federal non-tribal water right claim" encompasses federal reserved right claims, federal state-based claims, and claims relating to the aforementioned federal agencies that do not involve water right claims made by a tribe.

Federal Non-Tribal Water Claims Subcommittee: Melissa Hornbein (MT), DL Sanders (NM), and Dwight French (OR). WestFAST members participating in the Subcommittee in an *ex officio* capacity include: Lee Koss (Bureau of Land Management), Marc Kodack (Department of Defense), Andrew Hautzinger (U.S. Fish and Wildlife Service), and Christopher Savage (U.S. Forest Service).

2. CWA JURISDICTION*

Work-to-Date: In 2011, the EPA and the U.S. Army Corps of Engineers released draft guidance intended to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States* decisions.

In September 2013, the EPA and Corps withdrew the draft guidance. At the same time, the agencies announced that they had submitted a draft rule to clarify CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review. In addition, EPA announced that its Science Advisory Board is developing a report on the connection between small, isolated waters and larger bodies of water. EPA released the report for public comment in September 2013, and has indicated that the final connectivity report will inform the final connectivity report.

In 2013, the WSWC wrote EPA and the Corps a series of five letters to: (1) express concern about the agencies' process in developing the rule; (2) urge them to engage in greater consultation with the states and to comply with the state consultation criteria of Executive Order 13132; and (3) to comment on the draft connectivity report.

In addition, the WSWC created a CWA Rulemaking Workgroup to gather information on the WSWC member states' perspectives regarding the rulemaking and to identify further areas of consensus among the western states regarding the rulemaking. In March 2014, the workgroup developed a letter that the WSWC sent to EPA and the Corps setting forth a list of additional consensus comments on the rulemaking, including a list of waters and features that should be excluded from the rule's definition of "waters of the U.S." The letters were based upon WSWC Position #330.5.

2014-2015: The Committee will continue to work with the Water Resources and Water Quality Committees through the Workgroup to follow and comment on the development of a jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC's positions.

Time Frame: Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Mike Fulton (AZ), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jon Patch (ND), Bill Schuh (ND), J.D. Strong (OK), Todd Chenoweth (TX), Walt Baker (UT), Laura Driscoll (WA), Stephen Bernath (WA), and Bill DiRienzo (WY).

*See Item 3(a) of the Water Quality Committee Workplan

3. AD HOC GROUP ON RESERVED INDIAN WATER RIGHTS

Work-to-Date: The WGA and WSWC have long supported the negotiated resolution of Indian water rights claims (WSWC Position #336). As a result, the WGA and WSWC have worked with the Native American Rights Fund (NARF) for over thirty years as part of the Ad Hoc Group on Reserved Indian Water Rights to promote negotiated settlements.

In recent years, the Group has highlighted the need to secure a permanent funding mechanism that will ensure that settlements authorized by Congress and approved by the President will be implemented. The Ad Hoc Group has also initiated quarterly conference calls or in-person meetings with the Department of Interior to discuss key issues associated with Indian water rights settlements.

In 2013, the WSWC and NARF held their 13th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 13-15, 2013, at the Pojoaque Pueblo near Santa Fe, New Mexico. Over 160 state, tribal, federal, and other experts participated.

In March 2014, the Ad Hoc Group met with Congressional and Administration offices in support of Indian water rights settlements, including officials from the White House, the Office of Management and Budget, the Council on Environmental Quality, and the Department of the Interior.

2013-2014: The Reserved Rights Subcommittee, working with WGA staff, will oversee WSWC efforts in the following areas: (1) activities to gather support for an appropriate remedy to settlement funding issues, including efforts to support the Reclamation Water Settlements Fund, the Authorized Rural Water Projects Completion Act (S. 715), development of a permanent settlement funding mechanism, and funding for federal assessment, negotiation, and implementation teams; and (2) with the Ad Hoc Group, continue meeting with the Administration via the quarterly conference calls and other face-to-face opportunities to discuss key issues associated with Indian water rights settlements.

Time Frame: Ongoing

Reserved Rights Subcommittee: Bill Staudenmaier (AZ); Cindy Chandley (AZ); Jay Weiner (MT), DL Sanders (NM); Bidtah Becker (NM); and Norman Johnson (UT)

4. WATER CONSERVATION

Work-to-Date: The WSWC has carried out a number of projects involving water conservation over the years. In 1983, it published its report “Water Conservation and Western Water Resource Management,” which discussed the various aspects of water conservation, its potential benefits and limitations, as well as its role in western water law and management. The report also summarized water conservation activities in sixteen western states. Subsequent WSWC efforts include a 1993 update to the report as well as various roundtables, workshops, and symposia focused on conservation, among other efforts.

The current WGA/WSWC position on conservation is found in Paragraph B(3)(c) of WGA Resolution #2014-3, which states: “Western Governors encourage adoption of strategies to sustain water resources and declining and inconsistent snowpack, including the use of water conservation.... The Governors encourage the use of and research into promising water-saving strategies.”

2014-2015: The Legal Committee will develop a report on agricultural and urban water conservation that will focus on the issues associated with improving or implementing a conservation program at the state level. In particular, it will: (1) include a literature review of existing legal research related to water conservation; (2) describe concerns related to abandonment and forfeiture and discuss existing state protections for conservation; (3) describe issues and state efforts regarding consumptive use requirements as they pertain to conservation; (4) describe issues and state efforts regarding adverse impacts to water right holders associated with conservation; (5) carry out case studies of existing water conservation and salvage programs in California, Montana, Oregon, Utah, and Washington to identify the “lessons learned” from these programs; and (6) identify policy options for states to consider when working to implement or improve a conservation program at the state level.

The report will build upon past WGA and WSWC conservation efforts, including but not limited to the 1983 report, the 1993 update, and the 2012 WGA-WSWC Water Transfers report. As a first step, WSWC staff will work with the Committee’s Water Conservation Subcommittee to define the term “conservation” for the purposes of the report. Past WSWC reports have defined the term “water conservation” as “decreasing water withdrawals and/or consumption by reducing demand through the appropriate and more efficient use of available water supplies.” In addition, the report will recognize that conservation is a means to an end and not an end in and of itself, and will consider third party impacts and unintended consequences.

WSWC staff will develop the report under the guidance and direction of the Committee’s Water Conservation Subcommittee and the Water Resources Committee’s Water Use Efficiency/Conservation Subcommittee. Rather than issue a survey to gather the necessary information, WSWC staff will rely on independent research and focused telephone interviews with select staff from the applicable WSWC state agencies. It is also envisioned that WSWC member states will review the report to ensure its accuracy. Additional outreach may be conducted with other stakeholders in the environmental, urban, and agricultural communities on an as-needed basis.

Time Frame: August 2014 to January 2015.

Subcommittee: Jeanine Jones (CA), John Simpson (ID), Greg Ridgley (NM), and Phil Ward (OR)

Tab K – Draft FY 2014-2015 Work Plan –
Executive Committee

**D-R-A-F-T
EXECUTIVE COMMITTEE
WORK PLAN
2014/2015**

1. NEWSLETTER

Work to date: *Western States Water* provides members and others with accurate and timely information on various water resources topics at state, regional and national levels. It is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key Congressmen and their staffs, and top federal administration officials. Other public and private agencies and individuals may subscribe for a fee. It is primarily distributed via email, and is posted on our website, with password protection (for recent issues).

2014/15: Along with the Council's regular meetings, the newsletter requires our most significant commitment of staff resources, though that is usually ancillary to other efforts. The response from members and others receiving the newsletter has been consistently positive. The Council will continue to provide this service weekly via email, except for those who request a hard copy.

Time Frame: Ongoing

2. REGULAR MEETINGS

Work to Date: The first meeting of the Council was held in Stateline, Nevada in 1965, and regular meetings have been held since. Currently, the Council meets three times per year, rotating among the member states, which host the meetings at a location of their choice. Guest speakers and topics for discussion are scheduled according to members' interests and needs. External policy positions for consideration are noticed 30-days before the Council meets and are distributed not only to members, but also to WGA staff and the governors' staff. Any position statement not noticed may be brought before the Council for consideration at a meeting by unanimous consent, but if approved, must be sent to WGA for review prior to distribution consistent with mutually agreed upon procedures for policy coordination between WGA and WSWC.

2014/15: Montana will host the Summer 2014 meetings in Helena, and Arizona will host the Fall 2014 meetings in Phoenix.

3. 50th ANNIVERSARY MEETING

2014/15: The Council will celebrate its 50th Anniversary in 2015. The first meeting was held in Stateline, Nevada on August 3, 1965. The Council's 40th Anniversary Commemoration was held there in 2005. Council members and staff will recognize and commemorate the 50th anniversary at the WSWC Summer 2015 meetings.

Subcommittee: Roland Westergard, Hal Simpson, and Phil Ward

4. 2015 DC ADMINISTRATION and CONGRESSIONAL VISITS

Work to date: In March 2013, Council officers, members and staff traveled to Washington, D.C. and had over 30 visits with Administration and Congressional officials in support of WSWC and WGA positions and priorities. Native American Rights Fund (NARF) staff joined in many of the visits. WSWC members and staff presented a briefing for congressional staff on the importance of Indian water rights settlements (attended by 16 staffers). Some of the feedback from these meetings suggested a need for greater contact and communication between the Council and federal policymakers.

2014/15: The Council's Officers and staff will again plan visits in the Spring of 2015 to make Administration and Congressional contacts and advise them on major national water issues from the perspective of western states. WSWC members and staff will also schedule visits with individual congressional offices, as well as visits with WestFAST principals. The WestFAST Liaison Officer and WestFAST members will participate in these visits with Executive Branch agencies.

Time frame: Spring 2015

4. WGA/WSWC COORDINATION and COLLABORATION

Work to Date: The publication of the WGA/WSWC report(s) entitled "Water Needs and Strategies for a Sustainable Future," raised awareness of the challenges facing the West. The WGA adopted the 2006 and 2008 reports as policy, and the Council has worked to implement their recommendations, many of which have been completed. In June 2010, the Council completed and the WGA accepted a Progress Report summarizing implementation activities. In 2011, WGA adopted two comprehensive policy statements, one focused on water quantity and the other on water quality, and WGA revised and readopted these in December 2013.

Of particular note, a priority recommendation was establishment of the Western States Federal Agency Support Team (WestFAST) and the hiring of a liaison officer in the Council's offices.

2014/15: The Committee will continue to assist in the implementation of WGA policy in consultation with WGA.

As in the past, the Council may propose policy resolutions for WGA consideration. Further, the WSWC Chair and/or Executive Director will participate in WGA meetings as appropriate. Working with the WGA, the Council will also coordinate WestFAST activities and needs.

Time Frame: ongoing

5. WESTFAST

Work to date: WestFAST's creation has had many benefits. It is a unique forum for addressing western (and national) water issues that has brought together a dozen federal agencies to collaborate with each other and state agencies with water-related responsibilities. WestFAST addresses issues raised and discussed with the Council and WGA (which in turn support development and implementation of related federal policies and programs). WestFAST and the Council have also discussed development of a set of collaborative principles to guide federal/state working relationships. WestFAST is in its sixth year of existence.

2014/15: The Committee will continue to oversee the Council's work with WestFAST. Further, the Committee will work to ensure participating agencies realize the real and potential benefits of WestFAST, and work to build a sound foundation for continuing collaboration. The Council will also seek to build closer ties with WestFAST principals.

Time Frame: Ongoing

6. WATER MANAGEMENT SYMPOSIA

Work to date: An annual WSWC Water Management Symposium has traditionally been held under the auspices of the Executive Committee. However, the Committee has usually asked one of the other committees to take the lead. In odd numbered years, an Indian Water Rights Settlement Symposia has been held.

In 2012, the Council held a symposium in November in Phoenix, Arizona in collaboration with relevant federal agencies, multiple stakeholders, and public and private experts on Western State Water Resources Infrastructure Needs & Strategies. It explored state financing authorities, policies, programs and projects, as well as public-private financing and cost sharing resources, with a goal of identifying common interests and promoting partnerships.

2014/15: The Council will again sponsor a Water Infrastructure Symposium focused on streamlining regulatory requirements to facilitate timely construction of projects in an environmentally responsible manner.

Time Frame – July – December 2014

7. ANNUAL REPORT

Since its organization in 1965, the Council has prepared and published an annual report. The annual report includes a brief discussion of the Council's formation and a detailed summary of its current membership and activities. It is a report of the Council's meetings, and provides an explanation of resolutions and positions and other actions taken by the Council. Further, it includes a description of other important activities and events, as well as workshops, seminars and symposia sponsored by the Council. It also describes the Council's involvement in major current water policy issues. Lastly, biennially, it includes an audit of the Council's finances, and current rules of organization. Recently, electronic copies have been distributed.

Time frame: July – September (for the 2013 calendar year).

8. WESTERN WATER RESOURCES VISION

~~The Council has been involved in discussions of national water policy and planning since its inception in 1965. In 2009, the U.S. Army Corps of Engineers completed a survey of state water plans and national water related needs and trends.~~

~~**2014/15:** The Council will continue to collaborate with federal agencies and others on water policy initiatives, review the final Corps' report and other agency reports, as well as the individual state reports and summarize any common themes.~~

~~The Council will also identify common elements of state water plans, compare planning approaches, and provide options for states to improve their planning processes, as well as recommend ways federal agencies can provide appropriate assistance, including needed "tools."~~

~~**Time frame:** Ongoing~~

Tab L – Draft FY 2014-2015 Work Plan –
Water Quality Committee

**WATER QUALITY COMMITTEE
WORK PLAN
July 1, 2014 to June 30, 2015**

1. HYDRAULIC FRACTURING

Work-to-Date: The Environmental Protection Agency (EPA) is preparing a study on the relationship between hydraulic fracturing and drinking water, a final draft of which is expected in 2014. In May 2013, the Bureau of Land Management (BLM) also issued a proposed rule for hydraulic fracturing on public lands, which includes a variance process that would allow states to propose their own standards if they can prove that their regulations meet or exceed the requirements in BLM's rule. In addition, EPA, the Department of Energy (DOE), and the Department of the Interior (DOI) agreed in April 2012 to develop a "Multi-Agency Unconventional Oil and Gas Research Program" to support policy decision by relevant state and federal agencies. The effort is intended to help support the White House's March 2011 "Blueprint for a Secure Energy Future."

The Western Governors' Association (WGA) Resolution #2014-4) and WSWC Position #353 state that: (1) federal efforts involving hydraulic fracturing should leverage state knowledge, experience, policies, and regulations; (2) such efforts should be limited, based upon sound science, and driven by states; and (3) that both organizations oppose any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing.

2014-2015: The Committee will work with the Water Resources and Legal Committees to support the WGA and WSWC positions, and will continue to monitor and update the WSWC on developments involving hydraulic fracturing, including but not limited to EPA's study, BLM's proposed rule, and the EPA/DOE/DOI research program.

The Committee will also work in collaboration with the Water Resources and Legal Committees to prepare a summary of the applicable WSWC states' experiences with hydraulic fracturing. The summary will compliment previous reports by the Groundwater Protection Council and others that describe how state programmatic elements and regulations ensure that hydraulic fracturing does not impair water resources and environmental values. Examples of the types of information sought for the summary include but are not limited to: (1) the impacts of hydraulic fracturing on water quality, if any; (2) examples of how state regulations and other efforts protect water quality; (3) the economic benefits of hydraulic fracturing; (4) water supplies and amounts used for hydraulic fracturing; (5) state interaction with federal agencies involving hydraulic fracturing; and (6) the degree to which states utilize oil and gas taxes and other revenue related to hydraulic fracturing to fund water-related efforts, including but not limited to water planning, water management, and water regulation and protection. WSWC staff will prepare the summary under the direction of the Committees, and will gather the necessary information through independent research and focused telephone interviews with select staff from the applicable WSWC state agencies. It is also envisioned that the full WSWC will review the summary.

Time Frame: 2014

2. WATER QUALITY/QUANTITY NEXUS

Work-to-Date: Paragraph (B)(3) of WGA Resolution #2014-03 states: “Western Governors believe solutions to water resource challenges require an integrated approach within states and with federal, tribal and local partners. Water resource planning should occur within a framework that preserves states’ authority to manage water through policies which recognize state law and the financial, environmental and social values of the water resource to citizens of the western states today and in the future.” (emphasis added)

2014-2015: In conjunction with the Water Resources and Legal Committees, the Committee will hold an invitation only workshop to bring together state experts and other relevant stakeholders to discuss the interaction between water quality and quantity. The purpose of the workshop will be to produce findings and policy options for the WSWC to consider as it supports WGA Resolution #2014-03 by providing further insight on: (1) how state water quantity and quality regulations interact with each other; (2) how states can protect water quality within the existing framework of the prior appropriation doctrine; and (3) the proper relationship between federal environmental protections and the states’ primary and exclusive authority over the allocation of water resources. Under the WSWC’s direction, WSWC staff will prepare a summary of the meeting.

Time Frame: 2015

3. CLEAN WATER ACT ISSUES

There are a number of ongoing Clean Water Act (CWA) issues that pertain to WSWC policies or are otherwise of interest that the Committee will monitor and address on an as needed basis. These issues are listed below in order of priority.

a. CWA Jurisdiction*

Work-to-Date: In 2011, the EPA and the U.S. Army Corps of Engineers released draft guidance intended to provide clearer, more predictable guidelines for determining which water bodies are subject to CWA jurisdiction, consistent with the U.S. Supreme Court’s *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States* decisions.

In September 2013, the EPA and Corps withdrew the draft guidance. At the same time, the agencies announced that they had submitted a draft rule to clarify CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review. In addition, EPA announced that its Science Advisory Board is developing a report on the connection between small, isolated waters and larger bodies of water. EPA released the report for public comment in September 2013, and has indicated that the final connectivity report will inform the final connectivity report.

In 2013, the WSWC wrote EPA and the Corps a series of five letters to: (1) express concern about the agencies' process in developing the rule; (2) urge them to engage in greater consultation with the states and to comply with the state consultation criteria of Executive Order 13132; and (3) to comment on the draft connectivity report.

In addition, the WSWC created a CWA Rulemaking Workgroup to gather information on the WSWC member states' perspectives regarding the rulemaking and to identify further areas of consensus among the western states regarding the rulemaking. In March 2014, the workgroup developed a letter that the WSWC sent to EPA and the Corps setting forth a list of additional consensus comments on the rulemaking, including a list of waters and features that should be excluded from the rule's definition of "waters of the U.S." The letters were based upon WSWC Position #330.5.

2014-2015: The Committee will continue to work with the Water Resources and Legal Committees through the Workgroup to follow and comment on the development of a jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC's positions.

Time Frame: Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Mike Fulton (AZ), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jon Patch (ND), Bill Schuh (ND), J.D. Strong (OK), Todd Chenoweth (TX), Walt Baker (UT), Laura Driscoll (WA), Stephen Bernath (WA), and Bill DiRienzo (WY).

*See Item 2 of the Legal Committee Workplan

b. State Revolving Funds (SRFs) and Infrastructure Financing

Work-to-Date: WSWC Position #___ urges the Administration and Congress to provide greater flexibility and fewer restrictions on state SRF management and stable and continuing appropriations to the SRF capitalization grants at funding levels that are adequate to help states address their water infrastructure needs. WGA resolution 2014-04 also supports the SRFs as "important tools" and requests greater flexibility and fewer restrictions on state SRF management.

In January 2014, Congress passed an omnibus appropriations bill (H.R. 3547) to fund the federal government through FY 2014. Appropriations for the Clean Water SRF total \$1.45B, a \$73M increase, while the Drinking Water SRF will receive \$907M, a \$46M increase. H.R. 3547 also enacted or retained a number of limitations on the use of SRF funds, including but not limited to: (1) "Buy American" provisions for iron and steel; (2) requirements that between 20% and 30% of SRF funds be used for principal forgiveness, negative interest loans, or grants subject to additional provisions; and (3) requirements that states use at least 10% of their SRF funds for green infrastructure, water or energy efficiency improvements, or other "environmentally innovative" activities.

For FY 2015, the President's budget request seeks around \$1B for the Clean Water SRF, a cut of about \$431M from current levels. The request also seeks \$757M for the Drinking Water SRF, a reduction of \$150M.

2014-2015: The Committee will support the WGA and WSWC positions. In particular, WSWC staff will continue to update the Committee on developments within Congress and the Administration that have the potential to impact the SRFs. As needed, Committee members and WSWC staff will also meet with the Administration and Congress to further the objectives of the WGA and WSWC positions.

Time Frame: Ongoing

c. EPA's Water Transfers Rule

Work-to-Date: Paragraph B(2)(c) of WGA Resolution #2014-04 and WSWC Position #316 generally support EPA's Water Transfers Rule (940 C.F.R. § 122.3(i)), which clarifies that water transfers are exempt from National Pollutant Discharge Elimination System (NPDES) permitting under Section 402 of the CWA. The rule states that transfers do not require NPDES permits if they do not add pollutants and if there is no intervening municipal, industrial, or commercial use between the diversion and the discharge of the transferred water.

The rule has been challenged in multiple courts and a challenge filed by nine states, including Washington, is currently pending before the U.S. District Court for the Southern District Court of New York (SDNY). Oral arguments in that case took place in December 2013, and a decision is expected in 2014.

Litigation regarding the rule is also pending in the 9th Circuit Court of Appeals in *ONRC Action v. Bureau of Reclamation*. The case stems from claims an environmental group filed against the Bureau of Reclamation, arguing that the agency should obtain an NPDES permit to operate a drain in the federal Klamath Project that transfers water between the Klamath River and Lower Klamath Lake near the border between Oregon and California. A federal district court disagreed with this assertion, reasoning that the CWA is ambiguous and that the rule is entitled to deference. This case marks the first time the 9th Circuit will review the validity of EPA's rule, although it did issue a decision in 2003 before EPA promulgated the rule that rejected the "unitary waters" theory upon which the rule is based.

EPA has also indicated in the past that it may reconsider the rule and had formed an interagency workgroup to explore options for addressing the rule that includes representatives from EPA, the Corps, the U.S. Department of Agriculture, and the Department of the Interior.

The Committee and WSWC staff have carried out a number of efforts to support EPA's Water Transfers Rule, including meeting with Administration and Congressional officials to advocate the WSWC's position and updating the WSWC and others stakeholders on recent developments, among other efforts.

2014-2015: The Committee and WSWC staff will: (1) continue to support the WGA and WSWC positions; (2) monitor any and all activities impacting EPA's rule, including but not limited to the SDNY and 9th Circuit litigation and possible efforts by EPA to reconsider the rule; and (3) inform the WSWC of ongoing developments.

Time Frame: Ongoing

d. Nutrients

Work-to-Date: EPA's Office of Water is working to carry out a National Nutrient Strategy to accelerate state adoption of numeric water quality standards while building the scientific and technical infrastructure for developing new criteria to address nitrogen and phosphorus pollution.

On March 16, 2011, EPA Acting Assistant Administrator for Water Nancy Stoner issued a memo to EPA's Regional Administrators to synthesize key principles regarding the agency's technical assistance and collaboration with states. The memo urged the regions to place new emphasis on working with states to achieve near-term reductions in nutrient loadings. Most notably, the memo provided a "Recommended Elements of a State Nutrients Framework" to serve as a tool to "...guide ongoing collaboration between EPA regions and states in their joint effort to make progress on reducing nitrogen and phosphorus pollution." It also asked each region to use the framework as a basis for discussions with interested and willing states, the goal of which would be to tailor the framework to particular state circumstances.

The Committee and WSWC staff have followed and updated the WSWC on EPA efforts involving nutrients. Various Committee meetings have also featured presentations from EPA and state officials on federal and state nutrient management efforts.

Paragraph B(3)(b) of WGA Resolution #2014-04 states that "...nutrients produced by non-point sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions." The WGA's resolution further states that states should have "sufficient flexibility" to utilize their own incentives and authorities to establish standards and control strategies to address nutrient pollution, rather than "being forced to abide by one-size-fits-all federal numeric criteria." According to the WGA's resolution, successful tools currently in use by states include best management practices, nutrient trading, and controlling other water quality parameters, among other "innovative" approaches.

2014-2015: The Committee and WSWC staff will monitor EPA's nutrient efforts and

inform the WSWC of ongoing developments. It will also ensure that the WSWC's efforts do not duplicate those of the Association of Clean Water Administrators.

Time Frame: Ongoing

e. **Pesticide Permits and National Pollutant Discharge Elimination System (NPDES) Permits**

Work-to-Date: The Sixth Circuit Court of Appeals' 2009 ruling in *National Cotton Council v. Environmental Protection Agency* vacated an EPA rule that exempted pesticide applications made in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The decision has national implications because it consolidated rule challenges filed in eleven circuits, and because the U.S. Supreme Court declined to review the decision.

WSWC Position #328 urges Congress to amend the CWA and FIFRA to clarify that FIFRA-compliant pesticide applications do not require NPDES permits. Paragraph B(2)(d) of WGA Resolution #2014-04 also states that the Western Governors support FIFRA's primary role in regulating pesticide applications to water, and will seek state-based solutions that compliment rather than duplicate FIFRA.

WSWC members and staff have supported these positions through multiple visits with Congressional officials. WSWC staff also completed a summary of state information and examples of how dual CWA-FIFRA regulation will impact western states. Most recently, legislation (S. 175 and S.802/H.R. 935) has been introduced in the 113th Congress that would overturn the Sixth Circuit's decision and prevent EPA and states from requiring NPDES permits for pesticide applications.

2014-2015: The Committee will continue to: (1) monitor and inform the WSWC about developments involving this issue; and (2) work with key Congressional members and their staff consistent with the WGA and WSWC positions to support legislation that would clarify that FIFRA-compliant pesticide applications do not require NPDES permits.

Time Frame: Ongoing

f. **Abandoned Hardrock Mine Remediation**

Work-to-Date: The WGA and WSWC have long supported legislation to amend the Clean Water Act (CWA) to protect authorized third parties, or "Good Samaritans," who voluntarily clean up abandoned hardrock mines, from inheriting perpetual liability for the site under the CWA (WGA Policy Resolution #13-05).

A number of Good Samaritan bills have been introduced in Congress over the years, including legislation introduced by Senator Mark Udall (D-CO). These bills have been unsuccessful due to concerns about the potential impacts of amending the CWA and perceptions that sufficient protections already exist under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). However, considerable uncertainty exists as to whether CERCLA and other existing authorities provide Good Samaritans with sufficient protection from third party lawsuits for sites in which there is a continuing discharge of pollutants as defined by the CWA.

Over the past several years, the Committee has worked to support Good Samaritan legislation and other efforts to clean up abandoned hardrock mines, including multiple visits with Congress and the Administration, Congressional testimony in support of such legislation, and involvement in a WGA-organized Task Force focused on crafting an exemption for Good Samaritan activities by state governments.

Most recently, in December 2012, the Environmental Protection Agency (EPA) issued a memorandum to clarify administrative protections for Good Samaritans. EPA's regulations require operators of sites that continue to discharge pollution after cleanup to obtain NPDES permits under the CWA. The memorandum clarifies that Good Samaritans who complete cleanup efforts pursuant to EPA policies will not be considered "operators" responsible for obtaining NPDES permits if they lack: (1) access and authority to enter the site; (2) an ongoing contractual agreement or relationship with the site owner to control discharges; (3) power or responsibility to make timely discovery of changes to the discharges; (4) power or responsibility to direct persons who control the mechanisms, if any, causing the discharges; and (5) power or responsibility to prevent and abate the environmental damage caused by the discharges. Nevertheless, the memorandum states that it "...does not address or resolve all potential liability associated with discharges from abandoned mines."

2014-2015: The Committee will coordinate with the WGA and encourage efforts to clean up abandoned hardrock mines, including but not limited to enactment of Good Samaritan legislation and efforts to support utilization of EPA's 2012 memorandum. As part of this effort, the Committee will work with key Congressional members/staff, Administration officials, and other stakeholders to develop and support efforts to clean up abandoned hardrock mines in accordance with the WGA's policies.

In addition to the above actions, the Committee will: (1) work with the Administration and Congress to provide liability protections to Good Samaritans under existing authorities; and (2) evaluate the prospects for Good Samaritan legislation.

Time Frame: Ongoing

Tab M – Hydroclimate Monitoring and Data Workshop

Workshop on Hydroclimate Monitoring Systems & Measurement Needs

Background

Multiple federal agency monitoring programs cover various facets of the hydrologic cycle and provide fundamental data for managing the West's water resources, including: the NWS cooperative observer program (precipitation) and weather satellites, USDA's Snotel program (snowpack), the USGS cooperative stream gaging and groundwater monitoring programs, and the NASA/USGS Landsat earth observing mission (water use). Aging observing system infrastructure and federal budget cuts threaten the continuity of long-term observing records, and lack of federal resources has limited efforts to upgrade and modernize existing networks to expand data collection to meet the needs of state and local water management agencies.

Observations and data form the foundation upon which all water management is based – that which cannot be measured cannot be managed. Continuity and sustainability of long-term observations are essential for a broad spectrum of purposes including forecasting and managing extreme events (floods and droughts), managing international treaties and interstate compacts, and complying with federal public health and safety and environmental regulatory requirements. Shortcomings of existing observing systems have been well documented – the major loss of continuity of long-term precipitation records in the NWS cooperative observer program, needs for greater density of precipitation observations in Western mountain areas, and needs for better high-elevation and Plains snowpack monitoring to improve runoff forecasts.

Workshop

WSWC and CDWR are holding a June 23-25 workshop in San Diego to discuss strategies for supporting and improving key observing systems. The workshop will begin at 1:00 on Monday June 23rd, and end at noon on Wednesday the 25th. Topics to be covered include an overview of the funding status of key federal monitoring programs, development of a 21st century observing system for extreme precipitation in the West, emerging opportunities for supplementing ground-based observations with remote sensing, and strategic planning for sustaining long-term observing records.

Tab N – Surplus Water Rulemaking



W E S T E R N S T A T E S W A T E R C O U N C I L

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

August 6, 2013

Via Email: joellen.darcy@us.army.mil

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, I am writing to provide the Council's perspective on the U.S. Army Corps of Engineers' efforts involving surplus water and storage at Corps reservoirs. In particular, it is our understanding that the Corps is pursuing rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts pursuant to Section 6 of the Flood Control Act (FCA) of 1944. We also understand that the Corps is conducting a system-wide analysis of storage water reallocation in the Missouri River Mainstem Reservoir System.

As the Corps pursues these efforts, we respectfully request that you consider the following comments and perspectives, as well as the enclosed position regarding the states' right to access the natural flows that would exist absent Corps reservoirs and dams.

A. State Primacy

Water belongs to the states which have exclusive authority over the allocation and administration of rights to the use of surface water within their borders. State granted water use permits, once put to beneficial use, also become property rights with constitutional protections, including due process and compensation if taken through government action.

The basis of the states' primary and exclusive authority over their water resources is rooted in the Equal Footing Doctrine in Article IV of the U.S. Constitution, under which states take title to the navigable waters within their borders upon admission to the Union. As the U.S. Supreme Court has noted, Congress has also demonstrated a "consistent thread of purposeful and continued deference to state water law"¹ through such laws as the Mining Acts of 1866 and 1870, the Desert Lands Act of 1877, the Federal Water Power Act of 1920, and others. One notable example of this deference is found in Section 8 of the Reclamation Act, which states:

¹ *California v. U.S.*, 438 U.S. 645, 653-664 (1978).

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws....²

Congress was well aware of this deference when it enacted the laws that govern the use of surplus water and storage at Corps' reservoirs, namely the FCA and the Water Supply Act (WSA) of 1958. For example, it specified in the first sentence of the FCA in Section 1 that it is "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control...."³ Similarly, Congress specified in Section 301(a) of the WSA that it is the policy of Congress to:

[R]ecognize the primary responsibilities of the States and local interests in developing water supplies...and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.⁴

Section 301(c) of the WSA further specifies that the law's water supply section "shall not be construed to modify the provisions" of Section 1 of the FCA or the provisions of Section 8 of the Reclamation Act of 1902.⁵

In light of the above, the Corps' surplus water rulemaking and storage reallocation study must recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters, including but not limited to state storage and use requirements.

B. Stored Water

The Corps' efforts must acknowledge the difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states.

² 43 U.S.C. § 383.

³ 33 U.S.C. § 701-1 (emphasis added).

⁴ 43 U.S.C. § 390b.

⁵ *Id.*

C. The Flood Control Act of 1944

We are especially concerned about the Corps' decision to condition access to the natural flows that run through six mainstem reservoirs along the Missouri River by requiring a determination that surplus water is available for withdrawal and requiring that applicants sign a water supply agreement to pay the Corps for the proportionate cost of storing the water. As discussed below, these additional and unnecessary requirements are based upon a misinterpretation of the Act and should not serve as the basis of any rulemaking or study.

Section 6 of the FCA states that the Corps "is authorized to make contracts...at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir" under the Corps' control.⁶ The Corps has interpreted "surplus water" to mean any water in a Corps reservoir that is not required for federally authorized purposes "because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction."⁷ Corps officials in the Missouri River Basin have further indicated that once water reaches a reservoir, all water within the boundaries of that reservoir is subject to the Corps' authority and can be evaluated to determine whether it is "surplus" under the above definition, including the natural flows belonging to the states.

This interpretation ignores the distinction between storage capacity and stored water by improperly viewing the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the River. The Corps can evaluate the reservoir pool to determine whether there is water surplus for authorized needs and uses, but the natural flowing-river volumes that run beneath the reservoir system should not be considered stored water and may be permitted by the respective states without Corps interference or contract and fee requirements. Reasoning otherwise would be contrary to the protection of state "interests and rights in water utilization and control" provided under Section 1 of the FCA, as well as requirements under Section 6 that storage contracts for surplus water must not "adversely affect then existing lawful uses of such water."⁸ The states' use of natural flows was an existing lawful use prior to the Act's enactment and is therefore protected.

In light of the above, the Corps must recognize the states' rights by ensuring that its rulemaking and study do not consider natural flows to be surplus water or stored water. As stated in the enclosed position, any definition requiring a storage contract to access natural flows within a reservoir boundary would improperly expand the Corps' authority and violate the states' rights to develop, use, control, and distribute surface water. It would also conflict with state water laws relating to storage for water supply and the practices of other federal agencies that recognize western water laws, such as the Bureau of Reclamation.

⁶ 33 U.S.C. § 708 (emphasis added).

⁷ Engineer Regulation 1105-2-100, Planning Guidance Notebook at E-214 (Apr. 22, 2000).

⁸ 33 U.S.C. §§ 701-1, 708 (emphasis added).

D. Water Supply Act of 1958

We understand that some Corps representatives have cited Section 301(b) of the WSA as further justification for denying access to natural flows. Section 301(b) authorizes the Corps to include storage at any planned or existing Corps reservoir for municipal and industrial water supply, provided that “State or local interests shall agree to pay for the cost of such provisions....”⁹

We recognize the Corps’ authority under the WSA to require a contractual commitment to repay a portion of the cost of providing storage. However, as noted above, the amount of water stored in a reservoir does not include all of the water flowing through its boundaries. Requiring a fee to access natural flows that would otherwise be available absent the Corps’ facilities conflicts with the recognition of state primacy over water utilization and control found in Sections 301(a) and 301(c) of the WSA. Such a requirement also runs counter to Section 301(b)’s stated purpose of recouping expenses the Corps incurs in providing storage.

E. Flexibility

Any rulemaking to address surplus water contracts should be flexible enough to accommodate the various state laws, prior appropriation and riparian doctrines, and diverse physical conditions found throughout the country. In almost all cases, the most effective way to provide this flexibility is on a project-specific basis rather than with a “one-size-fits-all” approach. The Corps must also fully understand and follow its specific congressional authorizations and their supporting documentation, most of which recognize the unique elements of each basin and the differences in state law.

Additionally, the rulemaking must treat prior appropriation states differently than riparian states to account for the differences in their water laws and policies. For example, in riparian states, reasonable use of the water belongs to riparian owners. This means that the Corps, as the riparian owner, would have a user interest in the water captured in its reservoirs. However, prior appropriation states do not vest user rights based on land ownership. This means that the Corps has no user interest in the rivers flowing through its reservoirs unless it has received a grant of those rights from the state. Thus, while Congress has authorized the Corps to operate its dams for specified purposes in prior appropriation states, such authority does not mean that the Corps has Congressional authority to capture all water supply in a reservoir without an ownership interest or rights to consumptive use.

Furthermore, any rulemaking that fails to treat prior appropriation and riparian states differently could also conflict with Section 1(b) of the FCA, which protects beneficial uses in states west of the ninety-eighth meridian by stating:

[T]he use for navigation...of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any

⁹ 43 U.S.C. § 390b.

beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes....¹⁰

Other issues that require flexibility include but are not limited to:

- Many western states require a permit to impound and divert water, which may include the diversion of water from surplus storage.
- In some states, allocating return flows to all owners or users in a reservoir may result in water that is permitted to an existing water right being allocated in a way that violates state laws and state ownership of the water.
- The use or reuse of return flows may require a permit in some states, as well as a determination that the use of the water will not impair existing state-issued water rights.

F. Outreach with States

We respectfully urge your office and the Corps to engage the states as early as possible in its rulemaking and the development of the study. Given the implications these efforts could have on state water rights, state input will be most meaningful during the preliminary stages of development. Ideally, this engagement should happen before the proposed rule and study are published for public comment and too much momentum has built towards federal policy decisions that may not account for state rights and needs.

G. Conclusion

In sum, the Corps' surplus water rulemaking and storage water reallocation study should: (1) be developed with robust and meaningful state participation; (2) recognize and defer to the states' primary and exclusive authority over the allocation of surface water; (3) properly distinguish between stored water and storage capacity; and (4) ensure that natural flows are not considered to be surplus or stored water.

Moreover, the surplus water rulemaking effort should be flexible enough to accommodate the states' differing legal doctrines and physical conditions, and should treat prior appropriation and riparian states differently.

We would greatly appreciate the opportunity to have a dialog about these efforts, and invite you or a representative to join us at our upcoming fall meetings on October 2-4, in Deadwood, South Dakota.

¹⁰ 33 U.S.C. § 701-1(b).

Thank you for considering our comments and concerns, as well as our invitation. We look forward to continuing our collaborative relationship with the Corps to address these and other water management issues in the West.

Respectfully,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized with a large initial "P" and a long horizontal stroke.

Phillip C. Ward, Chairman
Western States Water Council

Encl.

Cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers
David Ponganis, Regional Director of Programs, Northwestern Division, U.S. Army Corps of Engineers
John D'Antonio, WestFAST Representative, U.S. Army Corps of Engineers
The Honorable Barbara Boxer, Chairwoman, Senate Environment and Public Works Committee
The Honorable David Vitter, Ranking Member, Senate Environment and Public Works Committee
The Honorable John Hoeven, Senator, North Dakota
The Honorable Heidi Heitkamp, Senator, North Dakota
The Honorable Tim Johnson, Senator, South Dakota
The Honorable John Thune, Senator, South Dakota
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee
The Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee
The Honorable Markwayne Mullin, Representative, Oklahoma
The Honorable Kevin Cramer, Representative, North Dakota
The Honorable Kristi Noem, Representative, South Dakota

POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
San Antonio, Texas
October 12, 2012

WHEREAS, the Western States Water Council strongly supports preservation of the States' inherent right to develop, use, control, and distribute water; and

WHEREAS, States have exclusive authority over the allocation and administration of rights to the use of surface water located within their borders and are primarily responsible for protecting, managing and otherwise controlling the resource; and

WHEREAS, States are in the best position to protect and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

WHEREAS, the Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers dams; and

WHEREAS, the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS, the various states have the authority and duty to manage permitting of stored water to supplement natural flows; and

WHEREAS, federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage that supplement natural flows, and water service contracts that supplement natural flow; and

WHEREAS, representatives of the U.S. Army Corps of Engineers have indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the U.S. Army Corps of Engineers without recognition of the States' rights to natural flows being separate from the captured floodwaters stored within those reservoirs.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council urge the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

BE IT FURTHER RESOLVED, that any policy of the U.S. Army Corps of Engineers to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights to develop, use, control, and distribute surface water.

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

**Nebraska abstained from voting on the position.*



WESTERN GOVERNORS' ASSOCIATION

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Chairman

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August 21, 2013

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western Governors' Association (WGA), I am writing to express interest and concerns related to the U.S. Army Corps of Engineer's pending rulemaking on the definition and treatment of surplus water in Corps reservoirs. It is critical that this important undertaking recognize the West's unique hydrology and legal doctrines, as well as Congress' longstanding deference to state law with respect to the allocation and use of water. Water belongs to the states, which have exclusive and Constitutional authority over its consumptive use and the allocation and adjudication of water rights.

WGA understands that the Administration is nearing completion of its review of a draft rule to address the policies by which it will determine prices for surplus water contracts. WGA is concerned that the Corps has not adequately engaged the states – which are responsible for the allocation and management of their water resources – in the development of this draft and that its release may be premature. Prior to publishing it in the *Federal Register* for public comment, WGA urges you to first initiate a substantive dialogue with the states.

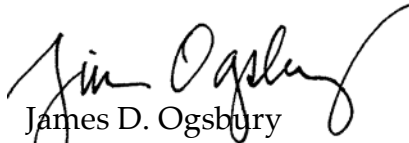
I have attached a letter recently sent to you by the Western States Water Council (WSWC), an affiliate organization of WGA, detailing the concerns of Western states. As requested in the letter, WGA asks you to work with the states, WSWC and WGA to address these concerns. I also urge you to attend the upcoming WSWC meeting in Deadwood, South Dakota (October 2-4, 2013) in order to discuss this matter with the state water managers that comprise the Water Council.

Honorable Jo-Ellen Darcy
August 21, 2013
Page 2

Releasing a proposed rule without first engaging in serious consultations with the states may significantly compromise our ability to reach a mutually acceptable solution that recognizes and balances both the rights and interests of the states and the responsibilities of the Corps as authorized by Congress.

Thank you for your consideration of this request. I look forward to your positive response and an opportunity to pursue a serious dialogue regarding this critical issue.

Sincerely,



James D. Ogsbury
Executive Director

cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers
Howard Shelanski, Administrator, Office of Information and Regulatory Affairs

Attachment

POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
San Antonio, Texas
October 12, 2012

WHEREAS, the Western States Water Council strongly supports preservation of the States' inherent right to develop, use, control, and distribute water; and

WHEREAS, States have exclusive authority over the allocation and administration of rights to the use of surface water located within their borders and are primarily responsible for protecting, managing and otherwise controlling the resource; and

WHEREAS, States are in the best position to protect and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

WHEREAS, the Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers dams; and

WHEREAS, the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS, the various states have the authority and duty to manage permitting of stored water to supplement natural flows; and

WHEREAS, federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage that supplement natural flows, and water service contracts that supplement natural flow; and

WHEREAS, representatives of the U.S. Army Corps of Engineers have indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the U.S. Army Corps of Engineers without recognition of the States' rights to natural flows being separate from the captured floodwaters stored within those reservoirs.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council urge the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

BE IT FURTHER RESOLVED, that any policy of the U.S. Army Corps of Engineers to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights to develop, use, control, and distribute surface water.

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

**Nebraska abstained from voting on the position.*

Tab O – Drought

Policy and Program Services

Drought Program

Background

The Bureau of Reclamation's "Drought Program" was established after Public Law 102-250 was enacted in 1991. The legislation and history of the "Drought Program" and its accomplishments are discussed below.

- **Applicable Legislation:** Reclamation States Emergency Drought Relief Act of 1991, Public Law 102-250, 106, Stat. 53, as amended
 - 2000 Amendment, P.L. 106-566
 - 2006 Re-Authorization, P.L. 109-234
 - 2010 Extension of Title I Authorization reads as follows (P.L. 111-212):

Sec. 404. (a) Section 104(c) of the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2214(c)) is amended by striking 'September 30, 2010' and inserting 'September 30, 2012' in lieu thereof.

(b) Section 301 of the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2241) is amended by striking 'through 2010' and inserting 'through 2012' in lieu thereof.

- **Administering Agency:** Department of the Interior, Bureau of Reclamation
- **Activities:** The Act authorizes emergency response and planning assistance that would minimize and mitigate losses and damages resulting from drought conditions.
- **Beneficiaries:** Federal, State, tribal, and local entities.

Interim Directives & Standards

Reclamation is working to update and finalize the Drought Directives and Standards, which will be posted here when available. The drafts below are for reference only.

- Title I: Emergency Assistance
- Title I Flow Chart
- Title I Checklist
- Title I Appendix C
- Title II: Contingency Planning
- Title II: Flow Chart
- Title II: Checklist

Title I: Assistance During Droughts

Title I allows Reclamation to undertake activities that would minimize or mitigate

drought damages or losses within the 17 Reclamation States including tribes within those states, and Hawaii. Any construction activities undertaken shall be limited to temporary facilities, with the exception of well construction.

[Click here](#) for the list of entities that are currently eligible to request Title I emergency drought assistance.

Title II: Drought Contingency Planning

[Title II](#) provides for assistance in drought planning. All 50 states and U.S. territories are eligible for Title II planning assistance.

Drought Program Contacts

Reclamation: <u>Avra Morgan</u> Reclamation Drought Coordinator Bureau of Reclamation, 84-51000 PO Box 25007 Denver, CO 80225-0007 Phone: 303-445-2906 Fax: 720-544-4207	Great Plains Region: <u>Chris Murray</u> Regional Drought Coordinator, GP-4600 PO Box 36900 Billings, MT 59107-6900 Phone: 406-247-7757 Fax: 406-247-7793
Lower Colorado Region: <u>Tina Mullis</u> Regional Drought Coordinator, BC00-4231 PO Box 61470 Boulder City, NV 89006-1470 Phone: 702-293-8139 Fax: 702-293-8042	Mid-Pacific Region: <u>Sheryl Looper</u> Acting Regional Drought Coordinator, MP-400 Federal Office Building - 2800 Cottage Way Sacramento, CA 95758 Phone: 916-978-5556
Pacific Northwest Region: <u>Megan Montague</u> Regional Drought Coordinator, PN-6436 1150 N. Curtis Rd, Suite 100 Boise, ID 83706-1234 Phone: 208-378-5396 Fax: 208-378-5305	Upper Colorado Region: <u>Jeff Painter</u> Regional Drought Coordinator, UC-430 125 S. State Street, Room 6107 Salt Lake City, UT 84138-1147 Phone: 801-524-3709 Fax: 801-524-3034

Last Updated: February 24, 2014

Calendar No. 130

113TH CONGRESS
1ST SESSION**S. 659****[Report No. 113–73]**

To reauthorize the Reclamation States Emergency Drought Relief Act of
1991, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 22, 2013

Mr. WYDEN introduced the following bill; which was read twice and referred
to the Committee on Energy and Natural Resources

JULY 15, 2013

Reported by Mr. WYDEN, with an amendment

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To reauthorize the Reclamation States Emergency Drought
Relief Act of 1991, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION OF RECLAMATION STATES EMER-**
4 **GENCY DROUGHT RELIEF ACT OF 1991.**

5 (a) **TERMINATION OF AUTHORITY.**—Section 104(c)
6 of the Reclamation States Emergency Drought Relief Act

1 of 1991 (43 U.S.C. 2214(c)) is amended by striking
 2 “2012” and inserting “2018”.

3 ~~(b) AUTHORIZATION OF APPROPRIATIONS.—Section~~
 4 ~~301 of the Reclamation States Emergency Drought Relief~~
 5 ~~Act of 1991 (43 U.S.C. 2241) is amended—~~

6 ~~(1) by striking “\$90,000,000” and inserting~~
 7 ~~“\$110,000,000”; and~~

8 ~~(2) by striking “2012” and inserting “2018”.~~

9 *(b) AUTHORIZATION OF APPROPRIATIONS.—Section*
 10 *301 of the Reclamation States Emergency Drought Relief*
 11 *Act of 1991 (43 U.S.C. 2241) is amended by striking*
 12 *“2012” and inserting “2018”.*

113TH CONGRESS
1ST SESSION

H. R. 3176

To reauthorize the Reclamation States Emergency Drought Relief Act of 1991, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 2013

Mr. DEFazio (for himself, Mrs. NAPOLITANO, Mr. COSTA, Mr. BEN RAY LUJÁN of New Mexico, Mr. SABLAN, Ms. CHU, Mr. HINOJOSA, Mr. HOLT, Mr. RANGEL, Mr. GRIJALVA, and Ms. HANABUSA) introduced the following bill; which was referred to the Committee on Natural Resources

A BILL

To reauthorize the Reclamation States Emergency Drought Relief Act of 1991, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION OF RECLAMATION STATES EMER-**
4 **GENCY DROUGHT RELIEF ACT OF 1991.**

5 (a) TERMINATION OF AUTHORITY.—Section 104(c)
6 of the Reclamation States Emergency Drought Relief Act
7 of 1991 (43 U.S.C. 2214(c)) is amended by striking
8 “2012” and inserting “2018”.

1 (b) AUTHORIZATION OF APPROPRIATIONS.—Section
2 301 of the Reclamation States Emergency Drought Relief
3 Act of 1991 (43 U.S.C. 2241) is amended by striking
4 “2012” and inserting “2018”.

○

113TH CONGRESS
1ST SESSION

H. R. 518

To amend the Reclamation States Emergency Drought Relief Act of 1991 for the purposes of extending the Reclamation States Emergency Drought Relief Act of 1991 through 2018, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 2013

Mr. MARKEY (for himself, Mrs. NAPOLITANO, Mr. BEN RAY LUJÁN of New Mexico, Mr. GRIJALVA, Mr. SABLAN, Mr. HOLT, Ms. HANABUSA, Ms. CHU, Ms. SLAUGHTER, Mr. HINOJOSA, and Mr. RANGEL) introduced the following bill; which was referred to the Committee on Natural Resources

A BILL

To amend the Reclamation States Emergency Drought Relief Act of 1991 for the purposes of extending the Reclamation States Emergency Drought Relief Act of 1991 through 2018, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. DROUGHT RELIEF.**

4 (a) TERMINATION OF AUTHORITY.—Section 104(c)
5 of the Reclamation States Emergency Drought Relief Act
6 of 1991 (43 U.S.C. 2214(c)) is amended by striking
7 “2012” and inserting “2018”.

1 (b) AUTHORIZATION OF APPROPRIATIONS.—Section
2 301 of the Reclamation States Emergency Drought Relief
3 Act of 1991 (43 U.S.C. 2241) is amended—

4 (1) by striking “90,000,000” and inserting
5 “\$110,000,000”; and

6 (2) by striking “2012” and inserting “2018”.

7 **SEC. 2. CLIMATE VARIABILITY REVIEW.**

8 Subsection (e) of section 203 of the Reclamation
9 States Emergency Drought Relief Act of 1991 (43 U.S.C.
10 2223(e)) is amended as follows:

11 “(e) REVIEW.—The contingency plans shall include
12 provisions for periodic review to assure adequacy of the
13 contingency plan to respond to current conditions, as well
14 as address projected long-term climate variability and
15 change, and such plans may be modified accordingly.”.

○



WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

February 25, 2014

The Honorable Brian Schatz, Chairman
Energy and Natural Resources Committee
Subcommittee on Water and Power
304 Dirksen Senate Building
Washington, DC 20510

The Honorable Mike Lee, Ranking Member
Energy and Natural Resources Committee
Subcommittee on Water and Power
304 Dirksen Senate Building
Washington, DC 20510

Dear Chairman Schatz and Ranking Member Lee:

On behalf of the Western States Water Council, representing the eighteen western governors on water policy issues, I am writing to comment on the SECURE Water Amendments Act of 2014 (S. 2019) for the record. These comments are based on the Council's October 8, 2013 letter to then-Chairman Ron Wyden and Ranking Member Lisa Murkowski expressing our continued support for implementation of the SECURE Water Act (Position #357).

Congress passed the SECURE Water Act in 2009 to authorize a number of important programs that support the states' primary responsibility to manage the nation's water resources. The Act's authorized activities provide much needed support that states and other non-federal entities in the West use to provide adequate and safe supplies of water for human health, the economy, and the environment, as well as enhancing public safety. However, many of these programs are unfunded or underfunded. Thus, reauthorization and appropriations are needed for these programs to fulfill their intended purposes.

As introduced, S. 2019 would address the Council's concerns by extending the authorization for two important SECURE Water Act programs, namely the Bureau of Reclamation's WaterSMART Grants Program and the U.S. Geological Survey's (USGS) National Water Availability and Use Assessment Grant Program.

A. WaterSMART Grants Program

The WaterSMART Grants Program provides cost-shared funding to states, tribes, and other entities on a competitive basis to address crucial water supply issues, stretch limited water supplies, and improve water management. Water managers have used this funding to improve their systems' operations and make more efficient use of limited supplies, which helps in responding to the severe and prolonged drought conditions that continue to impact much of the West. For example, from 2010-2012, the program leveraged non-federal investments by a two-to-one ratio to help conserve more than 616,000 acre-feet of water in the West.

The WaterSMART Grants Program's current authorized spending is expected to expire later this year and S. 2019 would ensure that Reclamation can continue assisting states in their water conservation efforts by reauthorizing the program through 2023. Failure to do so would greatly diminish Reclamation's ability to partner with states and local communities to increase water efficiency in the West, threatening a range of economic and environmental interests, even as unprecedented drought afflicts many areas. Consequently, the Council strongly supports reauthorization of the WaterSMART Grants Program.

B. National Water Availability and Use Assessment Grant Program

The availability of water data is critical for planning and timely responses to droughts, flooding, and other extreme weather events. In particular, a lack of timely and accurate data on water use and availability places human life, health, welfare, property and environmental and natural resources at a considerably greater risk of loss. Unfortunately, erosion of the federal investment over the years has led to the discontinuance, disrepair, or obsolescence of vital data systems and programs needed to inform water resources management across the country.

The SECURE Water Act authorized the National Water Availability and Use Assessment as part of a suite of activities aimed at enhancing the Department of the Interior's water data efforts. The Assessment is a USGS program aimed at providing better information on water resources budgets in the U.S., identifying trends in use and availability, helping forecast water availability for future needs, and maintaining a national inventory of water uses. Since states have the primary responsibility for gathering and managing data about water use, the SECURE Water Act authorized USGS to provide grants to state water management agencies to assist in acquiring locally-generated water data to be integrated with national datasets. However, USGS' requests for such grants have not been funded and its program authority expired with Fiscal Year 2013.

S. 2019 would reauthorize the Assessment's grant program through 2023 allowing for continuing support for state efforts to gather and analyze water data in a consistent manner. The Council supports reauthorization of this program. The Council also notes that its Water Data Exchange (WaDE) initiative has created the architecture for sharing information between states and with federal agencies, which will support this federal effort.

We commend the Subcommittee for its work in addressing important water needs in the West. We also look forward to working with the Subcommittee and the Congress to continue to improve western water management.

Sincerely,



Phillip C. Ward
Chairman, Western States Water Council

Enclosures

cc: The Honorable Mary Landrieu, Chair, Energy and Natural Resources Committee
The Honorable Lisa Murkowski, Ranking Member, Energy and Natural Resources Committee
The Honorable Jeff Flake, Senator for Arizona
The Honorable Mark Udall, Senator for Colorado
The Honorable Mazie Hirono, Senator for Hawaii
The Honorable James E. Risch, Senator for Idaho
The Honorable Dean Heller, Senator for Nevada
The Honorable John Hoeven, Senator for North Dakota
The Honorable Tom Udall, Senator for New Mexico
The Honorable Martin Heinrich, Senator for New Mexico
The Honorable Ron Wyden, Senator for Oregon
The Honorable Tim Johnson, Senator for South Dakota
The Honorable Maria Cantwell, Senator for Washington
The Honorable John Barrasso, Senator for Wyoming



WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westgov.org/hswc

October 8, 2013

Position #357

Via Fax: (202) 224-6163

The Honorable Ron Wyden, Chairman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

Honorable Lisa Murkowski, Ranking Member
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Wyden:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, we are writing to express our continued support for implementation of the SECURE Water Act ("the Act"), which Congress passed as Subtitle F of the Omnibus Public Lands Management Act of 2009 (Pub. L. 111-11).

As noted in Section 9501 of the Act, "although States bear the primary responsibility and authority for managing the water resources of the United States, the Federal Government should support the States, as well as regional, local and tribal governments...." The Act authorized a number of important programs to provide this much needed support. However, as discussed below, we are concerned that many of these programs have largely gone unfunded or underfunded. As a result, we encourage you to ensure that the Act's authorized activities receive continued authorizations and appropriations that are adequate to fulfill their stated purposes.

A. Water Management Improvement

Western water law and policy are based on the reality of scarcity and the need to use water wisely. While the western states have made great strides in increasing efficiency and reducing water use, continued investments and sacrifices are needed to maintain our quality of life in the West and to protect our environment.

Section 9504 of the Act recognized this need by authorizing the Secretary of the Interior to provide grants or enter into cooperative agreements to assist states and other non-federal entities in carrying out a range of water use efficiency improvements. The Act authorized \$200 million for this and other efforts under Section 9504, to remain available until expended.

One important water management tool that relies on this funding is the Bureau of Reclamation's WaterSMART Grant program, which provides cost-shared funding on a competitive basis to address crucial water supply issues, stretch limited water supplies, and improve water management. To date, the program has provided assistance that has helped facilitate the conservation of over 616,000 acre-feet of water in the West from 2010-2012.

However, notwithstanding the benefits of this program, the House FY 2014 Energy and Water Appropriations Bill (H.R. 2609) would zero out funding for the WaterSMART Grants Program. Eliminating or drastically reducing funding from past levels would greatly diminish the

Bureau of Reclamation's ability to partner with states and local communities to increase water efficiency in the West, while also threatening a range of economic and environmental interests. Consequently, we urge you to support appropriating sufficient funds to carry out the activities authorized under Section 9504 of the Act, including Reclamation's WaterSMART Grants program.

It is worth noting that this proposed cut comes at a time when the unobligated balance of the Reclamation Fund is projected to grow to about \$13.3 billion in FY 2013, an increase of over \$1 billion from FY 2012. The Reclamation Act of 1902 (Pub. L. 57-161) created the Fund to be the principle means of financing federal western water development in the West. The receipts that accrue to the Fund come from water and power sales, project repayments, and receipts from public land sales and leases in the 17 contiguous western states, as well as federal oil, gas and mineral leases. However, these receipts are only available pursuant to annual appropriation acts. Over the years, declining federal expenditures from the Fund for Reclamation purposes have created a growing unobligated balance that is used for other federal purposes. Thus, it is frustrating to see proposed cuts to the WaterSMART Grants Program and other critical Reclamation programs when the over \$2 billion in receipts that accrue to the Fund each year are more than sufficient to cover all current Reclamation expenditures and more.

The Council supports technical and financial assistance to states and local watershed groups and water districts as an appropriate federal role, consistent with authorized Reclamation programs, and as a suitable Reclamation Fund expenditure.

B. Water Data Enhancement

Real-time water resources data are critical for timely actions in response to droughts, flooding, and other extreme weather events. Without timely and accurate streamflow information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss. However, over the years, the lack of capital investments in water data programs has led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water data gathering activities.

Recognizing this need, the Act authorized a variety of activities to enhance the Department of the Interior's water data efforts, including the development of a national groundwater monitoring program, a brackish water assessment, and the establishment of a national water availability and use assessment. Section 9507 of the Act also authorized an additional \$10 million for each of fiscal years 2009 through 2019 for enhancements to the U.S. Geological Survey's (USGS) National Streamflow Information Program (NSIP). NSIP is intended to provide a national backbone focused on national needs and interests. The authorized enhancements would increase the number of NSIP streamgages and also help ensure the NSIP streamgages are flood hardened and equipped with water quality sensors and modernized telemetry. Since federal investments have been insufficient to fully fund NSIP, these authorized enhancements, if funded, would go a long way towards achieving the program's mission.

The Council has long supported NSIP as well as USGS' Cooperative Water Program, which together provide vital water data that States and other public and private entities and individuals rely on in making day-to-day planning and management decisions. The Council also conducted a recent survey with its member states regarding USGS budget priorities that further underscores the importance of these programs, finding that almost 90% of the States identified USGS' stream monitoring networks as being "most important" with respect to their ability to carry out their surface water management and administration responsibilities.

C. Conclusion

The Council has long supported watershed and basin-wide coordination that involves all governmental entities and stakeholders interested in finding solutions to present and future water management challenges. The Act's authorized activities further this coordination and provide much needed support that States and other non-federal entities in the West use to provide adequate and safe supplies of water for human health, the economy, and the environment, as well as enhancing public safety.

We look forward to working with the Congress to improve western water management under the activities authorized under the Act.

Sincerely,

A black and white image of a handwritten signature in cursive script, which appears to read "Phillip C. Ward". The signature is written in dark ink on a light background.

Phillip C. Ward, Chairman
Western States Water Council

113TH CONGRESS
2D SESSION

S. 2019

To reauthorize and update certain provisions of the Secure Water Act.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 2014

Mr. SCHATZ (for himself, Mr. HEINRICH, Mr. WYDEN, Mr. UDALL of New Mexico, Ms. HIRONO, and Mr. UDALL of Colorado) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

A BILL

To reauthorize and update certain provisions of the Secure Water Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “SECURE Water
5 Amendments Act of 2014”.

6 **SEC. 2. AUTHORIZED ACTIVITIES; ELIGIBILITY; AUTHOR-**
7 **IZATION OF APPROPRIATIONS.**

8 (a) IN GENERAL.—Section 9504 of the Omnibus
9 Public Land Management Act of 2009 (42 U.S.C. 10364)
10 is amended—

1 (1) in subsection (a)—

2 (A) in paragraph (1)(H)—

3 (i) in clause (i), by striking “or” at
4 the end;

5 (ii) in clause (ii), by striking the pe-
6 riod and inserting “; or”; and

7 (iii) by adding at the end the fol-
8 lowing:

9 “(iii) to plan for or address the im-
10 pacts of drought.”; and

11 (B) in paragraph (2)(A)—

12 (i) by striking “; and” and inserting
13 “; or”;

14 (ii) by striking “(A) be located within
15 the States” and inserting the following:

16 “(A) be located in—

17 “(i) the States”; and

18 (iii) by adding at the end the fol-
19 lowing:

20 “(ii) the State of Hawaii; and”; and

21 (2) in subsection (e), by striking “There is”
22 and all that follows through “\$200,000,000” and in-
23 serting “There are authorized to be appropriated
24 such sums as are necessary to carry out this section
25 for each of fiscal years 2015 through 2023”.

1 **SEC. 3. AUTHORIZATION OF APPROPRIATIONS FOR NA-**
2 **TIONAL WATER AVAILABILITY AND USE AS-**
3 **SESSMENT PROGRAM.**

4 Section 9508(e)(2) of the Omnibus Public Land Man-
5 agement Act of 2009 (42 U.S.C. 10368(e)(2)) is amended
6 by striking “\$12,500,000 for the period of fiscal years
7 2009 through 2013” and inserting “such sums as are nec-
8 essary for the period of fiscal years 2014 through 2023”.

○

Tab P – Federal Legislation and Litigation Update

LITIGATION AND LEGISLATION UPDATE
174TH WSWC MEETINGS
ARLINGTON, VIRGINIA – APRIL 3, 2014

Nathan Bracken
WSWC Assistant Director and General Counsel
nbracken@wswc.utah.gov

This summary describes developments regarding notable legislation and litigation that pertain to WGA/WSWC policies or are otherwise of interest. It focuses mostly on litigation and federal legislative developments that took place after the WSWC's 2013 fall meetings, which took place on October 2-4, 2013, in Deadwood, South Dakota. This update is current as of March 21, 2014, and begins with the most recently introduced legislation.

NOTABLE LEGISLATION

Bill Number(s)	Summary	Dates/Status	Sponsor(s)
S. 2034	Issue – Bureau of Reclamation Title Transfers Title – Reclamation Title Transfer Act of 2014: Would authorize the Secretary of the Interior to establish a program to facilitate the transfer of appropriate Bureau of Reclamation projects and facilities to non-federal entities in consultation with the governors of affected states and in conformity with state water laws. <i>Staff with Senator Brian Schatz's office (D-HI) contacted WSWC staff for comments prior to introducing the bill. The bill ultimately included language proposed by WSWC staff that would require consultation with the governors and conformity with state water laws.</i>	02/24/14: Introduced and referred to Energy and Natural Resources Committee 02/27/14: Subcommittee on Water and Power hearing	Subcommittee on Water and Power Chair Brian Schatz (D-HI) introduced the bill

S. 2019 H.R. 4258	Issue – SECURE Water Act/WaterSMART Title – SECURE Water Act Amendments Act of 2014: Would amend the SECURE Water Act to raise the authorization ceiling for the WaterSMART grants program, authorizing “such sums as are necessary” through 2023. It would also clarify that activities to plan for and reduce drought impacts are eligible for the grants and would make projects in Hawaii eligible. Additional provisions would reauthorize the National Water Availability and Use Assessment’s grant program through 2023, providing “such sums as are necessary,” compared to the previously authorized amount of \$12.5M. <i>*WSWC Position #357 and related letter dated 02/25/14, which supported S. 2019’s reauthorization of the WaterSMART and National Water Availability and Use Assessment grant programs</i>	02/12/14: S. 2109 introduced in Senate and referred to Energy and Natural Resources Committee 02/27/14: Senate Subcommittee on Water and Power hearing 03/14/14: H.R. 4258 introduced in House and referred to Natural Resources Committee	Senate Subcommittee on Water and Power Chair Brian Schatz (D-HI) introduced S. 2019 with Senators Mark Udall (D-CO), Mazie Hirono (D-HI), Tom Udall (D-NM), Martin Heinrich (D-NM), and Ron Wyden (D-OR) House Natural Resources Committee Ranking Member Grace Napolitano (D-CA) introduced H.R. 4258 with 17 co-sponsors
S. 2016 H.R. 4024	Issue – California/Drought Title – California Emergency Drought Relief Act of 2014: Would reauthorize the Reclamation States Emergency Drought Relief Act through 2017, increasing funding from \$90M to \$190M. The bills would also raise the authorization ceiling for the SECURE Water Act’s WaterSMART grants program from \$200M to \$250M. Provisions specific to California and Oregon would, among other things: (1) authorize federal actions to maximize water supplies in California’s Bay-Delta; (2) fund federal efforts to develop other water sources for wildlife refuges in California to save Central	02/11/14: S. 2016 introduced in the Senate and referred to Energy and Natural Resources Committee 02/11/14: H.R. 4039 introduced in the House and referred to the Committees on	Senator Dianne Feinstein (D-CA) introduced S. 2016 with Senators Barbara Boxer (D-CA), Ron Wyden (D-OR), and Jeff Merkley (D-OR) Rep. Jim Costa (D-

	Valley Project water for crops and drinking water; (3) authorize water planning and management activities to reduce water use in the Klamath Basin in California and Oregon; and (4) prioritize the Drinking Water and Clean Water State Revolving Funds (SRFs) in California for projects that boost drinking and municipal water supplies. The bill is intended, in part, to be an alternative to drought legislation (H.R. 3964 – see below description) that the House passed in February to address California’s drought. <i>*WSWC Positions #357 and #347</i> <i>**WGA Resolution #2014-03, Paragraph (B)(4)(b)</i>	Agriculture, Energy and Commerce, Transportation and Infrastructure, and Natural Resources	CA) introduced H.R. 4039 with Representatives Sam Farr (D-CA) and Tony Cardenas (D-CA)
H.R. 3981	Issue – Storage Water Title – Accelerated Revenue, Repayment, and Surface Water Storage Enhancement Act: Would require the Secretary of the Interior to allow for the prepayment of repayment contracts between water users and the U.S.	01/31/14: Introduced and referred to House Natural Resources Committee 02/05/14: Subcommittee on Water and Power hearing	House Natural Resources Committee Chair Doc Hastings (R-WA) introduced the bill
H.R. 3980	Issue – Storage Water Infrastructure Title – Water Supply Permitting Coordination Act: Would authorize the Secretary of the Interior to coordinate federal and state permitting processes regarding the construction of new surface water storage projects that are located on lands falling under the jurisdiction of the Secretaries of Agriculture and Interior. The bill would also designate Reclamation as the lead agency for permit processing.	01/31/14: Introduced in House and referred to Natural Resources Committee 02/05/14: Subcommittee on Water and Power holds hearing on bill	House Subcommittee on Water and Power Chair Tom McClintock (R-CA) introduced the bill with Rep. Cynthia Lummis (R-WY)
H.R. 3964	Issue – California/Drought/Bay-Delta Title – San Joaquin Valley Emergency Water Delivery Act: Would preempt California law, notwithstanding Section 8 of the Reclamation Act, to increase water deliveries in	01/29/14: Introduced in House and referred to Natural Resources Committee	Rep. David Valadao (R-CA) introduced the bill with 16 co-sponsors, including

	California's drought-stricken Central Valley. According to the bill's sponsors, the bill and its preemption of state law is needed to address environmental regulations they believe have harmed the Central Valley's economy by curtailing water deliveries to protect the Delta smelt and other fish listed under the ESA. The bill is similar to H.R. 1837, which co-sponsor Devin Nunes (R-CA) introduced in 2011. That bill passed the House but stalled in the Senate due to opposition from Senators Dianne Feinstein (D-CA) and Barbara Boxer (D-CA). The California Department of Natural Resources also opposes the bill. <i>*WSWC Position #331 opposing preemption of state water law in federal legislation</i> <i>See summary of S. 2016/H.R. 4024 above</i>	02/05/14: House passes bill by a vote of 229-191 02/06/14: Bill received in the Senate and placed on the Legislative Calendar	California's entire Republican delegation to the House
S. 1971	Issue – Energy – Water Nexus Title - Nexus of Energy and Water for Sustainability Act of 2014 (NEWS Act): Would require the Director of the Office of Science and Technology Policy to establish either a Committee on Energy-Water Nexus for Sustainability or a Subcommittee on Energy-Water Nexus for Sustainability under the National Science and Technology Council, co-chaired by the Secretary of Energy (DOE) and Secretary of the Interior. Would require the Committee or Subcommittee to: (1) serve as a forum for developing common federal goals and plans on energy-water nexus issues; (2) promote coordination of the related activities of all federal departments and agencies; (3) coordinate and develop capabilities for data collection, categorization, and dissemination of data from and to other federal departments and agencies; and (4) engage in information exchange between federal departments and agencies. Would require the Director of the Office of Management and Budget (OMB), within 30 days after the President submits the budget of the U.S. Government each year, to provide Congress with a report that: (1) displays the budget proposed, including any interagency or intra-agency transfer, for each of the federal agencies that carry out energy-water nexus projects for the upcoming fiscal year; (2) identifies all federal and state expenditures since 2011 on energy-water nexus projects; and (3) lists all energy-water nexus projects to be	01/29/14: Introduced and referred to Energy and Natural Resources Committee	Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK) introduced the bill with Senator Ron Wyden (D-OR)

	undertaken in the upcoming fiscal year, with the federal portion of funds for those projects. **WGA Resolutions #13-09 and #2014-03, Paragraph 3(b)		
S. 1946	Issue – Dam Safety Title – None: Would amend the Reclamation Safety of Dams Act of 1978 to: (1) authorize “such sums as are necessary” to carry out the act, removing authorized spending ceilings; and (2) provide for the reimbursement of costs incurred in the modification of structures under such Act, the cause of which results from new hydrologic or seismic data or changes in state-of-the-art criteria deemed necessary for safety purposes.	01/16/14: Introduced and referred to Energy and Natural Resources Subcommittee on Water and Power 02/27/14: Subcommittee on Water and Power hearing	Senator Ron Wyden (D-OR) introduced the bill with Natural Resources Subcommittee on Water and Power Chair Brian Schatz (D-HI) and Senators Dianne Feinstein (D-CA) and Jeff Merkley (D-OR)
H.R. 3862	Issue – Wastewater Infrastructure/SRFs Title – Clean Water Affordability Act of 2014: Would amend the Clean Water Act (CWA) to update the Environmental Protection Agency’s (EPA) clean water affordability policy to assist municipalities that cannot meet water quality standards. It would require states to provide at least 15% of SRF capitalization grants to assist municipalities with less than 10,000 individuals that meet certain eligibility criteria. Municipalities would have an extended repayment loan period from the current limit of 20 years to 30 years, as well as extra time for their implementation schedules of up to 30 years. Moreover, the bill would require that states use between 20% and 30% of the capitalization grants they receive to “provide additional subsidization” to eligible municipalities. <i>*WSWC Position #330 and 08/24/12 letter to House leaders urging Congress to provide states with sufficient flexibility to manage the SRFs</i> **WGA Resolution #14-04, Paragraph(B)(2)(8)	01/14/14: Introduced and referred to Transportation and Infrastructure Committee	Rep. Robert Latta (R-OH) introduced the bill with three co-sponsors

S. 1818 H.R. 3716	Issue – Indian Water Rights Title – Pyramid Lake Paiute Tribe – Fish Springs Ranch Settlement Act: Would authorize and ratify a settlement agreement between the Pyramid Lake Paiute Tribe and the Fish Springs Ranch in Nevada. The agreement would resolve the tribe’s objections to a project the ranch is developing to import up to 8,000 acre-feet of groundwater per year to the Reno, Nevada area. As part of the settlement, the ranch would make a number of payments to the tribe for various purposes. While the agreement does not involve any federal funding, it does require Congressional authorization for the tribe to execute certain waivers and releases of claims.	12/12/13: S. 1818 introduced in the Senate and referred to Indian Affairs Committee 12/12/13: H.R. 3716 introduced in the House and referred to Natural Resources Committee 12/19/13: H.R. 3716 referred to Natural Resources Subcommittee on Water and Power	Senator Harry Reid (D-NV) introduced S. 3716 with Senator Dean Heller (R-NV) Rep. Mark Amodei (R-NV) introduced H.R. 3716 with Rep. Steven Horsford (D-NV)
S. 1800	Issue – Bureau of Reclamation Repair, Rehabilitation, and Maintenance Needs Title – Bureau of Reclamation Transparency Act: Directs the Secretary of the Interior to: (1) report to Congress on Reclamation efforts to manage all Reclamation facilities and to standardize and streamline data reporting and processes for purposes of managing such facilities, and (2) update such report biennially. The bill would also requires the reporting to include a detailed assessment of major repair and rehabilitation needs at all Reclamation projects and an itemized list of major repair and rehabilitation needs of individual facilities at each project.	12/11/13: Introduced and referred to Energy and Natural Resources Committee 02/27/14: Subcommittee on Water and Power hearing	Senator John Barrasso (R-WY) with co-sponsor and Subcommittee on Water and Power Chair Brian Schatz (D-HI)
H.R. 3582	Issue – Infrastructure/Clean Water SRF Title – Water Trust Fund Act of 2013: Would create a “Water Protection and Reinvestment Trust Fund” in the Treasury to provide a deficit-neutral source of revenue to help states replace, repair, and rehabilitate critical wastewater treatment facilities. Most of the funding would be distributed as grants and loans through the Clean Water SRF. Fifteen percent of the funds would be used to support an “innovative financing program”	11/21/13: Introduced and referred to the Committees on Energy and Commerce, Ways and Means, and Transportation and Infrastructure	Rep. Earl Blumenauer (D-OR) introduced the bill with seven co-sponsors

	similar to the Transportation Infrastructure Finance and Innovation Act. To help finance the Fund, the bill would create a voluntary labeling system in which businesses could chose to place a small label on their products indicating there are “contributing to America’s clean water.” For each unit that displayed a label, companies would contribute \$0.03 to the Water Trust Fund. The program would target water based beverages and products disposed of in wastewater, such as toilet paper and toothpaste.		
H.R. 3547	Issue – FY 2014 Appropriations Title – Consolidated Appropriations Act, 2014 (signed into law - P. L. 113-76): Will appropriate \$1.02T to operate the federal government through the remainder of FY 2014. Will also comply with the Bipartisan Budget Act of 2013, which Congress passed in December to establish limits for overall discretionary spending in FY 2014 and FY 2015. Under the legislation, the U.S. Army Corps of Engineers would receive \$5.5B, a \$487M increase. The bill would also prohibit the Corps from changing the definition of “fill material” as used in the CWA. Within the Department of the Interior, Reclamation would receive \$1.1B, an increase of \$99M above current levels. Bureau of Land Management Funds (BLM) funding would also rise about \$7M to \$1.1B. In contrast, Fish and Wildlife Service funding would fall \$32M to \$1.4B, and USGS would get around \$1B, about \$36M below 2013 levels. EPA would receive \$8.2B, a \$143M cut. The bill would fund the Clean Water SRF at \$1.45B, a \$73M increase. The Drinking Water SRF would receive \$907M, a \$46M increase. Among other limitations, the bill would: (1) require that 10% of Clean Water SRF funds must address green infrastructure, water or energy efficiency, or “other environmentally innovative activities;” (2) require that between 20% and 30% of the funds be used for principal forgiveness, negative interest loans, or grants subject to additional provisions; and (3) establish “Buy American” requirements for iron and steel. Within the Department of Agriculture, the Natural Resources Conservation Service (NRCS) would receive \$813M, a \$46M increase. The Forest Service would get \$5.5B.	11/20/13: Introduced in the House 12/02/13: House passes bill 376-5 12/12/13: Senate passes bill in the form of an amendment by unanimous consent 01/17/14: Signed into law after the resolution of differences between House and Senate versions of the bill	Senate Appropriations Committee Chair Barbara Mikulski (D-MD) and House Appropriations Chair Hal Rogers (R-KY)

	As for other WestFAST agencies, the bill would increase National Aeronautics and Space Administration (NASA) funding by \$120M to \$17.6B. DOE) energy programs would receive \$10.2B, a \$620M increase from 2013 levels. Similarly, the National Oceanic and Atmospheric Administration (NOAA) would get \$5.3B, \$310M above base FY 2013 levels, excluding supplemental funding. <i>*WSWC Position #330 and 08/24/12 letter to House leaders urging Congress to provide states with sufficient flexibility to manage the Clean Water and Drinking Water SRFs, and expressing concern about increasing restrictions on the SRFs</i> <i>**WGA Resolution #14-04, Paragraph(B) (2)(8)</i>		
S. 1677 H.R. 3449	Issue – Stormwater Title – Innovative Stormwater Infrastructure Act of 2013: Would require EPA to provide competitive grants to eligible higher education institutions and research institutions to establish and maintain between three and five “centers of excellence” that will develop research and other information to support “innovative stormwater control infrastructure.” Requires EPA to provide competitive grants to eligible entities that manage stormwater, water resources, or waste water resources to carry out various activities in support of innovative stormwater infrastructure. Requires EPA to carry out various activities intended to promote the use of innovative stormwater infrastructure.	11/12/13: S. 1677 introduced in Senate and referred to Environment and Public Works Committee 11/12/13: H.R. 3449 introduced in House and referred to Transportation and Infrastructure and Science, Space, and Technology Committees	Senator Tom Udall (D-NM) introduced S. 1677 Rep. Donna Edwards (D-MD) introduced H.R. 3449 with 26 co-sponsors
H.R. 3377	Issue – CWA Jurisdiction Title – Defense of Environmental Property Act of 2013: Would exclude the following from CWA jurisdiction: (1) waters that do not physically abut navigable waters and lack a continuous surface water connection to navigable waters; (2) man-made or natural structures or channels through which water flows intermittently or ephemerally, or that periodically provide drainage for rainfall; (3) wetlands without a continuous surface	10/29/13: Introduced 10/30/13: Referred to Transportation and Infrastructure Committee	Rep. Mac Thornberry (R-TX) introduced the bill with seven co-sponsors

	connection to bodies of water that are waters of the United States; and (4) and groundwater, which would be considered state water and could not be used to determine or assert federal jurisdiction over isolated or other waters. Additional provisions would prohibit the EPA and the Corps from: (1) using a “significant nexus” test to determine federal jurisdiction; (2) aggregating excluded wetlands or waters to determine or assert federal jurisdiction; and (3) promulgating rules or issuing guidance that expands or interprets the definition of navigable waters unless expressly authorized by Congress. Of further note, the bill would authorize states or individual property owners to obtain judicial review of jurisdictional determinations by EPA or the Corps that would affect their ability to plan the development and use of land and water resources within 30 days after such a determination. <i>**WSWC Position #330.5 and comment letters to EPA and the Corps dated 04/10/13, 11/05/13, 11/20/14, and 03/10/14</i> <i>**WGA Resolution #14-04, Paragraph (B)(1)(a)</i>		
S.1630 H.R. 3189	Issue – Water Rights/Department of Agriculture/Department of the Interior Title – Water Rights Protection Act: Would prohibit the Secretaries of Agriculture and Interior from conditioning permits, leases, or other land use agreements on the transfer of water rights to the U.S. It would also prohibit both Secretaries from requiring water users to apply for a water right in the name of the U.S. as a condition for permission to operate on federal land. The bill is intended, in part, to address attempts by the Forest Service to require ski area operators to transfer their water rights to the federal government as a condition of receiving permits to operate on federal land. H.R. 3189, as amended and passed by the House, also specifies that it will not: (1) interfere with existing or future Reclamation contracts entered into pursuant to federal	09/26/13: H.R. 3189 introduced in House and referred to Natural Resources Committee 10/31/13: S. 1630 introduced in Senate and referred to the Energy and Natural Resources Committee 03/04/14: House Natural Resources Committee reports H.R. 3189	Senator John Barrasso (R-WY) introduced S. 1630 with Senators Jeff Flake (R-AZ), Mike Crapo (R-ID), James Risch (R-ID), Dean Heller (R-NV), Orrin Hatch (R-UT), Mike Lee (R-UT), and Michael Enzi (R-WY)

	Reclamation law; (2) the implementation of the Endangered Species Act (ESA); (3) limit or expand existing federal reserved water rights on lands that the Secretaries of Agriculture or Interior administer; (4) limit or expand certain authorities under the Federal Power Act; and (5) limit or expand any existing reserved water right or treaty right of any federally recognized Indian tribe. The House also amended H.R. 3189's definition of "water rights" to include water rights for federally recognized Indian tribes. <i>* WGA/WSWC comment letter dated 11/14/13 stating that both organizations were reviewing the bill's (pre-amended version) implications beyond ski area permits but that the legislation appeared to support federal deference to state water law</i>	03/13/14: House passes H.R. 3189 by a vote 238-174	Rep. Scott Tipton (R-CO) introduces H.R. 3189 with 15 co-sponsors
S. 659 H.R. 3176	Issue – Drought/Bureau of Reclamation Title – None: Would reauthorize the Reclamation States Emergency Drought Relief Act through 2018 with \$15M remaining in spending authority. <i>*WSWC Position #347 and 04/30/13 written testimony submitted to the Senate Energy and Natural Resources Committee on support of S. 659</i>	09/25/13: H.R. 3176 introduced in House and referred to Natural Resources Committee 03/22/13: S. 659 introduced in Senate and referred to Energy and Natural Resources Committee 04/16/13: Senate Energy and Natural Resources Subcommittee hearing on S. 659 07/15/13: Senate Energy and Natural Resources Committee reports S. 659 10/10/13: House Subcommittee on Water	Senate Energy and Natural Resources Committee Chair Ron Wyden (D-OR) introduced S. 659 Natural Resources Committee Ranking Member Pete DeFazio (D-OR) introduced H.R. 3176 with 10 co-sponsors

		and Power hearing on H.R. 3176	
H.J. Res. 59	Issue – FY 2014 and FY 2015 Budget Title – Bipartisan Budget Act (signed into law - P.L. 113-67): Caps overall discretionary spending at \$1.012T for FY 2014 and at \$1.014T for FY 2015, representing an increase of around \$45B over last year and eliminating the threat of a government shutdown for the next two years. The bill also “turns off” the next round of sequestration cuts, providing about \$63B in “sequester relief” over the next two years. Overall, the bill is expected to lower the deficit by \$23B over the long term.	09/10/13: Introduced in House 09/20/13: House passes bill by a vote of 230-189 09/27/14: Senate passes bill in the form of an amendment by a vote of 54-44 12/26/14: Signed into law after various negotiations to resolve differences	Senate Budget Committee Chair Patty Murray (D-WA) and House Budget Committee Chair Paul Ryan (R-WI)
H.R. 2850	Issue – EPA/Hydraulic Fracturing Title – EPA Hydraulic Fracturing Study Improvement Act: Would require EPA to undertake certain procedures in carrying out its study of the potential impacts of hydraulic fracturing on drinking water resources. Among other things, the bill would require EPA to “...ensure that identification of the possible impacts of hydraulic fracturing on drinking water resources...be accompanied by objective estimates of the probability, uncertainty, and consequence of each identified impact, taking into account the risk management practices of States and industry. Estimates or descriptions of probability, uncertainty, and consequence “shall be as quantitative as possible given the validity, accuracy, precision, and other quality attributes of the underlying data and analyses, but no more quantitative than the data and analyses can support.” <i>*WSWC Position #353</i> <i>**WGA Resolution #13-09(B)(3) and related letter to Secretary of the Interior Sally</i>	07/30/13: Introduced and referred to Science, Space and Technology Committee 08/01/13: Committee reports amended version of bill by voice vote 10/23/14: Bill placed on Union Calendar	Rep. Lamar Smith (R-TX), Chair of the House Science, Space and Technology Committee introduced the bill along with co-sponsors Reps. Chris Stewart (R-UT) and Cynthia Lummis (R-WY)

	<i>Jewell dated 08/23/13, available at: http://westgov.org/policies/doc_download/1754-govs-letter-to-jewell-on-fracking</i>		
H.R. 2728	Issue – BLM/Hydraulic Fracturing Title – Protecting States’ Rights to Promote American Energy: Would amend the Mineral Leasing Act to prohibit the Secretary the Interior from enforcing any federal regulation, guidance, or permit requirement regarding hydraulic fracturing in any state that has hydraulic fracturing regulations. The bill also requires Interior to recognize and defer to state regulations for all activities related to hydraulic fracturing on federal land regardless of whether those rules are duplicative, more or less restrictive, have different requirements, or do not meet federal guidelines. These provisions respond, in part, to proposed regulations the BLM has issued regarding hydraulic fracturing on federal lands. Additionally, the bill would institute a number of requirements regarding EPA’s development of an ongoing study of the potential impacts of hydraulic fracturing on drinking water supplies.	07/18/13: Introduced and referred to the Natural Resources Committee 11/12/13: Reported out of committee 11/20/13: House passes bill 235-187	Rep. Bill Flores (R-TX) and 19 co-sponsors
H.R. 2642	Issue – Farm Bill Title – Agricultural Act of 2014 (signed into law - P. L. 113-79): Reauthorizes agriculture and nutrition programs over the next five years. The bill will cost an estimated \$956B over the next ten years, with about 80% of the funding going towards the federal food stamp program, which will receive an \$8B cut. The other 20% would support conservation programs, energy initiatives, agricultural subsidies, and other efforts. Of this amount, the bill will provide \$57B for conservation programs and consolidate 23 conservation programs into 13, cutting \$6B in spending. It will also spend \$881M in mandatory funding for the Department of Agriculture’s renewable energy and biofuels programs. To address wildfires, the bill will streamline the approval of forest treatment projects and allow for increased collaboration between the Forest Service and the Bureau of Land Management with state foresters on restoration projects. It will also authorize the Forest	07/10/13: Introduced in House 07/11/13: House passes bill 216-208 07/18/13: Senate passes a substitute amendment consisting of the language of its Farm Bill (S. 954) by unanimous consent 01/27/14: Conference report filed 01/29/14: Conference	House Agriculture Committee Chair Frank Lucas (R-OK)

	Service to lease up to five new air tankers. In addition, the bill includes language from S. 971, which Senator Ron Wyden (D-OR) introduced last year to codify findings from the U.S. Supreme Court and the EPA that stormwater runoff from forest roads is not a point source of pollution requiring National Pollutant Discharge Elimination System (NPDES) permits under the CWA. The bill excluded language from a prior version of H.R. 2642 that said pesticide applications do not require NPDES permits. <i>**WGA Resolutions #13-07; #14-04(B)(3)(a); and #14-04(B)(2)(d), and a letter dated 01/21/14 supporting Farm Bill legislation, available at:</i> http://westgov.org/policies/doc_download/1785-farm-bill-letter	report agreed to in House by a vote of 251-166 02/04/14: Conference report agreed to in Senate by a vote of 68-32 02/07/14: Signed into law	
H.R. 2431	Issue – National Integrated Drought Information System (NIDIS) Title – National Integrated Drought Information System Reauthorization Act of 2013 (signed into law - P.L. 113-86): Will reauthorize NIDIS through 2018 and authorize \$13.5M for each of fiscal years 2015 through 2018. The Senate passed its own NIDIS bill (S. 376), which was similar to H.R. 2431, but would have authorized \$12M per year for the program. <i>*WSWC Position #346</i> <i>**WGA Resolution #2014-03, Paragraph B(4)(d); WGA support letters dated 02/07/14, 07/23/13, 05/09/13, and related documents, available at:</i> http://westgov.org/search?searchword=NIDIS&searchphrase=all	06/19/13: Introduced in and referred to Science, Space, and Technology Committee 02/06/14: Reported out of committee 02/10/14: House passes bill by a vote of 365-21 02/25/14: Senate passes bill by unanimous consent 03/06/14: Signed into law	Rep. Ralph Hall (R-TX) introduced the bill along with Science, Space, and Technology Committee Chair Lamar Smith (R-TX) and Rep. Ben Ray Lujan (D-NM)

S. 2010 H.R. 1963	Issue Hydropower Title: Bureau of Reclamation Conduit Hydropower Development Equity and Jobs Act: Would amend the Water Conservation and Utilization Act (WCUA) to authorize small, non-federal hydropower development at facilities constructed under the WCUA. The bill is similar to legislation (H.R. 678) Congress passed last year to facilitate small hydropower development at other federal projects authorized under Reclamation law. <i>*WSWC Position #351</i> <i>**WGA Resolutions #2014-03(B)(2)(c) and 04/22/13 WGA letter supporting S. 306/H.R. 678, available at: http://westgov.org/policies/doc_download/1707-wga-wswc-hydropower-letter-4-22-13.</i>	05/14/13: H.R. 1963 introduced and referred to House Natural Resources Subcommittee on Water and Power 05/23/13: House Subcommittee on Water and Power hearing on H.R. 1963 10/22/13: House Natural Resources Committee reports H.R. 1963 12/03/13: House passes H.R. 1963 by voice vote 12/09/13: H.R. 1963 referred to Senate Energy and Natural Resources Committee 02/10/14: S. 2010 introduced in Senate and referred to Energy and Natural Resources Committee 02/27/14: Senate Subcommittee on Water and Power hearing	Senator John Barrasso (R-WY) introduced S. 2010 Rep. Steve Daines (R-MT) introduced H.R. 1963 with co-sponsors Reps. Doug LaMalfa (R-CA), Scott Tipton (R-CO), Kevin Cramer (R-ND), and Cynthia Lummis (R-WY)
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S. 715	Issue – Rural Water Projects, Indian Water Rights Settlements, and Indian Irrigation Projects Title – The Authorized Rural Water Projects Completion Act: Would dedicate \$150M in annual funding from the Reclamation Fund through 2035 for water infrastructure projects. In particular, the bill would provide \$80M per year from the Reclamation Fund for an account to support authorized rural water projects. In reporting the bill, the Natural Resources Committee approved two additional amendments. The first by Senator John Barrasso (R-WY) would create an account that would provide \$35M per year for the repair, replacement, and maintenance of certain Indian irrigation projects. The second amendment by Senator Ron Wyden (D-OR) would create an account to provide \$35M per year to complete the construction, design, and planning for water projects that are part of authorized Indian water rights settlements, and to resolve tribal claims against the U.S. relating to the federal use of tribal land for hydropower generation. The amended version of the bill specifies that the Secretary of the Interior “may not use less” than the \$80M and \$35M per year that would accrue to the rural water project and Indian water rights settlement accounts in carrying out their stated purposes. The bill is similar to legislation (S. 3385) that Senator Max Baucus (D-MT) introduced in the 112th Congress. <i>*WSWC Positions #333, #336, and #343</i> <i>**WGA Resolution 2014-03 Paragraphs (2)(a) and (3)(e)</i> <i>The amended version of S. 715 is not available on www.thomas.gov. A hard copy of the amended version is attached to this summary.</i>	04/11/13: Introduced and referred to Energy and Natural Resources Committee 04/16/13: Committee hearings held 11/21/13: Bill reported out of committee by voice vote	Senator Max Baucus (D-MT) introduced the bill with nine co-sponsors, including western Senators Jon Tester (D-MT), John Hoeven (R-ND), Heidi Heitkamp (D-ND), Tom Udall (D-NM), Martin Heinrich (D-NM), and Tim Johnson (D-SD) Senators John Barrasso (R-WY) and Ron Wyden (D-OR) sponsored amendments to the bill. <i>Tester has since indicated that he will sponsor the bill following Baucus’ departure to become the U.S. Ambassador to China</i>
S. 1853 H.R. 1422	Issue – EPA Science Advisory Board (SAB) Title – EPA SAB Reform Act: Among other things, the bill would: (1) require at least	04/06/13: H.R. 1422 introduced in House and referred to Committee	Senator John Boozman (R-AR) introduced S. 1853

	10% of the SAB to be from state, local, or tribal governments; (2) enact reforms intended to strengthen public participation and comment opportunities; (3) allow SAB members to be affiliated with organizations that have an interest in the regulations, so long as the interest is fully disclosed; (4) enable the SAB to review EPA risk or hazard assessments, which the agency uses to justify regulations; and (5) make public the lists of nominees to the SAB while also requiring nominees to submit public disclosure reports. The bill is intended to address concerns regarding the SAB, which supplies the scientific assessments that underlie EPA regulations. Some notable concerns include transparency, potential conflicts of interest, and a lack of state and industry experts on the SAB panels assigned to review scientific reports and regulations. In July 2013, the House Science Committee reported a similar bill (H.R. 1422) that Rep. Chris Stewart (R-UT) introduced.	on Science, Space, and Technology 07/22/13: Science, Space, and Technology Committee reports H.R. 1422 12/18/13: S. 1853 introduced in Senate and referred to Environment and Public Works Committee	with six co-sponsors, including western Senators Mike Crapo (R-ID) and Deb Fischer (R-NE), and Environment and Public Works Committee Chair David Vitter (R-LA) Rep. Chris Stewart (R-UT) introduced H.R. 1422 with 21 cosponsors
S. 601 H.R. 3080	Issue – U.S. Army Corps of Engineers H.R. 3080 Title – Water Resources and Reform and Development Act (WRDA) of 2013 – Notable provisions include: <u>Dams and Levees (Title I):</u> • Sec. 121 - amend the National Dam Safety Program Act to include development of a dam safety education and public awareness initiative, among other things. • Sec. 123 - authorize the Corps to provide technical assistance to states (at their request) to: (1) encourage state levee safety programs; (2) assist the states in establishing and carrying out a state levee safety program; and (3) improve an existing state levee program. • Sec. 123 – require the Corps, in consultation with the states and non-federal interests, to establish federal levee safety guidelines relating to the Corps’ efforts authorized under this section. The guidelines will incorporate state and local activities to “the maximum extent practicable.” • Sec. 124 - require a review of the Corps’ vegetation management guidelines for levees.	03/18/13: S. 601 introduced and referred to Senate Environment and Public Works Committee 05/15/13: Senate passes S. 601 by a vote of 83-14 09/11/13: H.R. 3080 introduced 10/23/13: House passes H.R. 3080 417-3 10/31/13: Senate passes H.R. 3080 in the form of	Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) S. 601 introduced S. 601 with co-sponsor Ranking Member David Vitter (R-LA) House Transportation and Infrastructure Committee Chair Rep. Bill Shuster (R-PA) introduced H.R. 3080 with

	<u>Assessment of Water Supply in Arid Regions/Drought (Title I, Sec. 130):</u> • Require the Corps to assess the management practices, priorities, and authorized purposes of Corps reservoirs in arid regions to determine the effects of such efforts on water supply during periods of drought. • Submit a report to Congress on the results of assessment within one year of the enactment of the bill. <u>Project Authorizations (Title IV):</u> • Sec. 401 - authorizes final feasibility studies for 23 water resources projects that have an estimated federal cost of almost \$8B – four projects in the West (two each for CA and TX). • Sec. 303 - automatically de-authorize projects authorized under the bill after seven years if construction has not begun during that time. • Note: the de-authorization efforts in Title III will offset the funding for these projects. S. 601 Title – Water Infrastructure Development Act of 2013: Notable provisions include: <u>Project Authorization:</u> Title I would authorize projects with completed Chief of Engineer reports that the Assistant Secretary of the Army for Civil Works has referred to Congress by the date of the bill’s enactment. This currently represents around 18 projects. <u>Surplus Water:</u> Section 2064 states: “No fee for surplus water shall be charged under a contract for surplus water if the contract is for surplus water stored on the Missouri River.” <u>Upper Missouri Basin Flood and Drought Monitoring:</u> Section 5008 would create a flood and drought monitoring program in the Upper Missouri River Basin to operate U.S. Geological Survey (USGS) streamgages and restore, maintain, and provide soil moisture and snowpack monitoring, including NRCS SNOTEL sites. The Corps would establish the program in coordination with NOAA, NRCS, USGS, and Reclamation. The bill would authorize \$11.25M for the program.	an amendment that consists of its WRDA bill (S. 601) 10/31/13: H.R. 3080 sent to conference committee	Committee Ranking Member Nick Rahall (D-WV), Subcommittee on Water Resources and Environment Chair Bob Gibbs (R-OH) and Subcommittee Ranking Member Timothy Bishop (D-NY)
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	<u>Levee Safety:</u> Title VI would create a national levee safety program intended to provide national leadership and encourage establishment of state and tribal levee safety programs. For the purposes of the program, it would be focused on “canal structures,” which it defines in part as “...an integral part of a flood risk reduction system that protects the leveed area from flood waters associated with hurricanes, precipitation events, seasonal high water and other weather-related events.” Title VI includes a number of exclusions that specify, among other things, that the term “levee” does not include a canal regulated by a federal or state agency to ensure that applicable federal safety criteria are met or a levee or a canal structure that is: (1) not part of a federal flood damage reduction system; (2) not recognized under the National Flood Insurance Program as providing protection from the 1%-annual-chance-or-greater flood; (3) not greater than three feet high; (4) has a leveed area with a population of less than 50 individuals; and (5) has a leveed area less than 1,000 acres. The bill would authorize \$300M for FY 2014 through FY 2023 for grants to state and tribal levee safety programs and another \$300M for the same time period for levee rehabilitation assistance grants. <u>Financing:</u> Title X would establish a five-year WIFIA pilot program similar to other proposals (e.g., S. 335 and H.R. 1877) within the Corps and EPA. Modeled on the Transportation Infrastructure Finance and Innovation Authority program, WIFIA would provide loans and loan guarantees for flood control, water supply, and waste water projects. Among other things, the program would establish additional opportunities for financing water resources projects “...that complement but do not replace or reduce existing federal infrastructure financing tools such as the [Clean Water and Drinking Water SRFs].” Buy American requirements would also apply to the program. The bill would authorize \$50M for each of fiscal years 2014 through 2018 for WIFIA. <u>Extreme Weather:</u> Title XI would require the Corps to develop a study and recommendations relating to options for reducing risk to human life and property from extreme weather events, such as hurricanes, coastal storms, and inland flooding. <i>*WSWC Position #329 (supporting development of a national levee safety program but stating that such a program should not apply to water supply canals)</i>		
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	**WGA Resolution #2014-03 (B)(2)(b,) and comment letters dated 05/9/13 and 10/18/13, available at: http://westgov.org/letters-testimony-30 <i>See Litigation and Legislative Update prepared for the WSWC's October 2013 meetings in South Dakota for a more detailed description of the WRDA bills</i>		
S. 802 H.R. 935	Issue – CWA/Federal Insecticide Fungicide and Rodenticide Act (FIFRA)/Pesticides Title – Sensible Environmental Protection Act of 2013: Would amend the CWA and FIFRA to clarify that pesticide applications made in compliance with FIFRA do not need NPDES permits. The bill would also overturn the 6th Circuit Court of Appeals decision in <i>National Cotton Council v. EPA</i>, 553 F.3d 927 (6th Cir. 2009), which held that pesticide applications require NPDES permits. The bills are similar to S. 175, which would only amend FIFRA to state that “notwithstanding any other law, no permit shall be required” to use pesticides registered under FIFRA. <i>* WSWC Position #328 and 12/20/11 WSWC letter to Senate leaders urging them to hold a vote on prior legislation (H.R. 872) that would have amended the CWA and FIFRA to clarify that pesticides applications do not require NPDES permits</i> ** WGA Resolution #14-04(B)(2)(d)	03/04 /13: H.R. 935 introduced in House and referred to Agriculture and Natural Resources Committees 04/24/13: S. 802 introduced in Senate and referred to Environment and Public Works Committee 10/29/13: House Transportation Committee holds mark up on H.R. 935 and reports bill by voice vote 03/13/14: House Agriculture Committee hold mark up on H.R. 935 and reports bill by voice vote	Sen. Kay Hagan (D-NC) introduced S. 802 with 13 co-sponsors, including Environment and Public Works Committee Ranking Member David Vitter (R-LA) and western Senators Mike Crapo (R-ID), James Risch (R-ID), Deb Fischer (R-NE), Heidi Heitkamp (D-ND), and James Inhofe (R-OK) House Transportation and Infrastructure Subcommittee on Water Resources and Environment Chair Bob Gibbs (R-OH) introduced H.R. 935 with 59co-sponsors

NOTABLE LITIGATION

Case Name	Issue – EPA/Wastewater Treatment
<i>Iowa League of Cities v. EPA</i> , 711 F.3d 844 (8 th Cir. 2013)	This case focuses on on two letters EPA sent to Senator Chuck Grassley (R-IA) in response to questions he raised over the circumstances in which “mixing zones” and “blending” were permitted for wastewater treatment. Concerned with EPA’s responses, the Iowa League of Cities sued EPA, arguing that the letters created new regulatory requirements that required compliance with the Administrative Procedure Act’s (APA) notice and comment procedures. The 8th Circuit agreed with the Iowa League of Cities and found that EPA violated the APA, reasoning that “...the letters can be considered ‘promulgations’ for the purposes of establishing our jurisdiction...because they have a binding effect on regulated entities.” In reaching this decision, the court also relied on the D.C. Circuit Court of Appeals’ decision in <i>Appalachian Power Co. v. EPA</i>, 208 F.3d 1015 (D.C. Cir. 2000), which found that: “If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’”
Court U.S. Court of Appeals for the 8th Circuit	
Relevant Dates	
03/25/13: Court issues opinion 07/10/13: Court denies request from EPA to rehear decision 10/21/13: EPS confirms that it will not appeal decision 11/26/13: City and county groups urge EPA to apply 8th Circuit decision nationwide	Republicans have cited the case as an example of transparency problems within EPA. However, EPA says the letters only explained its interpretations of existing regulations and policies, and that the decision could have a chilling effect on its ability to communicate with regulated entities in the future. EPA filed a request asking the 8th Circuit to review its decision, which the court denied. However, EPA subsequently decided in October 2013 not to appeal the decision to the U.S. Supreme Court, thereby allowing the decision to stand. Some EPA officials have since commented publically that the decision is only binding in the 8th Circuit and that EPA will apply the policies elsewhere in the country on a case by case basis. In response, the U.S. Conference of Mayors, National League of Cities, National Association of Counties, International Municipal Lawyers and Association, and the National Association of Clean Water Agencies wrote the EPA in November, opining that there is no legal basis to assert that the 8th Circuit’s decision does not apply nationwide. In support of this assertion, the groups argue that Congress granted the circuit courts original jurisdiction to review the NPDES regulations at issue under Section 509 of the CWA “to ensure nationwide uniformity and that EPA regulations provide for only one circuit to render an opinion on a petition to review.” To read the letter, see: http://www.eenews.net/assets/2013/12/02/document_gw_02.pdf.

Case Name	Issue – Corps/EPA/Section 404
<i>Mingo Logan v. EPA</i> , 714 F.3d 608 (D.C. Cir. 2013)	This case focuses on a permit the Corps issued to Mingo Logan, a West Virginia mining company, under Section 404 of the CWA. Although EPA did not exercise its “veto” authority when the Corps issued the permit, it later withdrew the specification of a portion of the total discharge area authorized under the permit. A federal district court found that EPA lacked authority under the CWA to retroactively withdraw a site’s specification, but the D.C. Circuit Court of Appeals overturned that decision in April, finding that the language of Section 404(c) in the CWA “...expressly empowers [EPA] to prohibit, restrict or withdraw the specification ‘whenever’ [it] makes a determination that the statutory ‘unacceptable adverse effect’ will result.”
Courts D.C. Circuit Court of Appeals U.S. Supreme Court	On December 16, West Virginia and 26 other states filed an amicus brief with the U.S. Supreme Court, urging it to review the D.C. Circuit Court of Appeals’ decision. Western states joining the brief include Alaska, Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming. The brief says the decision “fundamentally alters” the regulation of water pollution by threatening “...every ongoing and future public construction project that requires a 404 permit.” In particular, it argues that allowing EPA to veto a 404 permit at any time eliminates certainty for states and has a chilling effect on new public works projects, especially large and costly transportation projects, hydroelectric plants, and reservoirs.
Relevant Dates 03/12/12: U.S. District Court rules that EPA cannot retroactively invalidate a discharge permit 04/23/13: D.C. Circuit issues decision, reversing the district court’s decision 12/16/13: West Virginia and 26 other states file an amicus brief urging review of the D.C. Circuit’s decision	Secondly, the brief says the decision undermines the Corps’ role under Section 404, stating that the Corps “...has long exercised the authority to revoke or modify section 404 permits once they are issued.... EPA has authority to review and disagree with certain Corps actions during the permit process, but that authority ceases once the Corps issues the final permit.” The brief also criticizes the D.C. Circuit’s textual analysis of the CWA, citing Court precedent that “...statutory language ‘cannot be construed in a vacuum,’ but rather ‘must be read in [its] context with a view to [its] place in the overall statutory scheme.’ That scheme places the Corps - not EPA - in the primary role.” Lastly, the brief says the decision gives EPA “...a potential end run around the States’ [Section] 303 and 402 authority. Without any temporal limit on EPA’s...veto power, a new administration could use that power to effectively override settled water quality standards and [state-issued 402] permits.” In support of this argument, the brief notes that EPA raised but later withdrew concerns during the pendency of Mingo Logan’s 402 permit application, thereby allowing West Virginia to issue the permit. When the administration changed, the brief said “...EPA reasserted essentially the same objections in the form of its present veto of Mingo Logan’s 404 permit. This is a patent effort to circumvent West Virginia’s primacy under sections 303 and 402.... Though the agency’s window under the [CWA] to object to West Virginia’s water quality determinations and 402 permits has long closed, it is now trying to backdoor those objections through the 404 process.” To read the brief, see: http://governor.alabama.gov/assets/2013/12/13-599-Brief-of-Amici-

	<u>West-Virginia-and-26-Other-States.pdf</u>. The Supreme Court has not yet determined whether it will review the D.C. Circuit’s decision.
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Case Names	Issue – EPA’s Water Transfers Rule
<i>Friends of the Everglades v. EPA</i>, 699 F.3d 1280 (11th Cir. 2009) <i>New York, et al. v. EPA, et al.</i>, (S.D.N.Y.) (08-CV-8430)	In 2008, EPA promulgated its “Water Transfers Rule,” clarifying that certain water transfers do not require NPDES permits under the CWA. When EPA finalized the rule in 2008, opponents immediately challenged it in the Southern U.S. District Court of New York (SDNY) and the Southern U.S. District Court of Florida (SDFL). However, in issuing the rule, EPA opined that judicial review of the rule could only take place before the U.S. Circuit Courts of Appeal, and not the federal district courts. Given this position, opponents filed protective challenges in multiple circuits, which were consolidated in the 11th Circuit. The district court challenges were then stayed pending the 11th Circuit’s decision. The 11th Circuit subsequently stayed the consolidated rules challenge case pending the outcome of a related case that was also before the court, commonly known as the “Lake Okeechobee Case,” 570 F.3d 1210 (11th Cir. 2009). That case upheld the rule in 2009 as a reasonable interpretation of the CWA entitled to deference. The U.S. Supreme Court subsequently denied certiorari in 2010, allowing the consolidated rules challenge to proceed before the 11th Circuit.
Courts	
11th Circuit Court of Appeals Southern U.S. District Court of New York (SDNY)	In August 2012, a three-judge panel of the 11th Circuit heard oral argument on the consolidated petitions. The panel addressed two arguments raised by the petitioners: (1) whether the Courts of Appeal have jurisdiction under the CWA to review the rule; and (2) whether the rule is valid. On October 26, 2012, the 11th Circuit held that it did not have original subject matter jurisdiction to hear the consolidated challenge under the plain language of the CWA. As a result, the 11th Circuit dismissed the consolidated rules challenge without addressing the rule’s validity. The U.S. Solicitor asked the U.S. Supreme Court to review the decision, a request the Court denied on October 15, 2014.
Relevant Dates	
03/12/12: Challenges to EPA’s rule filed 06/04/09: 11th Circuit issues “Lake Okeechobee” decision, upholding EPA’s water transfers rule 11/29/10: U.S. Supreme Court denies certiorari for the 11th	The 11th Circuit’s dismissal of the consolidated rules challenge and the Court’s refusal to review that decision have allowed the challenges pending before the SDNY and the SDFL to proceed. However, petitioners subsequently dismissed their challenge in SDFL, presumably given the precedent favoring the rule that the 11th Circuit’s set forth in its “Lake Okeechobee” decision. Given the above developments, the SDNY action is now the only action left standing. As the SDNY action as proceeded, the court has approved requests by the following intervenors to join:

Circuit’s “Lake Okeechobee” decision, allowing consolidated rules challenge to proceed in the 11th Circuit 10/26/12: 11th Circuit finds that it does not have original jurisdiction to hear the consolidated rules challenge and dismisses the action 11/14/12: Petitioners move to dismiss their challenge in SDFL, leaving only the challenge before the SDNY 07/28/13: EPA files petition for certiorari to the U.S. Supreme Court regarding 11th Circuit dismissal of the consolidated rule challenge due 10/15/14: U.S. Supreme court denies certiorari for the 11th Circuit’s dismissal of the consolidated rules challenge 12/13: Oral arguments held in SDNY litigation	• A coalition of western states led by Colorado and New Mexico, which also includes Alaska, the Arizona Department of Water Resources, Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming; • A coalition of over 20 western water providers; • The South Florida Water Management District (SFWMD); and • New York City. On June 7, the intervenors filed coordinated briefs in support of their motion for summary judgment and in response to plaintiffs’ motions for summary judgment. The arguments for each brief are as follows: • EPA argued that the rule is a reasonable interpretation the CWA, and is therefore entitled to deference; • The western states argued that the rule is consistent with the “clear statement rule,” which requires a clear statement from Congress to authorize federal intrusion into a traditional state authority, such as water use; • The western water providers argued that vacating the rule would supersede or abrogate individual water rights because NPDES requirements would be prohibitively expensive, technically impractical, and compel curtailment of water transfers; • SFWMD argued that the rule is not only reasonable, but the singularly permissible statutory interpretation; and • New York City argued that the rule must be upheld under <i>Chevron</i> based on the language of the CWA that relates to NPDES jurisdiction and other provisions. The SDNY held oral arguments in December 2013. Reports of the proceedings indicate that the court appeared skeptical that it has latitude to deviate from the 2nd Circuit’s holding in <i>Catskill Mtns Chap of Trout Unltd v. NYC</i>, 273 F.3d 481 (Catskills I) and 451 F.3d 77 (Catskills II), which held that the CWA unambiguously requires NPDES permits for water transfers. The court also appeared to be skeptical that the lack of a clear statement from Congress that it intended to intrude on state authority over water allocations does not mean that the NPDES program cannot reach the water quality aspects of water transfers. A decision is expected at some point in 2014. Any decision will likely be appealed to the 2nd Circuit, which is likely to strike down the rule given its prior holdings in <i>Catskills I</i> and <i>Catskills II</i>. Such a ruling would create a split between the circuits given the 11th Circuit’s “Lake Okeechobee” decision, thereby setting up a possible appeal to the U.S. Supreme Court. * WSWC Position #342 ** WGA Resolution #14-04, Paragraph B(2)(c) <i>Special thanks to Peter Nichols, Special Asst. Attorney General for Colorado and New Mexico, who provided much of the information used in the summary of this litigation.</i>
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Case Names	Issue – EPA’s Water Transfers Rule
<i>ONRC Action v. Bureau of Reclamation</i>, No. 1-97-CV-03090-CL, 2012 U.S. Dist. LEXIS 114295 (D. Or., Aug. 14, 2012)	This case stems from claims an environmental organization, ONRC Action, filed against Reclamation, arguing that the agency should obtain an NPDES permit to operate a drain in the federal Klamath Project that transfers water between the Klamath River and Lower Klamath Lake near the border between Oregon and California. The U.S. District Court for the District of Oregon upheld the rule, reasoning that the CWA is ambiguous and that the rule is entitled to deference. The district court also found the 11th Circuit’s reasoning in its <i>Lake Okeechobee</i> decision to be persuasive. As discussed previously in the summary of the <i>Friends of the Everglades</i> litigation above, that decision also upheld the rule.
Courts	This case had been stayed due to the health of ONRC’s lead counsel, the litigation in the SDNY over the rule, and the certiorari petitions that had been filed in response to the 11th Circuit’s decisions regarding the rule. The stay has since been lifted and briefs were due in early 2014. The proceedings mark the first time the 9th Circuit will review the validity of the transfers rule, although the court did issue a decision in 2003 before EPA promulgated the rule that rejected the “unitary waters” theory upon which the rule is based. Some legal experts have opined that the 9th Circuit’s decision in this case could influence the challenge to the rule currently pending before the SDNY. See the above <i>Friends of the Everglades</i> summary for more information on the proceedings in that action. On March 21, twelve western states filed an amicus brief with the 9th Circuit, asking the court to affirm the district court’s ruling. While the brief agrees with the outcome of the ruling, the states’ legal position is not predicated upon deference to the rule. Instead, similar to the western states’ arguments in the SDNY action, the brief argues that the rule “is the only permissible interpretation” of the CWA because the act lacks a “clear and manifest” statement from Congress to authorize federal infringement into a traditional state authority – i.e., the states’ authority to allocate water within their borders. Alaska, Arizona, Colorado, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming joined the brief. * WSWC Position #342 ** WGA Resolution #14-04, Paragraph B(2)(c) <i>Special thanks to Peter Nichols, Special Asst. Attorney General for Colorado and New Mexico, who provided much of the information used in the summary of this litigation.</i>
U.S. District Court for the District of Oregon 9th Circuit Court of Appeals	
Relevant Dates	
08/14/12: District court issues its decision upholding the rule 03/21/14: Twelve western states file amicus brief with 9th Circuit opposing NPDES permits for transfers	

Case Names	Issue – CAFOs and NPDES Permits
<i>Alt v. EPA (now Alt v. Chesapeake Bay Foundation)</i>, No. 2:12 CV-42, 2013 U.S. Dist. LEXIS 152263 (N.D. W. Va. Oct. 23, 2013)	In December, EPA and several environmental groups filed an appeal with the 4th Circuit Court of Appeals, asking it to review a federal district court’s order in <i>Alt v. EPA</i>. The lower court held that agricultural waste from a West Virginia Concentrated Animal Feeding Operation (CAFO) that settled in the CAFO’s farmyard and washed into a nearby stream was not a point source of pollution requiring an NPDES permit. The decision relied on the CWA’s agricultural stormwater exemption, which excludes “agricultural stormwater discharges and return flows” as a point source.
Courts	The case focuses on a challenge that Lois Alt, a poultry farmer, filed in response to a compliance order she received from EPA, informing her that she was in violation of the CWA because she had not obtained an NPDES permit for the runoff. Although Alt had implemented best practices and kept her growing operations and her waste, manure, and material storage under a roof to reduce the amount of waste exposed to precipitation, ventilation fans from her confinement house had blown dust comprised of littler, dander, and feathers into her farmyard. Particles of waste from her confinement houses had also been tracked into or spilled in her farmyard.
U.S. District Court for the Northern District of West Virginia 4th Circuit Court of Appeals	
Relevant Dates	EPA argued that the exception only applies in situations where agricultural waste is applied pursuant to nutrient management practices, and does not apply to waste that inadvertently accumulates during livestock operations. EPA also argued that the areas where the waste had accumulated were “production areas,” defined under federal rules as the animal confinement, manure storage, raw materials storage, and waste containment areas of an animal feeding operation, which it said were ineligible for the exemption. The district court disagreed, stating: “Common sense and plain English lead to the inescapable conclusion that Ms. Alt’s poultry operation is ‘agricultural’ in nature and that the precipitation-caused runoff from her farmland is ‘stormwater.’” The court also found that the farmyard where the waste was located was not a “production area” because it did not include the animal confinement, manure storage, raw materials storage, and waste containment areas. Additionally, the court rejected EPA’s arguments that the discharges were industrial rather than agricultural and must have an agricultural purpose to trigger the exemption, stating in part: “The only requirement is that the exempt discharges be agriculture related. It is clear that the incidental manure and litter are related to the raising of poultry and are therefore related to agriculture.” See: https://ecf.wvnd.uscourts.gov/cgi-bin/show_public_doc?2012cv0042-144. For more on the case, see: http://www.fb.org/index.php?action=legal.recentDocket&id=85.
10/23/13: District court issues decision 12/23/13: EPA and environmental groups appeal district court order 05/13/14: oral arguments scheduled before 4th Circuit	

Case Names	Issue – EPA/Total Daily Maximum Loads (TMDLs) - Chesapeake Bay
<i>American Farm Bureau Federation v. EPA</i>, No. 1:11-CV-0067, 2013 U.S. Dist. LEXIS 131075 (M.D. Pa., Sept. 13, 2013)	This case stems from EPA’s TMDL for the Chesapeake Bay, which it developed with Delaware, the District of Columbia, Maryland, New York, Pennsylvania, Virginia, and West Virginia to set limits for non-point sources of nutrient and sediment pollution in the Bay.
Courts	The American Farm Bureau Federation and other agricultural groups challenged the TMDL in federal court over concerns that it gives EPA the ability to dictate local land use and development. The groups argued that while the CWA authorizes EPA to issue TMDLs, states retain ultimate authority to determine how to implement TMDLs and address non-point source pollution. According to the groups, the TMDL infringes upon this authority by setting detailed allocations for sources of pollution, rather than the “total” load for pollutants in the watershed, and by establishing timelines, reasonable assurance requirements, and other “backstop” measures to ensure state compliance.
U.S. District Court for the Middle District of Pennsylvania 3rd Circuit Court of Appeals	
Relevant Dates	However, the district court disagreed, finding among other things, that the act’s use of the term “total maximum daily load” is ambiguous and allows the agency to set detailed pollution caps for non-point sources in a watershed. The decision prompted the American Farm Bureau Federation to appeal the decision to the 3rd Circuit. On February 3, the Attorney Generals for 21 states filed an amicus brief with the 3rd District Court of Appeals, asking it to overturn the district court’ decision. Ten western states joined the brief, including Alaska, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming. The brief challenges the district court’s ruling, arguing that the CWA is not ambiguous and does not authorize the TMDL. “What makes this TMDL particularly offensive to the CWA and to States’ rights is EPA’s attempt to regulate sources of pollution that it has no authority to regulate under the CWA,” the brief said. “EPA can create incentives for States to control non-point sources, but it cannot mandate how states chose to do so. Moreover, it regulates ‘upstream’ States whose borders do not even reach the Chesapeake Bay. Such regulation is beyond EPA’s authority.” The brief continues: “To say that the Chesapeake Bay States voluntarily surrendered their traditional authority to regulate water pollution and land use dramatically understates EPA’s coercive tactics in developing the TMDL. It also misses the point - the CWA does not authorize EPA to develop the type of TMDL it did, and no acquiescence by any State can give it the authority it lacks.” The brief further argues that the TMDL “...strips States of their...right to make the land-use decisions necessary to comply with federal water quality standards.... [It] has far-reaching implications for States across the country. If...left to stand, other watersheds, including the Mississippi River Basin (which spans 31 States), could be next.” To read the brief, see: http://www.lawandenvironment.com/wp-content/uploads/2014/02/48.pdf.
09/13/13: District court issues decision 02/03/14: Twenty-one states file amicus brief urging 3rd Circuit to overturn district court decision	

Calendar No. _____

113TH CONGRESS
1ST SESSION**S. 715**

[Report No. 113-_____]]

To authorize the Secretary of the Interior to use designated funding to pay for construction of authorized rural water projects, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 11, 2013

Mr. BARTIS for himself, Mr. TESTER, Mr. UDALL, of New Mexico, Ms. KLOBUCHAR, Mr. FRANKEN, Mr. JOHNSON of South Dakota, Mr. HENRICH, Mr. HOEVEN, Ms. HERRICK, and Mr. HARKIN introduced the following bill, which was read twice and referred to the Committee on Energy and Natural Resources

(legislative day, _____), _____

Reported by Mr. WYDEN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italics]

A BILL

To authorize the Secretary of the Interior to use designated funding to pay for construction of authorized rural water projects, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Authorized Rural
3 Water Projects Completion Act”.

SEC. 2. DEFINITIONS.

5 In this Act:

6 (1) **FUND.**—The term “fund” means the Rec-
7 lamation Rural Water Construction Fund estab-
8 lished by section 3(a).

9 (2) **SECRETARY.**—The term “Secretary” means
10 the Secretary of the Interior.

SEC. 3. RECLAMATION RURAL WATER CONSTRUCTION**FUND.**

13 (a) **ESTABLISHMENT.**—There is established in the
14 Treasury of the United States a fund to be known as the
15 “Reclamation Rural Water Construction Fund”, con-
16 sisting of—

17 (1) such amounts as are deposited in the Fund
18 under subsection (b); and

19 (2) any interest earned on investment of
20 amounts in the Fund under subsection (4);

21 (b) **DEPOSITS TO FUND.**—

22 (1) **IN GENERAL.**—For each of fiscal years
23 2014 through 2030, the Secretary of the Treasury
24 shall deposit in the Fund \$80,000,000 of the reve-
25 nues that would otherwise be deposited for the fiscal
26 year in the reclamation fund established by the first

1 section of the Act of June 17, 1902 (32 Stat. 388,
2 chapter 1092).

3 (2) AVAILABILITY OF AMOUNTS.—Amounts de-
4 posited in the Fund under paragraph (1) shall—

5 (A) be made available in accordance with
6 this section; without further appropriation; and
7 (B) be in addition to amounts appropriated

8 for such purposes under any other provision of
9 law.

10 (3) LIMITATION.—Notwithstanding paragraphs
11 (1) and (2), no amounts may be deposited in, or
12 made available from, the Fund under those para-
13 graphs if the transfer or availability of the amounts
14 would increase the deficit.

15 (c) EXPENDITURES FROM FUND.—

16 (1) IN GENERAL.—

17 (A) EXPENDITURES.—Subject to subpara-
18 graph (B), for each of fiscal years 2014
19 through 2035, the Secretary may expend from
20 the Fund not more than the sum of—

21 (i) \$80,000,000; and

22 (ii) the amount of interest accrued in
23 the Fund for the fiscal year in which the
24 expenditures are made.

1 (B) ADDITIONAL EXPENDITURES.—Not-
2 withstanding subparagraph (A), the Secretary
3 may expend more than \$80,000,000 for any fis-
4 cal year listed in subparagraph (A) if such
5 amounts are available in the Fund due to ex-
6 penditures not reaching \$80,000,000 in 1 or
7 more prior fiscal years.

8 (2) USE.—

9 (A) IN GENERAL.—Subject to subpara-
10 graph (B), the Secretary may use amounts
11 from the Fund to complete construction of
12 rural water projects—

13 (i) authorized to be carried out by the
14 Secretary on or before the date of enact-
15 ment of this Act; or

16 (ii) for which—

17 (i) pursuant to section 106(e) of
18 the Rural Water Supply Act of 2006
19 (42 U.S.C. 2405(e)), a feasibility
20 study has been submitted to the Sec-
21 retary by September 30, 2012; and

22 (ii) an Act of Congress after the
23 date of enactment of this Act has au-
24 thorized the construction of the
25 project.

(B) **LIABILITY.**—The Secretary may not use amounts from the Fund to pay for any operation and maintenance costs of an authorized rural water project.

(2) **EXPENSES.**—The Secretary shall not expend any amounts from the Fund until the date on which the Secretary develops—

(A) programmatic goals to carry out this section that—

(i) would enable the completion of construction of the authorized rural water projects as expeditiously as possible; and

(ii) reflect—

(I) the goals and priorities identified in the laws authorizing the authorized rural water projects; and

(II) the goals of the Reclamation Rural Water Supply Act of 2006 (42 U.S.C. 2401 et seq.); and

(B) funding prioritization criteria to serve as a formula for distributing funds under this section that take into account—

(i) an evaluation of the urgent and compelling need for potable water supplies

in the affected rural and tribal communities;

(ii) the status of the current stages of completion of the authorized rural water project;

(iii) the financial needs of the affected rural and tribal communities;

(iv) the potential economic benefits of the expenditures on job creation and general economic development in the affected rural and tribal communities;

(v) the ability of the authorized rural water project to address regional and watershed level water supply needs;

(vi) the ability of the authorized rural water project—

(I) to minimize water and energy consumption; and

(II) to encourage the development of renewable energy resources, such as wind, solar, and hydropower elements;

(vii) the need for the authorized rural water project to address—

7

(4) the needs of Indian tribes and members of Indian tribes; and

(H) other community needs or interests; and

(viii) such other factors as the Secretary determines to be appropriate to prioritize the use of available funds.

(d) INVESTMENTS OR AMOUNTS.—

(1) IN GENERAL.—The Secretary shall invest such portion of the Fund as is not, in the judgment of the Secretary, required to meet current withdrawals.

(2) CARRIES NO FUND.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to, and form a part of, the Fund.

(e) TRANSFERS OF AMOUNTS.—

(1) IN GENERAL.—The amounts required to be transferred to the Fund under this section shall be transferred at least monthly from the general fund of the Treasury to the Fund on the basis of estimates made by the Secretary of the Treasury.

(2) ADJUSTMENTS.—Proper adjustment shall be made in amounts subsequently transferred to the

8

extent prior estimates were in excess of or less than the amounts required to be transferred.

(f) TERMINATION.—On September 30, 2025—

(1) the Fund shall terminate; and

(2) the unexpended and unobligated balance of the Fund shall be transferred to the reclamation fund established by the first section of the Act of June 17, 1902 (32 Stat. 388; chapter 1092).

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Authorized Rural Water Projects Completion Act”.

(b) TABLE OF CONTENTS.—The table of contents of this

Act is as follows:

Sec. 1. Short title.

Sec. 2. Definitions.

Sec. 3. Reclamation rural water construction fund.

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

TITLE I—RECLAMATION RURAL WATER CONSTRUCTION AND SETTLEMENT IMPLEMENTATION FUND

Sec. 101. Establishment.

Sec. 102. Accounts.

Sec. 103. Deposits to Fund.

Sec. 104. Expenditures from Fund.

Sec. 105. Investments of amounts.

Sec. 106. Transfers of amounts.

Sec. 107. Transferrability between accounts.

Sec. 108. Termination.

TITLE II—RURAL WATER PROJECTS

Sec. 201. Rural water projects.

Sec. 202. Restrictions.

TITLE III—RECLAMATION INFRASTRUCTURE AND SETTLEMENT IMPLEMENTATION

Sec. 301. Reclamation infrastructure and settlement implementation.

TITLE IV—REPAIR, REPLACEMENT AND MAINTENANCE OF
CERTAIN INDIAN IRRIGATION PROJECTS

Sec. 401. Repair, replacement, and maintenance of certain Indian irrigation projects.

Sec. 402. Eligible projects.

Sec. 403. Requirements and conditions.

Sec. 404. Study of Indian irrigation program and project management.

Sec. 405. Tribal consultation and user input.

Sec. 406. Allocation among projects.

1 SEC. 2. DEFINITIONS.

2 In this Act:

3 (1) **FUND**.—The term “Fund” means the Rec-
4 landation Rural Water Construction and Settlement
5 Implementation Fund established by section 101.

6 (2) **INDIAN TRIBE**.—The term “Indian tribe” has
7 the meaning given the term in section 4 of the Indian
8 Self-Determination and Education Assistance Act (25
9 U.S.C. 450b).

10 (3) **RURAL WATER PROJECT**.—The term “rural
11 water project” means a project that is designed to
12 provide domestic, industrial, municipal, or residen-
13 tial water to a small community or group of small
14 communities, including Indian tribes and tribal orga-
15 nizations.

16 (4) **SECRETARY**.—The term “Secretary” means
17 the Secretary of the Interior, acting through the Com-
18 missioner of Reclamation.

1 **TITLE I—RECLAMATION RURAL**
2 **WATER CONSTRUCTION AND**
3 **SETTLEMENT IMPLEMENTA-**
4 **TION FUND**

5 SEC. 101. ESTABLISHMENT.

6 There is established in the Treasury of the United
7 States a fund, to be known as the “Reclamation Rural
8 Water Construction and Settlement Implementation Fund”,
9 consisting of—

10 (1) such amounts as are deposited in the Fund
11 under section 103; and
12 (2) any interest earned on investment of
13 amounts in the Fund under section 105.

14 SEC. 102. ACCOENTS.

15 Within the Fund, there are established the following
16 accounts:

17 (1) Rural Water Project Account.

18 (2) Indian Irrigation Account.

19 (3) Reclamation Infrastructure and Settlement
20 Implementation Account.

21 SEC. 103. DEPOSITS TO FUND.

22 (a) **IN GENERAL**.—For each of fiscal years 2014
23 through 2035, the Secretary of the Treasury shall deposit
24 in the Fund \$150,000,000 of the revenues that would other-
25 wise be deposited for the fiscal year in the reclamation fund

11

1 established by the first section of the Act of June 17, 1902
2 (32 Stat. 388, chapter 1093), of which—

3 (1) \$80,000,000 for each of the fiscal years shall
4 be deposited in the Rural Water Project Account es-
5 tablished under section 102(1);

6 (2) \$35,000,000 for each of the fiscal years shall
7 be deposited in the Indian Irrigation Account estab-
8 lished under section 102(2); and

9 (3) \$35,000,000 for each of the fiscal years shall
10 be deposited in the Reclamation Infrastructure and
11 Settlement Implementation Account established under
12 section 102(3).

13 (b) AVAILABILITY OF AMOUNTS.—Amounts deposited
14 in the Fund under subsection (a) shall be used, subject to
15 appropriation, to carry out this Act.

16 **SEC. 104. EXPENDITURES FROM FUND.**

17 (a) IN GENERAL.—Subject to subsection (b), for each
18 of fiscal years 2014 through 2035, the Secretary may ex-
19 pend from the Fund, in accordance with this Act, not more
20 than the sum of—

21 (1) \$150,000,000, to be allocated from the
22 amounts in the accounts specified in section 102; and
23 (2) the amount of interest accrued in the Fund
24 within each account for the fiscal year in which the
25 expenditures are made, with the interest accrued

12

1 within each account used only for expenditures from
2 that account.

3 (b) ADDITIONAL EXPENDITURES.—

4 (1) IN GENERAL.—The Secretary may expend
5 more than \$150,000,000 for any fiscal year referred
6 to in subsection (a) if the additional amounts are
7 available in the Fund as a result of a failure of the
8 Secretary to expend all of the amounts available
9 under subsection (a) in 1 or more prior fiscal years.

10 (2) RETENTION IN ACCOUNTS.—Any additional
11 amounts referred to in paragraph (1) shall—

12 (A) be retained within the account to which
13 the amounts were designated;

14 (B) accrue interest for the designated ac-
15 count in accordance with this title; and

16 (C) only be expended for the purposes for
17 which expenditures from the designated accounts
18 are authorized.

19 **SEC. 105. INVESTMENTS OF AMOUNTS.**

20 (a) IN GENERAL.—The Secretary shall invest such
21 portion of the Fund as is not, in the judgment of the Sec-
22 retary, required to meet current withdrawals.

23 (b) CREDITS TO FUND.—The interest on, and the pro-
24 ceeds from the sale or redemption of, any obligations held

13

1 in the Fund shall be credited to, and form a part of, the
2 Fund.

3 **SEC. 106. TRANSFERS OF AMOUNTS.**

4 (a) IN GENERAL.—The amounts required to be trans-
5 ferred to the Fund under this title shall be transferred at
6 least monthly from the general fund of the Treasury to the
7 Fund on the basis of estimates made by the Secretary of
8 the Treasury.

9 (b) ADJUSTMENTS.—Proper adjustment shall be made
10 in amounts subsequently transferred to the extent prior esti-
11 mates are in excess of or less than the amounts required
12 to be transferred.

13 **SEC. 107. TRANSFERABILITY BETWEEN ACCOUNTS.**

14 (a) TRANSFERABILITY OF IRRIGATION FUNDS.—No
15 sooner than fiscal year 2023, if the Secretary determines
16 that there are no further deferred maintenance needs of ir-
17 rigable Indian irrigation projects, the Secretary may expend
18 amounts and any interest accrued in the Indian Irrigation
19 Account established by section 102(2) on any expenditure
20 authorized under section 301 from the Reclamation Infru-
21 structure and Settlement Implementation Account estab-
22 lished by section 102(3).

23 (b) TRANSFERABILITY OF WATER SETTLEMENT
24 FUNDS.—No sooner than fiscal year 2023, if the Secretary
25 determines that there are no further needs of Indian tribes

14

1 under section 301, the Secretary may expend amounts and
2 any interest accrued in the Reclamation Infrastructure and
3 Settlement Implementation Account established by section
4 102(3) on any expenditure authorized under sections 401
5 through 406 from the Indian Irrigation Account established
6 by section 102(2).

7 **SEC. 108. TERMINATION.**

8 On September 30, 2035—

9 (1) the Fund shall terminate; and
10 (2) the unexpended and unobligated balance of
11 the Fund shall be transferred to the reclamation fund
12 established by the first section of the Act of June 17,
13 1902 (32 Stat. 358, chapter 1093).

14 **TITLE II—RURAL WATER**
15 **PROJECTS**

16 **SEC. 201. RURAL WATER PROJECTS.**

17 Subject to section 202, for each of fiscal years 2014
18 through 2035, the Secretary may use not less than
19 \$30,000,000 of the amounts available in the Rural Water
20 Project Account established under section 102(1) to complete
21 construction of rural water projects—
22 (1) authorized to be carried out by the Secretary
23 on or before the date of enactment of this Act; or
24 (2) for which—

1 (A) pursuant to section 106(c) of the Rural
 2 Water Supply Act of 2006 (43 U.S.C. 2405(e)),
 3 a feasibility study has been submitted to the Sec-
 4 retary by September 30, 2012; and

5 (B) on Act of Congress after the date of en-
 6 actment of this Act has authorized the construc-
 7 tion of the project.

8 **SEC. 202. RESTRICTIONS.**

9 (a) NO OPERATION AND MAINTENANCE COSTS.—The
 10 Secretary shall not use any amounts from the Fund to pay
 11 for operation and maintenance costs of an authorized rural
 12 water project.

13 (b) CONDITIONS.—The Secretary shall not expend any
 14 amounts from the Fund to carry out this title until the date
 15 on which the Secretary develops—

16 (1) programmatic goals to carry out this title
 17 that—

18 (A) would enable the completion of construc-
 19 tion of the authorized rural water projects as ex-
 20 peditiously as practicable; and

21 (B) reflect—

22 (i) the goals and priorities identified
 23 in the laws authorizing the authorized rural
 24 water projects; and

1 (ii) the goals of the Reclamation Rural
 2 Water Supply Act of 2006 (43 U.S.C. 2401
 3 et seq.); and

4 (2) funding prioritization criteria to serve as a
 5 methodology for distributing funds under this title
 6 that take into account—

7 (A) an evaluation of the urgent and compel-
 8 ling need for potable water supplies in the af-
 9 fected rural and tribal communities;

10 (B) the status of the current stages of com-
 11 pletion of the authorized rural water project;

12 (C) the financial needs of the affected rural
 13 and tribal communities;

14 (D) the potential economic benefits of the
 15 expenditures on job creation and general eco-
 16 nomic development in the affected rural and
 17 tribal communities;

18 (E) the ability of the authorized rural water
 19 project to address regional and watershed level
 20 water supply needs;

21 (F) the ability of the authorized rural water
 22 project—

23 (i) to minimize water and energy con-
 24 sumption; and

17

- 1 (ii) to encourage the development of re-
 2 newable energy resources, such as wind,
 3 solar, and hydropower elements;
 4 (G) the need for the authorized rural water
 5 project to address—
 6 (i) the needs of Indian tribes and
 7 members of Indian tribes; and
 8 (ii) other community needs or inter-
 9 ests; and
 10 (H) such other factors as the Secretary de-
 11 termines to be appropriate to prioritize the use
 12 of available funds.

13 **TITLE III—RECLAMATION INFRA-**
 14 **STRUCTURE AND SETTLE-**
 15 **MENT IMPLEMENTATION**

16 **SEC. 301. RECLAMATION INFRASTRUCTURE AND SETTLE-**
 17 **MENT IMPLEMENTATION.**

18 Consistent with section 104, for each of fiscal years
 19 2014 through 2035, the Secretary shall use not less than
 20 \$35,000,000, plus accrued interest, of the amounts author-
 21 ized to be expended from the Reclamation Infrastructure
 22 and Settlement Implementation Account established under
 23 section 102(3)—
 24 (1) to provide compensation authorized under an
 25 Act of Congress to extinguish or otherwise resolve all

18

- 1 monetary claims of an Indian tribe against the
 2 United States relating to the continued and past use
 3 of the land of the Indian tribe by the United States
 4 for the generation of hydropower; or
 5 (2) to complete construction, planning, and de-
 6 sign of projects and implement provisions authorized
 7 under one or more Acts of Congress that—
 8 (A) settle or otherwise resolve, in whole or
 9 in part, litigation involving the United States
 10 and the rights of one or more federally recognized
 11 Indian tribes to access, use, or manage water re-
 12 sources; or
 13 (B) implement agreements approved by
 14 Congress pursuant to which one or more feder-
 15 ally recognized Indian tribes agree to some limi-
 16 tation on the exercise of rights or claims to ac-
 17 cess, use, or manage water resources.

TITLE IV—REPAIR, REPLACEMENT, AND MAINTENANCE OF CERTAIN INDIAN IRRIGATION PROJECTS

SEC. 401. REPAIR, REPLACEMENT, AND MAINTENANCE OF CERTAIN INDIAN IRRIGATION PROJECTS.

(a) IN GENERAL.—The Secretary shall establish a program to address the deferred maintenance needs of Indian irrigation projects that—

- (1) create risks to public or employee safety or natural or cultural resources; and
- (2) unduly impede the management and efficiency of the Indian irrigation program.

(b) FUNDING.—Consistent with section 104, of the amounts authorized to be expended from the Indian Irrigation Account established under section 102(2), the Secretary shall use or transfer to the Bureau of Indian Affairs not less than \$35,000,000, plus accrued interest, for each of fiscal years 2014 through 2035 to carry out maintenance, repair, and replacement activities for 1 or more of the Indian irrigation projects described in section 402 (including any structures, facilities, equipment, or vehicles used in connection with the operation of those projects).

SEC. 402. ELIGIBLE PROJECTS.

The projects eligible for funding under section 401(b) are the Indian irrigation projects in the western United States that, on the date of enactment of this Act—

- (1) are owned by the Federal Government, as listed in the Federal inventory required by Executive Order 13327 (40 U.S.C. 121 note; relating to Federal real property asset management);
- (2) are managed by the Bureau of Indian Affairs (including projects managed under contracts or contracts pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.); and
- (3) have deferred maintenance documented by the Bureau of Indian Affairs.

SEC. 403. REQUIREMENTS AND CONDITIONS.

Not later than 180 days after the date of enactment of this Act and as a precondition to amounts being expended from the Fund to carry out this title, the Secretary of the Interior, in consultation with the Assistant Secretary for Indian Affairs, the Commissioner of the Bureau of Reclamation, and representatives of affected Indian tribes, shall develop and submit to Congress—

- (1) programmatic goals to carry out this title that—

21

1 (A) would enable the completion of repair-
 2 ing, replacing, improving, or performing mainte-
 3 nance on projects as expeditiously as possible;
 4 (B) facilitate or improve the ability of the
 5 Bureau of Indian Affairs to carry out the mis-
 6 sion of the Bureau of Indian Affairs in oper-
 7 ating a project; and
 8 (C) ensure that the results of government-to-
 9 government consultation required under section
 10 405 be addressed; and
 11 (2) funding prioritization criteria to serve as a
 12 methodology for distributing funds under this title,
 13 that take into account—
 14 (A) the extent to which deferred mainte-
 15 nance of qualifying irrigation projects poses a
 16 threat to public or employee safety or health;
 17 (B) the extent to which deferred mainte-
 18 nance poses a threat to natural or cultural re-
 19 sources;
 20 (C) the extent to which deferred mainte-
 21 nance poses a threat to the ability of the Bureau
 22 of Indian Affairs to carry out the mission of the
 23 Bureau of Indian Affairs in operating the
 24 project;

22

1 (D) the extent to which repairing, replac-
 2 ing, improving, or performing maintenance on a
 3 facility or structure will—
 4 (i) improve public or employee safety,
 5 health, or accessibility;
 6 (ii) assist in compliance with codes,
 7 standards, laws, or other requirements;
 8 (iii) address unmet needs; and
 9 (iv) assist in protecting natural or cul-
 10 tural resources;
 11 (E) the methodology of the rehabilitation
 12 priority index of the Secretary, as in effect on
 13 the date of enactment of this Act;
 14 (F) the potential economic benefits of the ex-
 15 penditures on job creation and general economic
 16 development in the affected tribal communities;
 17 (G) the ability of the qualifying project to
 18 address tribal, regional, and watershed level
 19 water supply needs; and
 20 (H) such other factors as the Secretary de-
 21 termines to be appropriate to prioritize the use
 22 of available funds that are, to the fullest extent
 23 practicable, consistent with tribal and user rec-
 24 ommendations received pursuant to the consulta-
 25 tion and input process under section 405.

1 **SEC. 404. STUDY OF INDIAN IRRIGATION PROGRAM AND**2 **PROJECT MANAGEMENT.**

3 (a) TRIBAL CONSULTATION AND USER INPUT.—Before
 4 beginning to conduct the study required under subsection
 5 (b), the Secretary of the Interior shall—

6 (1) consult with the Indian tribes that have ju-
 7 risdiction over the land on which an irrigation
 8 project eligible to receive funding under section 402 is
 9 located; and

10 (2) solicit and consider the input, comments, and
 11 recommendations of the landowners served by the irri-
 12 gation project.

13 (b) STUDY.—Not later than 2 years after the date of
 14 enactment of this Act, the Secretary of the Interior, acting
 15 through the Assistant Secretary for Indian Affairs, shall
 16 complete a study that evaluates options for improving pro-
 17 grammatic and project management and performance of ir-
 18 rigation projects managed and operated in whole or in part
 19 by the Bureau of Indian Affairs.

20 (c) REPORT.—On completion of the study under sub-
 21 section (b), the Secretary of the Interior, acting through the
 22 Assistant Secretary for Indian Affairs, shall submit to the
 23 Committees on Energy and Natural Resources and Indian
 24 Affairs of the Senate and the Committee on Natural Re-
 25 sources of the House of Representatives a report that—
 26 (1) describes the results of the study; and

1 (2) includes recommendations for improving pro-
 2 grammatic and project management and performance
 3 in each qualifying project area and for the program
 4 as a whole.

5 (d) FUNDING.—Of the amounts authorized to be ex-
 6 pended from the Indian Irrigation Account established
 7 under section 102(2), \$1,000,000 shall be made available
 8 during fiscal year 2014 to carry out this section, to remain
 9 available until expended.

10 **SEC. 405. TRIBAL CONSULTATION AND USER INPUT.**

11 Before expending funds on an Indian irrigation
 12 project pursuant to section 401, the Secretary of the Interior
 13 shall—

14 (1) consult with the Indian tribe that has juris-
 15 diction over the land on which an irrigation project
 16 eligible to receive funding under section 402 is lo-
 17 cated; and

18 (2) solicit and consider the input, comments, and
 19 recommendations of the landowners served by the irri-
 20 gation project.

21 **SEC. 406. ALLOCATION AMONG PROJECTS.**

22 (a) IN GENERAL.—Subject to subsection (b), to the
 23 maximum extent practicable, the Secretary shall ensure
 24 that, for each of fiscal years 2014 through 2035, each Indian
 25 irrigation project eligible for funding under section 402 that

1 has critical maintenance needs receives part of the funding
2 under section 401 to address critical maintenance needs.

3 (b) PRIORITY.—In allocating amounts under section
4 401(b), in addition to considering the funding priorities de-
5 scribed in section 403, the Secretary shall give priority to
6 Indian irrigation projects for which funding has not been
7 made available during the 15-year period ending on the day
8 before the date of enactment of this Act under any other
9 Act of Congress that expressly identifies the Indian irri-
10 gation project or the Indian reservation of the project to ad-
11 dress the deferred maintenance, repair, or replacement
12 needs of the Indian irrigation project.

13 (c) CAP ON FUNDING.—

14 (1) IN GENERAL.—Subject to paragraph (2), in
15 allocating amounts under section 401(b), the Sec-
16 retary shall allocate not more than \$15,000,000 to
17 any individual Indian irrigation project described in
18 section 402 during any consecutive 3-year period.

19 (2) EXCEPTION.—Notwithstanding the cap de-
20 scribed in paragraph (1), if the full amount under
21 section 401(b) cannot be fully allocated to eligible ir-
22 rigation projects because the only remaining activities
23 authorized in section 401(b) are for irrigation
24 projects that would exceed the cap described in para-
25 graph (1), the Secretary may allocate the remaining

1 funds to eligible irrigation projects in accordance
2 with this title.

3 (d) BASIS OF FUNDING.—Any amounts made avail-
4 able under this section shall be nonreimbursable.

5 (e) APPLICABILITY OF ISDEAA.—The Indian Self-De-
6 termination and Education Assistance Act (25 U.S.C. 450
7 et seq.) shall apply to activities carried out under this sec-
8 tion.

Tab Q – WSWC 2013 Activities and Events

Western States Water Council 2013 Summary of Activities

Congressional Testimony Briefings and DC Visits

March 4-8 – WSWC leadership, members and staff traveled to Washington, D.C. and made over 30 visits with Administration and Congressional officials in support of WSWC and WGA positions and priorities. WSWC and Native American Rights Fund staff also presented a briefing for Congressional staff (sixteen attended) on the importance of Indian Water Rights Settlements.

April 19 – WSWC Executive Director visited Congressional offices after ICWP Roundtable in Washington, D.C.

April 30 – Senate Energy and Natural Resources Water and Power Subcommittee written testimony in support of S. 659 to reauthorize the Reclamation States Emergency Drought Relief Act and S. 715 to authorize increased spending from the Reclamation Fund for Rural Water Supply Projects.

September 10-13 – WSWC Executive Director presented at a USGS Congressional Briefing in Washington, DC.

October 10 – WSWC Executive Director testified before the House Natural Resources Committee, Subcommittee on Water and Power, in support of H.R. 3176 to reauthorize the Reclamation States Emergency Drought Relief Act.

November 21 – At the invitation of WGA, WSWC Executive Director joined WGA Executive Director for meeting with EPA Deputy Administrator on issues that included draft proposed rules defining waters of the United States.

WSWC Meetings, Symposia and Workshops

April 2-3 – The Council/WGA sponsored an Energy-Water Workshop in Denver, Colorado to bring together state and local officials to discuss the nexus between the two sectors and related issues, with some 70 participating.

April 3-5 – The Council's Spring meetings were held in Denver, Colorado and WGA Executive Director Jim Ogsbury addressed members. The meetings were preceded by the Energy-Water Workshop.

April 29 – May 1 – WSWC and California Department of Water Resources sponsored a Drought Prediction Workshop in San Diego.

June 24-26 – The Council's Summer meetings were held in Casper, Wyoming and Anne Castle, Assistant Secretary of Interior for Water and Science addressed members.

August 5-7 – WSWC and California Department of Water Resources sponsored a workshop on Quantifying Drought Impacts in San Diego.

August 13-15 – WSWC and Native American Rights Fund cosponsored their biennial symposium on Indian Water Rights Settlements in Santa Fe, New Mexico (over 160 attended)

October 2-4 – The Council's Fall meetings were held in Deadwood, South Dakota with a special session on Corps of Engineers surplus water allocation and pricing policies. [Notably the federal government was shut down, precluding participation by many federal guests. Further, the meetings were truncated due to the approach of winter storm Atlas, which hit the area, stranding some members and staff unable to get flights out for three days.]

Special Events

February 11– NASA's Landsat Data Continuity Mission (LDCM) successfully launched from Vandenberg Air Force Basin in California and the WSWC Executive Director attend at the invitation of NASA/USGS given our support for the mission and its thermal infrared imaging capability that western states are using extensively to measure consumptive water use.

February 21-22 – WSWC Legal Counsel spoke on state drought planning at a Climate Adaptation Conference hosted by the Georgetown Law Center in Washington, D.C.

Coordination with other Organizations

January 10-11 – WSWC Executive Director attended the Utah Governor’s Energy Development Summit in Salt Lake City.

February 21-22 – WSWC Executive Director spoke at the Family Farm Alliance annual meeting in Las Vegas on the WGA/WSWC Water Transfers Report.

March 26-27 – WSWC Legal Counsel attended and addressed the ASU Research Frontiers in Water Reuse in Tempe, Arizona.

April 14-15 – WSWC Executive Director addressed the Western Snow Conference in Jackson, Wyoming.

April 16-18 – WSWC Executive Director attended the ICWP Roundtable in Washington, D.C.

April 29-May1 – WaDE Program Manager attended and addressed National Groundwater Association Summit/Conference in San Antonio, Texas.

June 5-7 – WSWC Legal Counsel attended and moderated a panel on Indian water right settlements at the ABA Water Law Conference in Las Vegas Nevada. WSWC also participated in planning for the conference.

June 11-13 – WSWC Executive Director and WaDE Program Manager attended and presented papers on WaDE and Landsat at the annual conference of the Universities Council on Water Resources and National Institutes for Water Resources at Stateline, Nevada (Lake Tahoe).

July 6-8 – By special invitation, WSWC and WGA Executive Directors attended the Esri International User Conference in San Diego, California.

July 11 – WSWC Legal Counsel attended a Utah Water Summit townhall meeting in Layton, Utah.

July 17-19 – WaDE Program Manager attended and participated in CUAHSI Conference in Logan, Utah.

July 22-23 – WSWC Legal Counsel addressed USACE Watershed Course on western water law and issues in Fort Worth, Texas.

July 30-August 2 – WSWC Executive Director addressed the Water and Environment Policy Committee of CSG-West 66th Annual Meeting in Las Vegas, Nevada.

September 12 – WSWC Legal Counsel addressed the University of Arizona’s Water Resources Research Center regarding the WGA/WSWC water transfers report in Tucson, Arizona.

September 23-26 – WaDE Program Manager attended the NASA Applied Sciences Program, Water Resources Meeting in Lincoln, Nebraska.

October 16-17 – WSWC Legal Counsel attended the ICWP Annual Meeting in Denver, Colorado.

October 23-25 – WSWC Executive Director attended the Kansas Governors Water Conference in Manhattan, Kansas.

October 30 – WSWC Executive Director attended the Utah Water Summit townhall meeting in Provo, Utah.

November 6-8 – WSWC Executive Director presented on drought at the National Research Council DELS Advisory Committee Meeting in Washington, DC.

November 18-19 – WSWC Executive Director presented at the New Mexico Statewide Water Budget Working Group in Tamaya (ABQ, NM).

November 21-22 – WSWC Legal Counsel presented on the WGA/WSWC water transfers report at the 58th Annual New Mexico Water Conference in Albuquerque, New Mexico.

December 4-6 – WSWC Executive Director presented on the energy/water nexus at the Science and Technology for Sustainability Roundtable in Washington, DC hosted by the National Academies.

Letters

February 4 – WSWC joined 51 other water policy, industry, and environmental organizations in a letter to leaders of the House and Senate Appropriations Committees, urging them to enable the U.S. Geological Survey (USGS) to fully implement the National Streamflow Information Program (NSIP) and restore the USGS' capacity to fully match non-federal cost-share investments in the Cooperative Water Program (CWP).

April 10 – WSWC wrote the Environmental Protection Agency (EPA) & the U.S. Army Corps of Engineers requesting greater state consultation in the agencies' Clean Water Act rulemaking.

April 22 – WGA and WSWC sent a joint letter to the Senate Energy and Natural Resources Committee leadership to support the goals of four pending hydropower bills (S. 545/H.R. 267 and S. 306/H.R. 678).

August 6 – WSWC wrote Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy to comment on U.S. Army Corps of Engineers' draft procedures involving surplus water and storage at Corps reservoirs.

September 5 – WSWC wrote the leadership of the House Science, Space, and Technology Committee's Subcommittee on Environment, to support federal water and climate data gathering and monitoring programs, as well as related applied research.

October 8 – WSWC wrote a letter the Senate Energy and Natural Resources Committee leadership in support of the SECURE Water Act implementation.

November 1 – WGA and WSWC wrote a joint letter to the Federal Energy Regulatory Commission to comment on its investigation of a possible two-year licensing process for hydropower development at existing non-powered dams and closed loop storage projects.

November 5 – WSWC sent a letter to the Environmental Protection Agency (EPA) commenting on a draft EPA Science Advisory Board (SAB) study that synthesizes peer reviewed literature on the connection between small, isolated waters and larger bodies of water.

November 14 – WGA and WSWC sent a joint letter to the House Natural Resources Committee regarding the Water Rights Protection Act (H.R. 3189).

November 20 – WSWC wrote the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to "strongly urge" them to recognize the "significant federalism implications" of their Clean Water Act (CWA) rulemaking efforts and to comply with Executive Order (E.O. 13132).

December 23 – WSWC wrote the Office of Management and Budget (OMB), asking it to ensure that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers comply with Executive Order (E.O.) 13132 in the development of their Clean Water Act (CWA) jurisdiction rule.

Committees, Task Forces and Work Groups

American Bar Association Water Law Conference Planning Committee – WSWC Legal Counsel

Advisory Committee on Water Information, Monitoring Challenges in a Shrinking Budget Environment Work Group – WSWC Executive Director

Advisory Committee on Water Information, Water Resources Adaptation to Climate Change Workgroup – Jeanine Jones (CA) and WSWC Assistant Director/General Counsel (alternate).

National Geospatial Advisory Committee, Landsat Advisory Group – WSWC Executive Director

Publications

WGA/WSWC Who We Are and What We Do (flyer)

Materials prepared in cooperation with the National Oceanic & Atmospheric Administration (NOAA):

Data and Monitoring Needs for Western Water Management, October 2013

NOAA and the National Integrate Drought Information System, October 2013

NOAA and The Upper Columbia Salmon Recovery Board, October 2013

Western Water Data Needs and NOAA, October 2013

Unpublished

Concentrated Solar Power and Water in the Southwest, WSWC and National Renewable Energy Laboratory (NREL), currently under NREL review.

Tab R – WSWC Strategic Directions Summary

WSWC Strategic Directions Survey Summary
April 2014

General Issues

What are the most important water-related issues facing your state at this time?

Effective strategies for meeting future water needs

Increasing population and related water demands

Future economic development

Energy-related water supply and wastewater disposal issues

Water data collection/measurement/gaging/analysis/planning

Funding new water development projects

Sustainable state funding for water programs

Expanding storage capacity

Aging infrastructure - drinking water and wastewater

Increasing flood protection

Surface water supply reliability

Groundwater availability and mining

Static or decreasing water supplies

Climate variability and change and adaptation

Drought, flooding and extreme events with increasing frequency and intensity

Sea level rise

Atmospheric rivers

19th Century laws and 21st Century needs and priorities

Interstate and international issues (including water transfers)

Compact compliance - Colorado, Rio Grande, Republican, La Plata

Interbasin transfers of groundwater

Quantifying federal reserved water rights

Tribal reserved rights

Growing downstream water demands

Fully appropriated sources

Water rights adjudications and enforcement

Water distribution/management/compliance

Water reallocation and transfers based on actual use

Emphasizing beneficial use

Agricultural efficiencies and depletions

Conjunctive use and priority administration

Protecting existing rights

Illegal ponds [insufficient penalties? for administration/enforcement?]

Water quantity and water quality/integrated management

Safe drinking water for small systems

Environmental and area of origin protections

Instreamflow protections

EPA regulations governing agriculture - nutrient standards

Impact of numeric water quality standards on agriculture and municipalities

Affordable water quality protections

ESA regulation

Stormwater

Nonpoint source pollution

Toxics criteria and water quality standards to protect human health

NPDES primacy [Idaho and New Mexico]

Anti-degradation standards

Aggressive federal agencies asserting jurisdiction

[How do we address voids/gaps that invite federal intervention?]

Corps surplus water rules

Missouri River Corps activities impact on municipal water systems

Federal regulatory encroachment and mission creep generally

New legislative make up [fewer “boots under the table”]

State's approach to water-related legislation

Contradictory [administrative] decisions, given past state policies and practices

Conservation incentives within prior appropriation doctrine

Evolution of science and technology

Fixing the Sacramento/San Joaquin River/Delta

Council Directions

Over 80% of members expressed their opinion that protecting state rights and prerogatives with respect to western water resources was extremely important, with roughly 20% believing this was very important or important. 100% felt the WSWC has been effective in this regard, with 48% rating the Council as very effective and 38% extremely effective.

Similarly, a large majority (90%) believe that representing state interests and facilitating state participation in federal judicial proceedings is important (with 50% of those responding saying that it was very important and 15% extremely important). An equal proportion (90%) think the Council provides effective representation (with 10% saying the Council is extremely effective, 50% very effective and 30% effective). The remaining 10% rated this as somewhat important and 10% ranked the Council as somewhat effective in this area.

With respect to a focus on regulatory streamlining and limiting federal encroachment on states' rights, members equally rated this as very or extremely important (43% + 43%), with roughly 15% rating it as important to somewhat important. In this area, 91% of those responding ranked the Council as effective (24% effective, 57% very effective and 10% extremely effective).

Regarding communicating the Council's positions to the federal Administration and the Congress, 100% of the members responding ranked this as a priority, equally ranking it as very important or extremely important -- and the Council as very effective (45%) or extremely effective (55%).

Further, when it comes to promoting the Council's priorities for federal spending, 52% of members ranked this as very important, 29% as important and 14% as extremely important (95% total). Similarly, members rated the Council as effective 48%, very effective 43% and extremely effective 5% (95% total).

When it comes to interstate cooperation related to planning, conservation, development, management and protection of water resources, 81% of our members responding ranked this as important (within which 38% felt this was very important and 14% extremely important). Roughly 69% of those responding rated the Council as effective (with 33% rating us as very effective, and 10% extremely effective). However, 19% rated the Council as only somewhat effective and 10% as less effective. [Should we be doing more in this area?]

Council services in providing assistance with addressing state administrative, legislative and judicial issues was ranked as very important by 24% of those responding, important by 19% and extremely important by only 5% (48% total). While roughly 10% and 43% respectively, rated such services as less important or only somewhat important. Comparatively, 10% rated the Council as less effective, and 29% somewhat effective, in this area -- while about 38% rated the Council as effective, 14% very effective, and 10% extremely effective (62%).

Regarding the development and implementation of state water plans, a slight majority (53%) ranked this as important (with 24% important, 24% very important and 5% extremely important). Nearly half (47%) advising this was less important (33%) or only somewhat important (14%). Members responding were evenly split as to the Council's effectiveness in this area (with 45% rating the Council as effective, and 5% very effective, but 30% less effective and 20% only somewhat effective). [Should we be doing more to assist with state water planning?]

One-third of those responding ranked the completion of state general stream adjudications and defining rights to the use of water as important, with another third ranking this as very important (24%) or extremely important (10%). The remaining third ranked this as only somewhat important (14%) or of lesser importance (19%). In this area, 50% rated the Council as effective (with 5% very effective), while 30% rated the Council as somewhat effective and 15% less effective. [Should the Council be doing more to encourage general stream adjudications?]

The Council's role in collaborating with other interstate water organizations, NGOs, water users and other stakeholders was ranked as important 43%, very important 33%, or extremely important (10%) by an overwhelming majority (86%), while 14% felt this was somewhat important. Similarly 90% rated the Council as effective (30%), very effective (40%) or extremely effective (20%), while 10% rated the Council as somewhat effective in this area.

Promoting means to address water infrastructure needs was supported by roughly 90% of those responding (with 43% ranking this as important, 38% very important, and 10% as extremely important). Only 10% responded this was somewhat important or less important, split evenly. In this area, the Council was rated as effective by 55%, very effective by 20% and extremely effective by 10%, while 10% rated the Council as somewhat effective and 5% as less effective.

When it comes to addressing drought and other extreme events, 100% of those responding felt this was important (with 38% ranking it as very important and 33% as extremely important). Those responding also rated the Council as effective (40%), very effective (40%), or extremely effective (10%), for a total of 90% (with 10% evenly split between somewhat and less effective).

The Council's role in integrating water quality and quantity, as well as economic and environmental issues was ranked as important by 48% of those responding and very important by 43% -- representing overwhelming support (roughly 90%). Only 10% ranked this area as only somewhat important. Similarly, 80% of members responding rated the Council as effective (with 25% very effective and 5% extremely effective), and 20% evenly divided between somewhat and less effective.

Lastly, 100% of those responding felt the Council's role in promoting the advancement of water science and technology is important (45%), very important (35%), or extremely important (20%). An overwhelming majority rated the Council as effective (37%), very effective (53%), or extremely effective (5%). Only 5% rated the Council as only somewhat effective in this area.

WSWC Strategic Directions Survey Summary
Executive Committee
April 2014

Less than half of the Executive Committee responded (7 of 17 dues paying states).

Council Representation of Member State Interests

100% of those responding felt that the Council's representation of their State's interests was "about right," and similarly that representation of small, large and single-state issues was "about right."

100% similarly responded that Council effort in representing the interests of all its member states, compared to the interests of only a few states was "about right."

Two-thirds of those responding believed the Council should not become involved in international water issues (in North America), while 33% favored more involvement.

100% advised we should not become more involved in world water forums.

I can see the need to become involved in pressing North American issues that may impact our member states along the international borders, but would caution against this detracting from our core domestic water priorities.

Members Interaction with their governors, governors' staff, WGA and SAC

29% responded that they often have personal interactions with their governors, with 43% occasional personal interactions (72% total), while 28% seldom or never interact with their governor.

A greater number (42%) communicate often with their WGA Staff Advisory Council (SAC), 29% on occasion and 29% seldom communicate with SAC.

However, 14% very often communicate with someone else in their governor's office, 43% often, 29% occasionally, and only 14% seldom have any communication.

When it comes to communicating with WSWC staff regarding WGA actions and issues, Executive Committee members only occasionally (57%) or seldom (29%) discuss such actions or issues, while some (14%) report never doing so. [Does this mean that WSWC staff is not communicating WGA issues?]

WGA participation is not a priority for some governors' offices and may explain some of the above responses.

WSWC Member interaction with WestFAST

Executive Committee members seldom if ever have any personal individual WestFAST member contact.

While WestFAST's organization and interaction with the WSWC is seen as valuable, WSWC members usually have other federal agency contacts that they use to address issues in their state.

WSWC's Value to Members and Member States

WSWC members' individual participation in the Council is viewed as extremely beneficial by 57% of those responding, with 29% rating it as very beneficial, and 14% as beneficial.

Participation in WSWC is the most valuable of an interstate water organization, but you "get out of it what you put into it," and its value increases with increasing participation.

Staff is top-notch and very responsive to my needs.

The organization gets better with each passing year, and is doing a great job.

WSWC Communications (with Members)

100% of those responding felt Council communication is effective (57% extremely effective, 29% very effective and 14% effective).

100% find the newsletter to be extremely (57%) to very effective (43%).

100% find Council symposia/workshops to be very effective (86%) to effective (14%)

100% view email as effective, and most find it to be extremely or very effective (86%), though 73% of members still find phone calls to be effective (29%), very effective (29%) or extremely effective (14%).

86% find the regular Council meetings as an effective forum for communication, with 43% rating the meetings as extremely effective, 29% as very effective and 14% as effective. 14% rate the meetings as only somewhat effective.

72% rate webinars effective (29%), very effective (29%) or extremely effective (14%).

71% find www.westernstateswater.org to be effective communication (with 43% very effective and 14% extremely effective, compared to 29% that find it somewhat effective.

57% find the use of social media to be less (14%) or only somewhat effective (43%), with 28% evenly rating social media as effective or extremely effective.

Internal Council Policies and Practices

83% of those responding found the Council's committee and subcommittee structure adequate.

43% find current Council meetings to be highly effective, 22% above average and 22% average.

One comment was that it would make sense to reduce the number of regular Council meetings each year while still keeping the staff engaged with members.

The full Council/Committee meetings process seems cumbersome and duplicative.

The presentations and discussions at the meetings are good, but could be improved.

Given limited time for issue-specific discussions, one suggestion was to eliminate the host state presentations during the Friday morning full Council meeting, perhaps shifting this to the field trips.

States might also be asked to prepare short bullet point summaries of the state reports for circulation prior to the meetings.

We should be making better use of subcommittees.

Water Data Exchange (WaDE)

71% reported WaDE is important (14%), very important (43%) or extremely important (14%).

83% suggested the Council should consider greater investments in similar interstate cooperative efforts.

The Council should continue to focus on federal policy coordination and education between states and federal agencies.

It is worthwhile working with federal agencies to make their data collection, analysis and planning fit with the needs of the states, including but not limited to bringing the water census to the detail and scale that states can use in their water planning and decisionmaking.

[Should the Council dedicate more resources to providing more technical services to its member states, in addition to policy coordination and advocacy? For example, comparison and analysis of water program planning, agency organizational structure, budgeting, fees, financing and funding, etc.]

Council Staff Evaluation

100% of those responding believe the current level of staff support is appropriate to meet member needs.

100% reported they are satisfied with the personal and professional assistance provided by staff (with 72% extremely satisfied, 14% very satisfied and 14% satisfied).

100% reported they are extremely satisfied (57%) or very satisfied (43%) with the overall quality of the staff.

Staff has been doing a tremendous job of trying to cover everything, but we need to be realistic about the workload.

It's past time to fill the Assistant Executive Director position!

I believe WSWC staff is top-notch and perfectly suited to member states' needs.

I would hire anyone of them!

Tab S – Future Council Meetings

WESTERN STATES WATER COUNCIL

FUTURE MEETINGS

2014

Summer Council Meeting

Helena, Montana

July 15-18, 2014

Fall Council Meeting

Phoenix, Arizona

October 7-10, 2014

Upcoming Council Meetings/Host States

2015 Meetings

Spring – Oklahoma (last hosted 10/17/2008 in Oklahoma City)

Summer – WSWC 50th Anniversary

North Dakota (last hosted 7/11/2008 in Medora)

Nevada (last hosted July 23, 2010 in Lake Tahoe) – rotation for Spr 2017

Fall – Kansas (last hosted 4/24/09 in Kansas City)

2016 Meetings

Spring – Washington, D.C.

Summer – Utah (last hosted 7/17/09 in Park City)

Fall – Nebraska (last hosted 10/16/09 in Lincoln)

2014/2015 Symposia / Workshops

WSWC/CDWR Hydroclimate Monitoring and Data Workshop

June 23-25, 2014

San Diego, CA

WSWC/CDWR/NASA JPL Remote Sensing Workshop

August 25-27, 2014

Pasadena, CA

Water Management Symposium on Infrastructure: Sustainability, Storage & Streamlining

Utah – early September

Texas – November

(Water Quality and Water Resources Committee)

Water Quality / Water Quantity Workshop

in conjunction with ACWA in Washington, DC - Spring 2015

(Water Quality Committee)

MEETING SCHEDULE

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[illegible]

[illegible]

Tab T – WSWC Clean Water Act Work Group Update



WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 | Murray, Utah 84107 | (801) 685-2555 | FAX (801) 685-2559
Web Page: www.westgov.org/hwswc

MEMORANDUM

To: CWA Workgroup

From: Nathan Bracken, Assistant Director/General Counsel

Date: February 6, 2014

Re: "Straw Man" Language for Possible Council Comments on CWA Rulemaking

I. INTRODUCTION

Per the workgroup's conference call on January 27, I have prepared the following "straw man" language for those issues that the group identified as areas where consensus may be possible regarding the Clean Water Act (CWA) rulemaking. As requested by the workgroup, this memorandum also provides "straw man" language for the additional issues raised during the call where consensus is less certain and identifies those areas where the differences between the states' perspectives are most pronounced.

II. ISSUES WHERE CONSENSUS SEEMS MOST LIKELY

The following language is based upon the matrix of state perspectives Council staff prepared regarding the rulemaking, the Council's current position (#330.5) and related letters, as well as the workgroup's comments during the call.

A. State Consultation

In 2011, the Council asked the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council's request was based upon the belief that rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed that rulemaking would better ensure the treatment of states as co-regulators in the development and implementation of a final rule.

However, the submission of a draft rule on CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review without any substantive state consultation raises significant concerns that EPA's and the Corps' state consultation process for the rule will be no better than the process it used in developing the guidance. In particular, we

are concerned that EPA's and the Corps' outreach with the states will consist only of inviting the states to comment on the proposed rule after it has been published for public comment in the Federal Register, as opposed to working together with the states as partners to develop the rule. As our previous letters have noted, waiting until the public comment period to solicit state input ignores the states' unique role as co-regulators and will not allow for meaningful state input or consideration of state concerns.

As co-regulators, the states are separate and apart from the public. EPA and the Corps should not wait until the publication of a draft rule to seek substantive state input. The agencies should recognize the states' status as co-regulators and should have provided them with an opportunity to participate directly in drafting the proposed rule. As such, EPA and the Corps should give as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

B. Connectivity Report

EPA has indicated that its draft connectivity report will serve as the basis of the final rule. However, the draft rule's submission to OMB before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, EPA and the Corps should not finalize the jurisdictional rule until the connectivity report has been finalized.

Many western states have also submitted comments for EPA's Science Advisory Board (SAB) to consider in its review of the draft connectivity report. SAB's consideration of these comments and any subsequent recommendations from the final report should be carefully evaluated by EPA. Waiting until the connectivity report is finalized will give EPA more information to consider and may possibly lead to revisions before releasing the final draft rule for public comments.

C. Deference to State Water Law

The text of the rule should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, and state-federal co-regulation of water quality.

D. Groundwater

The draft rule would establish jurisdiction for waters that have a "shallow subsurface hydrologic connection" with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater. As such, the Council supports language included in the supplementary materials accompanying the draft rule that "nothing under this proposed rule would cause the shallow subsurface connections themselves to become jurisdictional" and that such connections "would not be considered 'Waters of the United States' [WOUS] in and of themselves." To fully clarify that groundwater is not subject to CWA jurisdiction, paragraph (b) of the rule, which identifies those waters that are

not WOUS, should also include groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.

E. Exclusions

The Council supports the intent of paragraph (b) of the draft rule, which excludes certain waters from its definition of WOUS. However, the list of excluded waters should also include additional waters and features that are generally considered to be outside the scope of the CWA. In addition to groundwater, these include:

1. Irrigation ditches, canals, and laterals that move water away from WOUS to deliver water to irrigated land and return flow ditches;
2. Non-tidal drainages, including tiles and irrigation ditches excavated on dry land, as well as excavated ditches used for drainage on logging and other natural resource management (i.e., grazing) roads and diversion ditches to control run-on and run-off at mining sites if constructed outside of natural drainages;
3. Artificial dugouts, lakes and ponds used for stock watering or irrigation, as well as dip ponds used for wild land firefighting and dust abatement;
4. Pits and quarries excavated in uplands for fill, sand, gravel, stone and related materials that fill with water, as well as any pits excavated for mining outside of naturally occurring WOTUS; and
5. Prairie potholes and playa lakes.

F. Significant Nexus

The Council appreciates the draft rule's recognition that Justice Kennedy's "significant nexus" test requires a connection between waters that is "more than speculative or insubstantial" to establish jurisdiction. However, the rule needs further clarification to quantify "significance" and to ensure that it does not extend jurisdiction to de minimis or insubstantial waters, nor lead to broad speculative connections.

G. Differences Between States

There are significant differences of opinion among the western states regarding the extent of the CWA's authority and the potential impacts of the draft rule, particularly with respect to whether the rule represents an expansion of jurisdiction as delineated by the U.S. Supreme Court. While the Council's comments represent those aspects of the draft rule where the western states agree, they do not represent the entirety of the individual states' respective views regarding the rule. As such, EPA and the Corps should carefully consider the individual comments that the states will submit regarding the rulemaking and should work with the individual states as co-regulators in revising and implementing the rule.

III. ADDITIONAL ISSUES WHERE CONSENSUS IS LESS CERTAIN

During the call, the workgroup identified the following issues where it is less certain that consensus is possible. This section briefly describes the discussion of those issues and provides possible “straw man” consensus language.

A. Significant Nexus

Todd Chenoweth of Texas expressed concern that the leaked rule is unclear in how it determines jurisdiction over wetlands under Section 404 of the CWA. Specifically, he noted that the rule would find some wetlands to be jurisdictional if they are adjacent to traditional navigable waters, while finding others to be jurisdictional on a case-by-case basis using Justice Kennedy’s significant nexus test. According to Todd, it is unclear as to which analysis the rule requires for a given wetland.

Bill Schuh of North Dakota also said further clarification is needed to determine how the significant nexus test will apply given the agricultural exemption. While the rule recognizes the agricultural exemption, Bill said the rule’s interpretation of the significant nexus test could extend jurisdiction to agricultural ditches.

Additionally, Tony raised the issue of isolated waters, noting that the U.S. Supreme Court has held in *SWANCC* that certain isolated waters (e.g., prairie potholes, playa lakes, etc) are not jurisdictional.

Possible consensus language could provide additional detail to the significant nexus language proposed in Section II(F) above. For example, potential language could include:

In particular, specific areas that require clarification include:

- (1) Wetlands: The rule would establish jurisdiction for certain wetlands that are “adjacent” to traditional navigable waters, but also sets forth a case-by-case process to establish jurisdiction for wetlands using Justice Kennedy’s significant nexus test. The rule should provide further clarification about when and how these analyses apply and how to resolve any conflicts that may arise.*
- (2) Agricultural Exemption: The rule properly maintains current agricultural exemptions. However, the rule’s definition of the significant nexus test, particularly its use of an aggregated watershed approach to establish jurisdiction over certain waters, raises questions as to whether the test could be applied to establish jurisdiction over currently exempt farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches. Thus, additional clarification is needed to ensure that the rule’s use of the significant nexus test does not conflict with the CWA’s agricultural exemption.*

(3) Isolated Waters: The U.S. Supreme Court's SWANCC decision ruled that CWA jurisdiction does not extend to certain isolated waters. In addition, both the plurality opinion and Justice Kennedy's concurring opinion in Rapanos found that the extent of CWA jurisdiction is not without limit. Therefore, further clarification is needed to ensure that the rule, particularly its aggregated watershed approach, does not establish jurisdiction over isolated waters that would not be jurisdictional under SWANCC and Rapanos.

B. Possible Expansion of Jurisdiction

Bill DeRienzo of Wyoming expressed concern that the rule represents a large expansion of authority and that EPA is downplaying the possible impacts of the rule. As indicated in Section IV below, a number of states have indicated that they do not believe the rule represents an expansion of jurisdiction and do not believe that the rule will impact them significantly. Thus, it is unlikely that there is universal consensus for a position expressing concern that the rulemaking will expand jurisdiction or adversely impact states.

Nevertheless, it may be worthwhile to explore whether consensus is possible for language along the following lines:

Although the issue of CWA jurisdiction has historically been viewed from the perspective of Section 404, the rulemaking would clarify jurisdiction for all CWA programs. There is considerable uncertainty and a lack of information about the rule's possible impacts, including its potential impacts on state-administered programs. Further work between EPA, the Corps, and the states is needed to quantify these potential impacts and address possible unintended consequences.

C. Tributaries and Dry Ephemeral Streams

Tom Stiles of Kansas has expressed concern that the draft rule's position that all tributaries are jurisdictional will expand jurisdiction to include dry ephemeral streams. Instead of automatic designation, Kansas would prefer a process that allows for case-by-case evaluation of dry ephemeral streams to determine jurisdiction.

Possible consensus language could include something similar to the following:

There are a variety of water courses in the arid West, including but not limited to dry ephemeral streams that have unreliable and often largely insignificant flows. Specifying that all tributaries are jurisdictional raises the possibility that these types of waters will be jurisdictional even if their contribution to downstream waters is de minimis. Rather than automatic designation, the rule should employ a case-by-case process to determine jurisdiction for these types of waters. Such a process would better account for the significant differences between tributaries in the West, and ensure

that limited state resources are not allocated towards protecting insignificant waters at the expense of much more important waters.

D. The Appropriate Use of the “Significant Nexus” Test

Bill Schuh questioned whether the rule’s reliance on the significant nexus test is appropriate given that it was written by one justice as opposed to the four who joined Justice Scalia’s plurality opinion. As noted below in Section IV of this memorandum, there are significant differences of opinion regarding the use of Kennedy’s significant nexus test. As a result, it is unlikely that the WSWC could come to universal consensus on a position that challenges the use of the significant nexus test or supports the plurality decision over the significant nexus test (or vice versa).

However, it may be worth comparing the *SWANCC* and *Rapanos* decisions with the draft rule’s aggregated watershed approach and the draft connectivity report to determine if there are any similarities, differences, or gaps. This information could then be used to assess whether the Council could develop narrowly-tailored consensus language on possible waters or features where use of the significant nexus test would be appropriate or inappropriate.

Of note, EPA Wetlands Division Director Dave Evans explained the draft guidance’s emphasis of the significant nexus test at the Council’s Spring 2012 Water Quality Committee meeting in Washington, D.C. The minutes of that meeting describe his explanation as follows:

Dave...explained [that] [t]he legal approach for interpreting a plurality decision is to look at the interpretation supported by a majority of the justices. In this case, the “continuous surface connection test” set forth in the plurality decision authored by Justice Scalia enjoys the support of four votes, while the “significant nexus” test from Justice Kennedy’s concurring opinion represents one vote. At the same time, the four dissenting justices indicated in Justice Steven’s dissent that they would find jurisdiction under either test. Thus, eight justices would find jurisdiction under the Scalia test and five would find jurisdiction under the Kennedy test. Dave further noted that the guidance does place more emphasis on Kennedy’s significant nexus test because it is more complex.

E. Establishing an Endpoint for CWA Jurisdiction

The workgroup discussed concerns that the rule is unclear regarding the full extent of CWA jurisdiction. The Council’s current position (#330.5) expresses concern that the previously proposed guidance provided “no clear and concise limits to federal jurisdiction,” and states that any rulemaking “should provide clear and concise limits to federal jurisdiction.” The Council could consider including similar language in future comments on the draft rule.

F. Additional Actions to Consider

Other possible actions to consider that could inform the workgroup's efforts include:

1. Reviewing existing case law to identify waters the courts have specifically included or excluded from CWA jurisdiction. Such a list could inform efforts to identify waters that should be excluded from CWA jurisdiction.
2. Reviewing the western states' existing statutory authority to regulate waters of the states to inform a discussion regarding the need for regulation. Such a review could also provide the basis for language that distinguishes between the need for regulation and a need for federal regulation (as noted on the call).
3. Gathering additional information about the rule's potential effects on state water right permitting, including surface water diversions and groundwater withdrawals, to support the Council's comments regarding deference to state water law.

IV. AREAS OF DISAGREEMENT

According to the matrix, the following represent those areas where disagreement is most pronounced among the western states:

- A. Shallow Subsurface Flows: Some states view the use of shallow subsurface flows to establish jurisdiction as an encroachment of federal authority on the states' control over groundwater. Others support the use of shallow subsurface flows as a necessary means of protecting water quality.
- B. Significant Nexus Test v. Plurality: Some states support using the significant nexus test, while others would prefer that the rule relied only on the plurality opinion's "continuous surface connection" test.
- C. Expansion/Non-Expansion of Jurisdiction: Whether the rule expands or does not expand CWA jurisdiction. There is a fundamental disagreement over the extent of CWA jurisdiction both before and after the Court's rulings.
- D. Potential Impacts: Whether or not the rule will have a substantial impact on the states and state resources.
- E. Bifurcated v. National Approach: Some states have expressed support for using a bifurcated approach to determining CWA jurisdiction in which there is a narrow, national level of jurisdiction based on the plurality opinion while EPA and the Corps work with each individual state to determine how to implement the significant nexus test. Other states have expressed concern about this approach and support a national standard.

WSWC MEMBER STATE PERSPECTIVES REGARDING THE “LEAKED” DRAFT CWA RULE AND THE RULEMAKING GENERALLY

January 24, 2014

	Benefits	Concerns	Possible Effects	Additional Comments
AK		-Lack of state involvement in development of the draft rule. -Connectivity study serving as basis of the rulemaking given its “almost complete lack” of AK-specific information in connectivity report (e.g., no mention of permafrost, boreal forest spruce bogs, low-nutrient waters, spring break up, etc.). AK is also concerned about the rule’s submission to OMB before comments on the study had been received and a scientific review of the study had been completed. -Rulemakings for lower 48 typically “do not fit AK” (“this one does not” as well) -States have a right to have jurisdiction over non-federal lands. -The rule will greatly expand CWA jurisdiction. -AK legislature has directed the state to consider assumption of the 404 program from the Corps, which raises concerns that the rule’s definition of the term “adjacency” will expand jurisdiction to specify which waters or wetlands cannot be included in a state-assumed and state-run program, further limiting the state’s interest in taking on the program.	-AK has 65% of the nation’s wetlands, which comprise about 43% of the state. Thus, the rule will affect AK like “no other state.” -No specific costs estimates at this time, but AK is “gravely concerned” about the potential impacts, which it expects to be “significant.” -Significant additional cost for 404 permitting -Potential additional costs for 402 permitting due to expanded definition.	–“This matter is of utmost importance to [AK], and we want to do everything we can to affect the direction of the proposed rulemaking.”
AZ	-The rule abandons the use of guidance, which can provide “neither certainty nor clarity.” The rule is necessary to “ensure robust public debate...and though this will be a monumental and controversial effort, [rulemaking] is the only way to get there.”	-The lack of state consultation in developing the rule before its submission to OMB.	It’s “much too early to tell” how the rulemaking will impact AZ. “If EPA is true to their word (that the scope of CWA jurisdictional waters will not expand) perhaps little.”	AZ commented on the rulemaking in general and not the leaked draft specifically. It intends to comment once the official version becomes available. AZ will work closely with the WSWC to formally comment once the official rule is released.

CA	-The rule will bring clarity to the uncertainty regarding CWA jurisdiction. -The rule will place limits on which tributaries are jurisdictional. -The rule defines how Kennedy's significant nexus test will be applied. -The rule will streamline jurisdictional determinations by showing where the "bright lines" are. -The rule recognizes that there may be a hydrologic connection between surface waters that are not physically connected.	-Lack of state involvement of the development of the draft rule.	-State authorities are broader than the CWA's WOTUS. Continued uncertainty about the extent of CWA jurisdiction could require the state to institute its own state surface water permitting program, which would be a resource intensive effort. -The draft rule will not increase 402 permits. -The draft rule will not affect the expenditure of state resources relative to Sections 303(d) and 305(b).	-CA is generally in support of the rulemaking.
CO	-The rule provides "much needed" clarification regarding EPA's jurisdictional reach. Jurisdictional determinations following <i>SWANCC</i> and <i>Rapanos</i> have contained much uncertainty. -The rule does not represent an expansion of EPA's jurisdiction beyond its current reach, and is a clarification of jurisdictional determinations that have been made based on existing guidance documents. -The draft rule maintains current agricultural exemptions. -CO believes jurisdictional determinations warrant consideration of the cumulative impacts of potential activities on multiple tributaries upstream of traditionally navigable waters within a particular watershed, which is "critical" for CO headwaters. Therefore, CO supports the draft rule's inclusion of this concept in its definition of "significant nexus," which is "consistent with EPA's existing approach." -CO supports the draft rule's inclusion of waters with a shallow subsurface hydrologic		-The draft rule will not result in increased costs for CO or its regulated community. -CO does not anticipate an increase in the number of 402 or 404 permits, an increase in segments on the 303(d) list, nor increased TMDL development.	-Colorado supports a "strong, consistent national" definition of WOTUS, and Colorado supports a national approach to determining jurisdiction rather than a bifurcated approach.

	connection to traditionally navigable waters as jurisdictional waters.			
ID		-Gov. Otter has written EPA, stating: “In the absence of any state consultation, the submission of a draft rule regarding CWA jurisdiction is of great concern as Idaho has sovereignty over the water of our state and exclusive authority over water allocation and water rights administration.” -Congress expected EPA and the states to implement the CWA as a federal-state partnership. “The drafting of this rule without state consultation violates congressional intent.” -The ID Dept. of Lands has commented that the rule should exclude: • Non-tidal drainages, including tiles and irrigation ditches excavated on dry land, as well as excavated ditches used for drainage on logging and other natural resource management (i.e., grazing) roads and diversion ditches to control run-on and run-off at mining sites if constructed outside of natural drainages. • Artificial lakes and ponds used for stock watering or irrigation, as well as dip ponds used for wildland firefighting and dust abatement. • Pits excavated in uplands for fill, sand, or gravel that fill with water, as well as any pits excavated for mining outside of naturally occurring WOTUS.	-State consultation is crucial because of “direct impacts” on the state and possible impacts to federal jurisdiction in ID.	-Gov. Otter has asked EPA and the Corps to provide ID with a “clear and defined process and schedule for proceeding with rule development.” -Gov. has informed EPA and the Corps that “Full state participation must be provided in the rulemaking process, and [ID’s] primary authority to allocate and administer water rights within its borders must be recognized.” -ID Dept. of Fish and Game has commented that the connectivity report “appropriately synthesizes the science.”
KS	-The draft rule expands the discussion on waters that are exceptions to the rule, notably ditches. KS believes this discussion should broaden to address situations in which irrigation ditches move water away from WOTUS to deliver water to irrigated land. KS has argued that these types of	-KS “strongly” opposes EPA’s proposed expansion of authority to “consider all [WOTUS] under their umbrella.” -“A one size fits all rule will result in unnecessary impacts and a significant waste of resources that could have been used to benefit Kansas waters.”	-The draft rule would override KS law by re-designating some waters as “classified” subject to numeric state water quality criteria and subsequently assessing those waters against Section 303(d) criteria. -KS is concerned about how the proposed rule would impact its planning and standards	-Ephemeral streams in western KS are “insignificant,” at least on a solitary basis. KS believes it is not enough for a stream to have a bed, banks, and an ordinary high water mark; it needs to have a history of dependable flow, at least seasonally, to align itself with the benefits and impacts set forth in EPA’s connectivity report. Infrequent

	ditches, as well as return flow ditches, are not WOTUS. KS further believes the current language in the proposed rule “opens the door” to make this argument. -The creation of a process for determinations regarding “other waters,” including the recognition that there are case-by-case situations and conditions that preclude automatic WOTUS designations (KS would like EPA to create a similar process for certain tributaries).	-KS is particularly concerned about the rule’s position that all tributaries are WOTUS, regardless of whether they are perennial, intermittent, or ephemeral. Including ephemeral tributaries as WOTUS will be an expansion of jurisdiction in KS. -The rule “blurs the lines” between intermittent streams, non-perennial streams, headwater streams, and ephemeral streams. While the first three are worthy of some level of CWA protection, KS does not currently recognize ephemeral streams as classified waters under the WOTUS subject to numeric criteria and federal oversight. Instead, these are “waters of the state” that receive protection pursuant to narrative criteria under KS’ WQS. -The rule could subject a dry channel to all programs authorized under the CWA, including WQS, monitoring, TMDLs, 319, 402, and 404. -The rule does not “provide us with any help” in applying KS’ 402 program to dry ephemeral tributaries; state authorities already provide that protection in designating any stream receiving a point source discharge as classified, regardless of flow regime status. -Requiring compensatory mitigation under 404 for ephemeral streams will have “debatable” benefits in KS.	programs under Sections 303(c) and 303(d). In particular, making dry ephemeral tributaries jurisdictional would make them classified in KS, which would impose numeric criteria on whatever uses can be made on those streams and potentially lead to the development of TMDLs. The relative increase in effective stream segments that would be treated as classified would increase “3-to- 4 fold” in KS. -The rule could result in the potential transfer of state resources, particularly KS’ TMDL program, to address marginal waters in western KS, which would be detrimental to the management and protection of “real, vital water resources in the wetter, central, and eastern” portion of KS. KS “should be determining the vulnerable waters and reaches in need of TMDLs and be allowed to utilize our resources, monitoring, and implementation activities in watersheds where benefits will be derived.” -Although KS law allows the state to apply 402 protections to dry ephemeral streams, the rule invites more federal oversight into matters that “are chiefly inconsequential because of unreliable flow.”	runoff, regardless of magnitude, should not bestow full protection under the CWA, except at the state’s discretion. -A process to evaluate site-specific information on activities in ephemeral streams for jurisdictional determinations and application of appropriate CWA programs would be a “far superior strategy” than automatic designation of WOTUS status on those streams. -While the science of the connectivity report appears to be “sound,” KS is concerned about how that science will be extrapolated “into realms not specifically studied,” particularly with respect to the ecological value of ephemeral streams (e.g. what are the intrinsic environmental uses that are supported on site in dry stream channels that only flow in response to rain?). -KS is also concerned that the connectivity report will be considered as a scientific basis that presumes that all non-navigable waters: (1) contribute equally and consistently; and (2) garner WOTUS status to all tributaries, “subjecting them to all aspects of the CWA, starting with the presumption that those streams are ‘fishable and swimmable.’” As the KS Dept. of Agriculture has noted, “Based on the report, there seems to be no measurement system that demonstrates an impact on navigable waters from non-navigable waters upstream. [Given] the lack of a measurement system for determining impacts and the fact that non-navigable waters are the jurisdiction of the state, it is clear that the report...should not be used as a basis for expanding EPA jurisdiction of non-navigable waters under the [CWA].” -In sum, a “one size fits all approach” is not applicable” in KS. For example, southeast Kansas experiences 42 to 45 inches of rainfall and 20 inches of evaporation. In contrast, the northwestern region of the state receives 18
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				to 20 inches of annual rainfall and 60 inches of annual evapotranspiration. "In many instances, if or when flow exists in a stream segment, flow doesn't reach a receiving water body before it absorbs into the streambed."
NV		-Lack of state involvement in development of the draft rule is NV's primary concern: "There cannot be a collaborative process if EPA does not engage with states prior to submittal of proposed rules to OMB. Once a rule has been submitted for review, it constrains significant input from states, allowing only minor revisions without the ability to shape the rule in a meaningful way." -The connectivity report, upon which the draft rule is based, "is blind with regard to what is really needed, which is clarification of the significance of the connection of waters. The report merely describes numerous examples of connectivity, no matter how vague or hypothetical. This approach merely muddies the water by demonstrating the complexity and difficulty in determination of significance, and allows EPA to jump to the flawed conclusion that nearly all waters are jurisdictional." The determinations in the definition of WOTUS are "far too broad, and consequently "far exceed" the intent of the CWA. -One "particular concern" to NV is the concept of subsurface hydrologic connectivity. "Groundwater has never been subject to CWA jurisdiction, and to change that fundamental tenet would conflict with state authority."	- "Further work will be required to understand the impacts and implications of the proposed rule. There are quite a few technical definitions that are subject to interpretation and would need clarification before we can evaluate how they will be used and what the resulting consequences would be."	
ND	-ND supports "EPA's scientific efforts to reduce ambiguities and uncertainties when defining the scope of [CWA] jurisdiction."	- "Merely establishing" that a connection between waters exists is an "insufficient basis" for establishing jurisdiction.	-ND is concerned that EPA's connectivity report, which will serve as the basis of the rulemaking, "may be inappropriately used" to	-EPA's connectivity report will have a "profound effect on future EPA and [Corps] guidelines and regulations regarding the

		-With respect to Kennedy’s significant nexus test, ND notes that Kennedy “recognized many waters are connected, but that a connection must be significant in order to determine there is some federal jurisdiction. Recognizing and addressing the statutory and constitutional limits of federal jurisdiction directly is the first step needed to clarify the [CWA’s] jurisdiction.” -The “key issue” that Kennedy raised in <i>Rapanos</i> “related not to identifying any nexus or connection, but defining what is a significant nexus. Justice Kennedy himself opined that this requires a case-by-case approach.” -“The establishment of global hydrologic connectivity...cannot be used as a pretext for the EPA and the Corps...to attempt to overturn legal precedent or adversely subordinate long-established and legitimate State authorities and constitutional principles.” -“Non-elected federal agencies through an over-extension of their rule-making process cannot overturn judicial decisions or subordinate legitimate elected officials’ legislative authority. EPA cannot extend federal jurisdiction by rule, where it has been limited by the U.S. Congress and the U.S. Supreme Court.” -Prairie potholes should also be excluded.	suggest that the scientific basis for drawing connections between waters “is sufficient to clarify [CWA] jurisdiction and usurp States’ authorities.”	scope of CWA jurisdiction.” -While ND “generally” agrees with the conclusions of the connectivity report, “it should be recognized that the degree to which streams or wetlands influence or affect downstream waters depend on their spatial juxtaposition on the landscape or the temporal context when assessing their connection or function.... It is recommended that the report attempt to quantify ‘significance’ in the context of connectivity.” -“To what purpose will the [connectivity] report be applied within the rule-making process? The Supreme Court has rejected the ‘connection’ drawn by EPA in the <i>Rapanos</i> and <i>SWANCC</i> cases. Any attempt by EPA to use the report to try and justify a different result will be fruitless.” -The draft connectivity report “...does not lend itself to delineation of boundaries of legitimate vs. state authority, but rather seems to suggest an unlimited scope to federal intrusion on state authority by the simple existence of biological and hydrological connection. Concern over such an intrusion on State authority was clearly expressed by the Supreme Court in <i>Rapanos v. United States</i>....” -“[W]hile the [report’s] discussion of the existence of connectivity is generally valid, the criteria discussed by the Court [in <i>Rapanos</i>] was far more specific, requiring that the water bodies ‘significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense,’ in a manner that is neither ‘speculative or insubstantial.’”
OK		-Lack of state involvement in development of the draft rule – the rule and connectivity report are “completely devoid” of state expertise.	-The rule may not cost OK much more to implement due to the state’s current “waters of the state” definition, which captures all surface water in the state. However, the	-OK believes that a more simplistic approach to addressing “adjacent” waters would be a general policy statement that: (1) recognizes that all waters are hydrologically connected;

		-The proposed rule “greatly expands” CWA jurisdiction. -The rule is not clearer or more precise in clarifying which waters are jurisdictional; it appears to move a “fuzzy” line from one place to another, which “doesn’t make the line less ‘fuzzy.’” -The definition of “adjacent” waters does not exclude groundwater, as well as a number of marginal waters. -The rule’s language, particularly its use of “subsurface hydrologic flows” and its definition for “tributary,” raises questions as to whether it extends jurisdiction to groundwater. -<i>Rapanos</i> and <i>SWANCC</i>, as well as the CWA, do not support the rule’s assertion that jurisdiction extends to all tributaries. “Alluvial groundwater could be included [because it] can affect the chemical, physical, and biological integrity [of other water bodies].” -Basing the leaked rule on the connectivity report’s findings regarding the connections between waters misses the point of the rule, which is “one of policy, intent, and implication.”	rule’s expanded jurisdiction raises a number of federalism concerns and would remove OK’s flexibility as a state to determine the costs of compliance on non-navigable waters.	and (2) all activities that impact a WOTUS must be carried out so that all waters specifically defined as a WOTUS meet WQS. -For example, hypothetically, the runoff from a parking lot is not a WOTUS, nor is the ditch next to the parking lot, nor is the ephemeral stream below that. However, the next downstream tributary with flows or standing water for “300 or more days a year” is a WOTUS and the state should take steps upstream to protect the downstream WOTUS.
OR	ODEQ “views this rule to add needed clarification and is not expected to add costs to the programs DEQ implements, particularly programs under [CWA] sections 303 and 402. Oregon’s application of those programs is guided by the state’s definition of waters of the state, which includes more waters than the federal definition.”	None identified at this time.	ODEQ “...does not view the rules as proposed to have any significant effects on the programs it administers, and may in some cases, provide helpful clarification.”	
TX		-Lack of state involvement in development of the draft rule. -The rule represents an expansion of the	-The draft rule would cause a “potentially large increase” in the number of areas for which TX would need to develop WQS. “This is a particular problem because the draft rule	-TX urges a rule based upon Scalia’s plurality opinion. -The subsection of the draft rule that

		definition of WOTUS that is “over and above” TX’s understanding of current law, and appears to be nearly as broad as the “migratory bird rule” struck down in <i>SWANCC</i>. -Summing the effects of all isolated wetlands in a basin will create a situation in which waters with a “tenuous nexus to navigable-in-fact” waters will be jurisdictional. -The leaked economic analysis that accompanies the draft rule “seems to suggest that...playa lakes would, or would nearly always, be considered to be [WOTUS].” Many of TX’s playa lakes are “not likely to meet the Kennedy significant nexus test.” -Groundwater is not subject to CWA jurisdiction and the rule’s use of subsurface flows to establish jurisdiction is inappropriate.	continues to have a case-by-case analysis for marginal waters.” -States would not have the option to wait until an entity seeks either a 404 or a 402 permit before making a determination as to whether an area is jurisdictional. This could be a “huge drain on staff resources” in terms of additional time consulting with the Corps and EPA. -With respect to 303(d) and 305(b), the state would also need to implement TMDLs and carry out ongoing monitoring after standards are developed. State resources are already “strapped” in terms of developing TMDLs for “the really significant water bodies.” -The draft rule would increase the number of 404 permits, along with 401 certifications for water infrastructure projects needed to address population growth and drought in TX. “This could cause significant delays in project construction for, at best, marginal waters.”	enumerates waters that are excluded from the definition of WOTUS could provide the framework for the WSWC to suggest additional waters for exclusion, such as playa lakes and similarly situated waters in the West.
UT	-The rule will bring clarity to the uncertainty regarding CWA jurisdiction. -The rule will place limits on which tributaries are jurisdictional. -The rule defines how Kennedy’s significant nexus test will be applied. -The rule clarifies that some jurisdictional authorities will not be subject to federal permitting authorities. -The rule will streamline jurisdictional determinations by establishing where the “bright lines” are. -The rule recognizes that there may be a hydrologic connection between surface waters that are not physically connected thus affording protection to downstream waters that are connected.	-Lack of state involvement in development of the draft rule. -Additional federal involvement, either by the US Army Corps of Engineers or EPA in jurisdictional issue, could be unsettling if it becomes intrusive .	-UT’s state authorities are broader than the CWA’s WOTUS. Continued uncertainty about the extent of CWA jurisdiction and delays in the implementation of a federal rule could require Utah to institute its own state surface water permitting program, which would be a hugely resource intensive effort . -The draft rule will not increase 402 permits in UT. -The draft rule will not affect the expenditure or dedication of UT’s resources relative to 303(d) and 305(b) activities. -An expansion in CWA jurisdiction could result in an increase of 401 Certifications issued by the state.	-“The greatest strides that have been made over the last 40+ years to protect our country’s waters have largely been as a consequence of the federally-enacted [CWA]. In order to make the next strides that will be needed to protect our increasingly stressed water resources, the consistencies afforded by a continued and even enhanced national approach will be necessary.”

	-“Sole reliance on state authorities to protect our waters will not always be successful due to the surface and hydrologic connection between states’ waters and the inconsistencies in the laws, priorities and standards of individual states.”			
WA	-Rule provides “good clarification” on what is jurisdictional – jurisdictional determinations have been “less predictable and more time consuming” for the Corps and applicants, thereby affecting WA’s Section 401 program. The draft rule “makes good progress at more clearly identifying which waters are jurisdictional.” -Rule adds new definitions that further clarify jurisdiction, including the definitions of “neighboring,” “tributary,” and “significant nexus.” -Rule is consistent with WA’s understanding of how upstream waters affect downstream waters. -Rule does not expand jurisdiction, but more clearly identifies which waters are jurisdictional. -Rule is consistent with on-the-ground implementation of the CWA. -WA supports inclusion of waters with a shallow subsurface hydrologic connection to navigable waters. -WA supports the inclusion and definition of tributaries as WOTUS and believes that tributaries should be regulated to ensure protection of navigable waters.		-WA does not believe the rule will add costs to programs, and that the rule may reduce regulatory uncertainty and shorten the amount of time it currently takes for the Corps to make jurisdictional determinations.	-WA supports the use of Kennedy’s “significant nexus” definition to identify which waters contribute services to navigable waters. -WA has many important wetlands that while not immediately adjacent, are still hydrologically connected to traditionally navigable waters and contribute important functions to those river systems, including base flow support. WA believes these waters should be protected. -Many of WA’s floodplains have wetlands that perform important services such as pollutant removal, flood water storage, and habitat for salmon species. All of these functions support the health of the navigable waters, and are the underpinnings of WA’s regional economy and quality of life. Effects of these waters should be considered in combination with other impacts to similarly located wetlands. -Tributaries contribute nutrients as well as pollutants to navigable waters. The definition of “tributaries” in the rule also includes wetlands, which are critical to maintain the hydrologic cycle in WA streams and rivers upon which endangered salmon depend.
WY		-Lack of state involvement in development of the draft rule. -The process of developing the SAB connectivity report separate from the	-The issue of jurisdiction has historically been viewed from the perspective of Section 404 permitting (primarily a federal program), but jurisdiction applies to more than dredge and fill activities. “A large expansion of CWA	-With respect to the connectivity report, WY has noted: “It’s important to remember that the United States Supreme Court ruled against EPA’s past exercise of jurisdiction in both the SWANCC and Rapanos decisions,

		rule's intended purpose as the basis of the draft rule. -Given the draft rule's submission to OMB before the finalization of the connectivity report, it is "likely that the SAB will have little, if any influence on the final rule." -"Because the real issue is the extent of regulatory jurisdiction, the proposed rule should...have been presented [to the SAB] so that the [connectivity] report could be evaluated within the context of how it did, or did not support the proposed rule." -The draft rule does not require a reasonably demonstrative connection between affected wetlands and stream channels and downstream navigable waters. -The connectivity report's "generalized conclusion" that all streams, regardless of size or flow, have important effects on larger downstream waters "should not be used as the basis for extending CWA jurisdiction. [D]oing so will result in a substantial expansion of federal regulatory involvement from what it is today."	authority will have many unnecessary consequences related to the adoption of [WQS] and NPDES permitting, which are primarily state administered programs." -"Extending CWA jurisdiction to remote ephemeral channels in the desert and plains systems will result in unnecessary federal regulation over water management and protection activities that are best left to state and local decision making."	basically because EPA was unable to reasonably demonstrate any significant connection between the affected wetlands and stream channels to a downstream navigable water. We are concerned that EPA intends to apply a similar approach... in place of any actual site analysis by declaring that every channel or erosional feature on the landscape has 'important' effects on downstream navigable waters."
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For the reasons set out in the preamble, title 33, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a), (b) and (c) to read as follows:

§328.3 Definitions

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;
- (5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the

same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

(b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section —

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) water-filled depressions created incidental to construction activity;

(vi) groundwater, including groundwater drained through subsurface drainage systems; and

(vii) gullies and rills and non-wetland swales.

(c) Definitions —

(1) **Adjacent:** The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

(2) **Neighboring:** The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) **Riparian area:** The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) **Floodplain:** The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) **Tributary:** The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed

and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.

(6) **Wetlands:** The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) **Significant nexus:** The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard

to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.

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**U.S. Environmental Protection Agency and U.S. Department of the Army
Interpretive Rule Regarding the Applicability of
Clean Water Act Section 404(f)(1)(A)**

SUBJECT: Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices.

PURPOSE: The purpose of this interpretive rule is to clarify the applicability of the exemption from permitting provided under section 404(f)(1)(A) of the Clean Water Act (CWA) to discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service (NRCS) conservation practice standards that are designed and implemented to protect and enhance water quality.¹

BACKGROUND:

Section 404(f)(1)(A) of the CWA exempts from permit requirements certain discharges associated with normal farming, silviculture, and ranching activities in waters of the United States, including wetlands. It is important to emphasize that this interpretive rule identifies additional activities considered exempt from permitting under section 404(f)(1)(A), but does not affect, in any manner, the scope of agriculture, silviculture, and ranching activities currently exempt from permitting under section 404(f)(1)(A) including, for example, plowing, seeding, cultivation, minor drainage, etc.

Section 404(f)(1)(A) does not provide an automatic exemption for all discharges related to farming, silvicultural or ranching practices. Rather, Section 404(f)(1) exempts only those discharges associated with activities specifically identified in subparagraphs (A) through (F), and “other activities of essentially the same character as named” (44 FR 34264). Section 404(f)(1)(A) lists discharges of dredged or fill material from “normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” This interpretive rule further clarifies the scope of this statutory exemption.

¹ As this interpretation addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with the U.S. Department of Agriculture (USDA).

Section 404(f)(1)(A) is limited to discharges associated with activities listed in the statute and defined by the agencies' regulations and that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation" (40 CFR 232.3(c)(1)(ii)(A); 33 CFR 323.4(a)(1)(ii)). This "established" requirement reconciles the dual intent reflected in the legislative history that although section 404 should not unnecessarily restrict farming, silviculture, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.²

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) regulations (40 CFR 230 and 33 CFR 320) and preamble to these regulations provide additional detail on "normal" activities listed in section 404(f)(1)(A). The words "such as" have been consistently interpreted as meaning the section applies "to the activities named in the statute and other activities of essentially the same character as named," and "preclude[s] the extension of the exemption ... to activities that are unlike those named." (44 FR 34264).

INTERPRETATION FOR CERTAIN CONSERVATION PRACTICES:

USDA and NRCS's natural resources conservation programs help people reduce soil erosion, enhance water supplies, improve water quality, increase wildlife habitat, and reduce damages caused by floods and other natural disasters. These longstanding USDA programs are effective in promoting the water quality and broader environmental goals identified in both the Food Security Act and Clean Water Act. The agencies believe working together to improve the consistency and integration of programs like these is fully consistent with the law, promotes the mutual objectives of our regulations and statutes, and increases clarity and predictability for the agriculture community. The result is good for the nation's waters and for farmers and foresters who want to protect the resources on their lands.

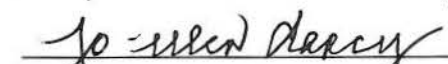
In light of the longstanding adoption of these agricultural conservation practices and their goal of protecting and enhancing water quality, the section 404(f)(1)(A) exemption is interpreted to cover certain agricultural conservation practices as "normal farming" activities. Normal farming necessarily includes conservation and protection of soil, water and related resources in order to sustain agricultural productivity, along with other benefits to environmental quality and continued economic development. "Upland soil and water conservation practices" are explicitly identified in the statute as "normal" farming activities, and conservation activities within the waters of the U.S. that include discharges in waters of the U.S. and that are designed to protect and enhance the waters of the U.S. have been determined to be of essentially the same character. As the statute does not limit the exemption to only those activities explicitly listed, it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt from the section 404 permitting requirements. This interpretation preserves congressional intent by ensuring that beneficial agricultural conservation practices will not be unnecessarily restricted so long as those activities are designed and implemented to protect and enhance water quality and do not destroy waters.

² This interpretive rule does not affect section 404(f)(2) of the CWA.

Specific NRCS agricultural conservation practices, identified by the EPA, the Army, and USDA, that could include the discharge of dredged or fill material in waters of the U.S. for the purposes of benefitting those waters are appropriately considered "normal farming" activities and exempt from permitting under Section 404(f)(1)(A). To qualify for this exemption, the activities must be part of an "established (i.e., ongoing) farming, silviculture, or ranching operation," consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards. So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in "waters of the United States" nor is site-specific pre-approval from either the Corps or the EPA necessary before implementing these specified agricultural conservation practices. The EPA, the Army, and USDA will enter into a Memorandum of Agreement to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that may include discharges in waters of the United States that would qualify under the exemption established by section 404(f)(1)(A).

 3/25/14
(Date)

Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency

MAR 25 2014
 (Date)

Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army



WESTERN GOVERNORS' ASSOCIATION

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March 25, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil
Works)
108 Army Pentagon
Washington, DC 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are writing with respect to the pending rulemaking regarding the jurisdiction of the Clean Water Act. As Governors of Western states, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management.

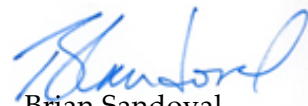
As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. While the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute substantive consultation. Western Governors strongly urge both EPA and the Corps to engage states as authentic partners in the management of Western waters.

States have federally-recognized authority to manage and allocate water within their boundaries. Section 101(g) of the Clean Water Act (CWA) expressly states that, "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act." The Western States Water Council, in its March 10, 2014, correspondence to you both, delineates the areas of concern states have with this rulemaking process. Western Governors urge you to engage with us, individually and through the Western Governors' Association, to resolve these important concerns in advance of any further action on this issue.

We appreciate your consideration and hope to remain productive partners in the management of waters in West.

Sincerely,


John Hickenlooper
Governor, State of Colorado
Chairman, WGA


Brian Sandoval
Governor, State of Nevada
Vice Chairman, WGA

Attachment



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March 10, 2014

Gina McCarthy
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Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing eighteen western governors on water policy issues, I am writing to provide additional comments to inform your agencies' efforts to develop a rule on Clean Water Act (CWA) jurisdiction. These comments are intended to build upon our previous correspondence and meetings with representatives from your agencies on this issue.

We have also received a letter dated February 10 from EPA Acting Assistant Administrator for Water Nancy Stoner, which responds to our November 2013 letters. As discussed in our comments below, the western states continue to have concerns about EPA's and the U.S. Army Corps of Engineers' coordination efforts, and request extensive interaction with the individual states and the state agencies that deliver and implement the CWA.

A. Connectivity Report

EPA has indicated that its draft connectivity report will serve to inform the final rule on CWA jurisdiction. However, the draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, the connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule in the Federal Register for public comment.

Additionally, many western states have submitted individual comments for the Environmental Protection Agency's (EPA) Science Advisory Board (SAB) to consider in its review of the draft connectivity report. EPA should carefully evaluate the SAB's consideration of these comments and any subsequent recommendations from the final report. Waiting until the report is finalized will give EPA more information to consider, and may possibly lead to revisions that improve the rule before its publication for public comment.

B. Deference to State Water Law

The text of the rule itself should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality.

C. Groundwater

The Council understands that the draft rule would establish jurisdiction for waters that have a “shallow subsurface hydrologic connection” with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater.

The Council understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOUS) in and of themselves. The Council supports the intent of such language. However, to fully clarify that groundwater is not subject to CWA jurisdiction, the text of the rule itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.

D. Exclusions

The Council understands that the draft rule may specifically exclude certain waters from its definition of WOUS. The Council supports the intent of such a provision and requests that your agencies also include other waters and features that are generally considered to be outside the scope of the CWA. In addition to groundwater, the following should also be excluded:

1. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
2. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters;
3. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement;
4. Man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface waters; and
5. Prairie potholes and playa lakes.

The preamble for the rule should also recognize that the states have authority pursuant to their “waters of the state” jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters.

E. Significant Nexus

The Council understands that the draft rule may recognize that Justice Kennedy’s significant nexus test requires a connection between waters that is “more than speculative or insubstantial” to establish jurisdiction. The Council supports the intent of such recognition. However, the rule should also quantify “significance” to ensure that it does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

F. State Consultation

As noted in the Council’s prior correspondence and meetings with your agencies, the western states remain concerned about the process EPA and the Corps are using to develop this rule.

In 2011, the Council asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed rulemaking would better ensure the treatment of states as co-regulators in the development of a draft rule.

However, the submission of a draft rule on CWA jurisdiction to OMB for interagency review without any substantive state consultation in the development of the rule raises significant concerns that your agencies will use a process that is no better than the one they used to develop the draft guidance. In particular, we remain concerned that individual states will not have the opportunity to provide substantive feedback until after EPA and the Corps have developed a draft rule and published it for public comment in the Federal Register.

While we recognize that EPA and the Corps have participated in various meetings and calls with the Council and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

In sum, EPA and the Corps should not wait until the public comment period to involve the states on a collective and individual basis in the development of the draft rule. States are co-regulators and are therefore separate and apart from the public. As such, waiting until the public comment period to consult with the states, both individually and collectively, in the development of the draft rule ignores their role as co-regulators and will not allow for meaningful state input or consideration of state concerns.

G. Conclusion

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phillip C. Ward", is written over a light blue circular stamp.

Phillip C. Ward
Chairman, Western States Water Council



WESTERN STATES WATER COUNCIL

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December 23, 2013

Sent Via Fax: (202) 395-3888

The Honorable Sylvia Mathews Burwell, Director
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

RE: Draft Clean Water Act Rule

Dear Director Burwell:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to ask that the Office of Management and Budget (OMB) ensure that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) comply with the state consultation criteria set forth in Executive Order (E.O.) 13132 as they formulate and implement their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position dated July 29, 2011, as well as our letters to EPA and the Corps dated April 10, 2013, November 5, 2013, and November 20, 2013.

A. State Consultation and E.O. 13132

The submission of a draft rule on CWA jurisdiction to OMB without any state consultation raises significant concerns about how and when EPA and the Corps will consult with the states regarding the formulation of this rule. Congress intended that the states and EPA would implement the CWA as a federal-state partnership, delegating authority to the states to administer the law as co-regulators with EPA.

While EPA has conducted some outreach with the Council and other organizations, these efforts have consisted primarily of communicating EPA's and the Corps' goals and time lines for the rulemaking. There is a difference between communication and consultation, and EPA and the Corps have yet to engage the states regarding state needs, perspectives, or expertise in developing the draft rule. Ideally, EPA and the Corps would have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a draft rule to OMB.

We are also concerned that EPA and the Corps apparently do not consider the rulemaking to have federalism implications requiring compliance with E.O. 13132, which sets forth specific state consultation criteria for federal agencies to follow when formulating and implementing policies that have federalism implications. According to Section 1(a) of the order, a policy will have federalism implications if it has "substantial direct effects on the States." Efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that many states believe will have very substantial and direct effects, thereby requiring compliance with E.O. 13132.

B. E.O. 13132's State Consultation Criteria

There is a considerable amount of uncertainty and significant differences of opinion regarding the extent of the CWA's authority and the impacts of any new rule. Such uncertainty underscores the need for EPA and the Corps to consult with the states as co-regulators regarding the formulation and implementation of this rule. Such consultation should be separate and apart from the general public comment period, and should give as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for substantive state consultation, including among others:

- Section 2(i): "The national government should be *deferential to the States* when taking action that affects the policymaking discretion of the States and should act only with the *greatest caution* where State or local governments have identified *uncertainties regarding the constitutional or statutory authority* of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether *Federal objectives can be attained by other means*." (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States *the maximum administrative discretion possible*. Intrusive Federal oversight of State administration is *neither necessary nor desirable*." (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "*early in the process* of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

C. Conclusion

As the Council has stated in its prior correspondence and interactions with EPA and the Corps, waiting until the publication of a proposed rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives.

Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without meaningful, substantive consultation with the states. Changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment is a needed first step. Promulgating this rule without complying with E.O. 13132's consultation criteria would be counterproductive and detrimental to building a positive and productive relationship with the states in implementing the CWA.

We respectfully request that OMB ensure that EPA and the Corps comply with E.O. 13132's state consultation criteria as they formulate and implement their CWA jurisdiction rule.

Thank you for considering the Council's views on this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is fluid and cursive, with the first name "Phillip" being more prominent and the last name "Ward" following in a similar style.

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs
Nancy Sutley, Chair, White House Council on Environmental Quality
Gina McCarthy, Administrator, Environmental Protection Agency
Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)



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November 20, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to strongly urge your agencies to consult with the states as soon as possible in the development of their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position and our letters dated April 10, 2013, and November 5, 2013.

A. State Consultation and Executive Order 13132

The submission of a draft rule on CWA jurisdiction to the Office of Management and Budget (OMB) without any state consultation raises significant concerns about how and when the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers will consult with the states regarding this rule. Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. As such, your agencies must treat the states as co-regulators in the development of any proposed rule regarding CWA jurisdiction. Ideally, EPA and the Corps would have consulted with the states prior to beginning the rulemaking process and certainly prior to submitting a draft rule to OMB.

We are especially concerned that your agencies may not consider the rulemaking to have federalism implications requiring compliance with Executive Order (E.O.) 13132's state consultation criteria. Such a perspective is in direct opposition to the principles of cooperative federalism embedded within the CWA. Any efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that necessitate compliance with E.O. 13132. In particular, such efforts qualify as "policies that have federalism implications" under the order because they have "substantial direct effects" on the states and on the "distribution of power and responsibilities among the various levels of government."

For example, aside from four states, including Idaho and New Mexico in the West, every state is primarily responsible for regulating discharges of pollutants to jurisdictional waters because they have delegated responsibility from EPA to operate approved National Pollutant Discharge Elimination System permitting programs under Section 402 of the CWA. Any

changes to the regulations and policies that govern which waters are jurisdictional will have a direct substantial impact to these programs. Specifically, changes limiting CWA jurisdiction could affect the states' ability to regulate waters previously considered to be jurisdictional, while changes that expand authority could require states to expend additional resources to permit discharges to previously unregulated waters.

Moreover, regardless of whether they have delegated authority under Sections 402 or 404, the requirements and limitations associated with jurisdictional waters will directly impact the ability of every state to enact policies regarding waters within their borders, as well as the allocation of their already limited resources. This is particularly true if the rule compels states to extend their Section 303(d) responsibilities to waters that are functionally marginal.

The considerable uncertainty and differences of opinion that exist regarding the extent of the CWA's authority demand that states receive a unique audience with your agencies as co-regulators that is separate and apart from the general public, and gives as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for exactly this type of consultation, including among others:

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable." (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "early in the process of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

As we have stated repeatedly in our prior correspondence and interactions with officials from your agencies, waiting until the publication of a rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment. Further, promulgating this rule without complying with E.O. 13132's consultation criteria could threaten the historically positive and productive relationship that states have enjoyed with EPA and the Corps in implementing the CWA.

B. Concerns to Address Through Consultation

As stated in our prior correspondence, there are a number of issues that require state consultation to address, including but not limited to:

- State Deference: How the rule will ensure deference to the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality as required under Sections 101(b) and 101(g).
- Groundwater: How to ensure that the rule will not be misinterpreted as extending CWA jurisdiction to groundwater, including state concerns regarding the use of "shallow subsurface hydrologic connections" to establish jurisdiction.
- Extent of CWA Jurisdiction: How the rule will comply with the limits Congress and the U.S. Supreme Court have established regarding the extent of CWA jurisdiction, including how the rule will provide clear and recognizable limits to such jurisdiction, especially pertaining to isolated wetlands.

C. Conclusion

In light of the above, we urge EPA and the Corps to recognize the significant federalism implications of this rulemaking and to comply with E.O. 13132's state consultation criteria. We also respectfully request additional information on how and when your agencies will consult with the states regarding the development of this rule, including how they will ensure the treatment of states as co-regulators.

We look forward to your response to these concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phillip C. Ward".

Phillip C. Ward
Chair, Western States Water Council

Enclosure

cc: Robert Perciasepe, Deputy Administrator, Environmental Protection Agency
Let Mon Lee, Deputy Assistant Secretary for Policy and Legislation, U.S. Army Corps of Engineers



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November 5, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OA-2013-0582

Dear Administrator McCarthy:

On behalf of the Western States Water Council, and its members, representing the governors of 18 western states, I am writing to comment on your agency's draft science report titled *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B). Our understanding is that the final version of this report will serve as the scientific basis for rulemaking that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are jointly developing to clarify the extent of Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. Our comments are based on our attached position and related letter dated April 10, 2013, which we sent to your agency and the Corps regarding the now withdrawn CWA guidance.

We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.

The overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*. For example, under Justice Kennedy's test, a mere scientific connection or "nexus" between waters is not sufficient to determine CWA jurisdiction. Instead, Justice Kennedy's test requires a fact-intensive, case-by-case physical and legal inquiry to determine whether that nexus is "significant" enough to establish CWA jurisdiction. Since the report does not describe how its scientific findings apply to this test or Justice Scalia's plurality decision, it is insufficient alone to establish or support CWA jurisdiction.

The report should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. Moreover, the CWA does not apply to ground waters, which are protected and allocated by western states, which recognize the hydrogeologic connections. Any reference to ground waters, including "shallow subsurface flows," is inappropriate in any related rulemaking.

As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* "would likely lead to further litigation" and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.

We are also concerned about the lack of state expertise and state representation on the Science Advisory Board. Not a single member of the board is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders.

In light of the above, we urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is fluid and cursive, with the first name "Phillip" being more prominent than the last name "Ward".

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Office of Environmental Information (OEI), Docket (Mail Code: 28221T),
Docket ID No. EPA-HQ-OA-2013-0582, U.S. Environmental Protection Agency,
1200 Pennsylvania Ave. NW, Washington, DC 20460



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April 10, 2013

Sent via email: Perciasese.bob@epa.gov
ASACWPOC@conus.army.mil

Mr. Robert Perciasese
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Guidance and Rulemaking

Dear Acting Administrator Perciasese and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states, I am writing to reiterate concerns regarding the *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, which the Council set forth in the enclosed comment letter dated July 29, 2011.

It is our understanding that your agencies are developing a proposed rule to clarify Clean Water Act (CWA) jurisdiction, as indicated in the Uniform Regulatory Agenda and Regulatory Plan published on December 21, 2012. As explained in our comment letter, the Council prefers rulemaking to clarify CWA jurisdiction instead of legally unenforceable guidance. Therefore, we urge you not to issue or apply the guidance to determine CWA jurisdiction while your agencies develop a new rule.

The vast majority of states have long worked as co-regulators with your agencies to protect water quality pursuant to the framework of cooperative federalism embodied in the CWA. Although states are responsible for implementing and administering most CWA programs, EPA and the Corps did not consult with the states in developing the draft guidance, nor did they share the document with the states prior to releasing it for public comment in April 2011. We understand your agencies have since revised the guidance after the public comment period and submitted it to the Office of Management and Budget for final review. Nevertheless, the revised guidance has not been made public nor has it been provided to the states for review.

We remain concerned about the lack of state consultation in developing the guidance and the potential that the final document may not adequately account for state needs and perspectives. The complexities of CWA jurisdiction and the broad ramifications for state and federal water quality programs warrant a formal and transparent rulemaking process. Unlike guidance, the notice and comment provisions of formal rulemaking facilitate early and ongoing engagement with states and other stakeholders. Formal rulemaking also triggers Executive Order 13132, which provides states with further opportunity to review a proposed regulation and offer perspectives prior to the publication of a rule.

Mr. Perciasepe and Ms. Darcy

April 10, 2013

Page 2

States bear the primary responsibility for preventing, reducing, and eliminating water pollution. By providing greater consultation with states, formal rulemaking is more likely than guidance to produce actual water quality improvements because it would better take into account state needs and perspectives, as well as the states' on-the-ground expertise and knowledge of water quality conditions and challenges within their borders. Issuing the guidance in the interim while EPA and the Corps pursue rulemaking would be a distraction that would create unnecessary conflict and uncertainty that would hinder the development of an effective rule.

Lastly, we urge you to continue to view the states as co-regulators and to ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is stylized with a large, looping initial "P" and a distinct "W" at the end.

Phillip C. Ward

Chair, Western States Water Council

Enclosure (WSWC Position #330.5)



WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

Position #330.5

July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC)¹ and *Rapanos v. United States (Rapanos)*² decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in SWANCC and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

A. State Water Resources Allocation and Water Rights Administration

Section 101(g) of the CWA expressly states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. 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."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"

¹ 531 U.S. 159 (2001).

² 547 U.S. 715 (2006).

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a “watershed” approach for satisfying Justice Kennedy’s “significant nexus” test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or “other waters,” no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA’s jurisdiction is not without limits.³

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a “watershed” approach instead of a “case-by-case” determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that “absent more specific regulations,” a “case-by-case” analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.⁴ Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential overbreadth” of the federal regulations at issue in *Rapanos*.⁵ The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

C. Groundwater

Page 16 of the draft guidance states that a wetland can be deemed to be “adjacent,” and therefore jurisdictional, if there is an unbroken “surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters.” Although the draft guidance does not use the term “groundwater,” nor define the term “shallow sub-surface hydrologic connection,” it could be interpreted as referring to

³ See *Rapanos*, 547 U.S. at 739 (stating, “The Corps’ expansive interpretation of the ‘waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction “...whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). *Id.* at 778-79 (Kennedy concurring)

⁴ *Id.* at 782.

⁵ *Id.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

D. States as Co-Regulators

The states, EPA, and the Corps have made progress in working together to carry out the CWA’s goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

E. Conclusion

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states’ primary authority to allocate water and administer water rights within their borders; (3) be consistent with SWANCC and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council’s views on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Weir Labatt III". The signature is fluid and cursive, with the last name "Labatt" being more prominent.

Weir Labatt, III
Chair, Western States Water Council



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

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FEB 21 2014

FEB 10 2014

**WESTERN STATES
WATER COUNCIL**

OFFICE OF WATER

Mr. Phillip C. Ward
Chair, Western States Water Council
5296 Commerce Drive, Suite 202
Murray, Utah 84107

Dear Mr. Ward:

Thank you for your November 20, 2013, letter to the U.S. Environmental Protection Agency and the Department of the Army, and your December 23, 2013, letter to the Office of Management and Budget, regarding the agencies' rulemaking process to clarify the scope of Clean Water Act jurisdiction.

As noted in your letter, Supreme Court cases in *Rapanos* and *SWANCC* have led to confusion regarding where the Clean Water Act applies. In September 2013, the agencies submitted to the Office of Management and Budget a draft Notice of Proposed Rulemaking that would revise the agencies' regulatory definition of the term "Waters of the United States" under the Clean Water Act. The agencies took this step in response to requests from a broad range of interests including some members of Congress, industry, agriculture, states, environmental groups, and other stakeholders that we clarify the geographic scope of Clean Water Act jurisdiction through formal notice and comment rulemaking.

Both the EPA and the Army recognize the critical role that states play in implementing the Clean Water Act. For this reason, the agencies have involved states in the earliest stages of their rulemaking process, and are committed to ensuring that the states remain active participants in future stages of the rulemaking process.

Because of states' critical Clean Water Act role, the EPA and the Corps voluntarily conducted extensive informal outreach and a federalism consultation in late 2011, early in the rule development process. Our consultations took place with the ten associations that are typically a part of federalism consultations (the "Big 10"), which include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States. In addition, we also invited the National Association of Clean Water Agencies, the Western Governors' Association and the Association of Clean Water Administrators to participate.

As part of this process, the agencies hosted three in-person meetings, two phone consultations and numerous outreach calls with state and local government agencies seeking technical input. More than 400 people participated in these discussions, and participants represented a wide variety of state and local agencies and associations, including the Western Governors' Association and the Western States Water Council.

As part of the consultation, we asked participants to provide input on what should be contained in a proposed rule and what areas of the definition of waters of the U.S. needed additional clarity. We received written comments from twelve counties, eight associations, and agencies from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas). In their written and oral comments, state and local governments identified a number of issues, including concerns about state authority over water rights, the jurisdictional status of groundwater, and the overall scope and extent of jurisdiction. The EPA and the Army have considered these comments in drafting the proposed rule, which is currently undergoing interagency review.

When the interagency review process concludes, the EPA and the Army will publish a proposed rule in the *Federal Register* and provide an additional opportunity for the Council and other interested parties to review the proposal and to provide comments. After the proposed rule is published, the agencies plan to meet with state and local government associations to review the comments we received during federalism consultation and discuss how the proposed rule addresses those comments. Moreover, the EPA's Regional Administrators will be playing an active role in reaching out to states and other partners, so you can expect direct engagement of your member states from EPA's Regional offices in the West. The EPA and Army will continue to take input from state and local governments through the end of the public comment process that will follow publication of the proposed rule. At the time the agencies publish a final rule, we will publish a federalism summary impact statement with the final rule, consistent with Executive Order 13132.

We also appreciate the Council's November 5, 2013, comments on the EPA's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The EPA's draft report synthesizes more than 1,000 peer-reviewed pieces of scientific literature about how smaller, isolated water bodies are connected to larger ones and represents the state-of-the-science on the connectivity and isolation of waters in the United States. The report is currently undergoing independent peer review by the EPA's Science Advisory Board. When the peer review process on the draft report is complete, the EPA will ensure that public and peer review comments are reflected in the final report, which will in turn serve as the scientific foundation of the final rule.

Thank you again for your letter and for your interest in the agencies' rulemaking process. Please feel free to contact us if you have any questions on this important issue, or you may call Benita Best- Wong, Director of the Wetlands, Oceans, and Watersheds at 202-566-1159 or Best-wong.benita@epa.gov.

Sincerely,



Nancy K. Stoner
Acting Assistant Administrator



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

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WESTERN STATES
WATER COUNCIL

Mr. Phillip C. Ward
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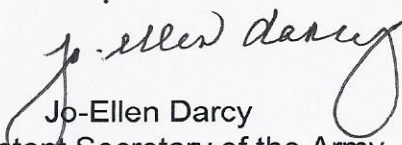
Dear Mr. Ward:

This is in response to your letter dated November 20, 2013, sent to my office and to Ms. Gina McCarthy, Administrator for the U.S. Environmental Protection Agency (EPA). Your letter recommends that we consult with the states in the development of the Clean Water Act (CWA) geographic jurisdiction proposed rulemaking. The U.S. Army Corps of Engineers and EPA have jointly drafted a proposed rule for defining waters of the U.S. The proposed draft rule was submitted to the Office of Management and Budget (OMB) for interagency review on 17 September 2013, pursuant to Executive Order 12866. I have coordinated this response with EPA and they have indicated that they will be responding under separate letter. I apologize for the delay in responding to your letter.

Executive Order 13132 discusses the issues of "federalism" and the "Unfunded Mandates Reform Act," intending to preserve the rights of the states in regulating themselves. The EPA is the lead federal agency for determining jurisdiction under the CWA (*Civiletti Memorandum*, 1979) and therefore is the lead federal agency on the joint rulemaking effort. As such, federalism implications and coordination with the states are primarily the responsibility of the EPA. The Corps does note that there will be a public notice comment period after the OMB interagency process, during which the states may provide specific comments.

If you have any further questions, please contact Mr. Chip Smith, of my staff, at (703) 693-3655 or charles.r.smith567.civ@mail.mil.

Very truly yours,


Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

Tab U – WSWC Clean Water Act 401
Certification Authority Survey
Results



W E S T E R N S T A T E S W A T E R C O U N C I L

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

MEMO

TO: WGA Staff Council

FROM: Tony Willardson, Executive Director, Western States Water Council

DATE: September 20, 2013

RE: **WGA and WSWC Actions and Interests Related to FERC Hydropower Licensing**

The WGA and WSWC have been actively involved in protecting States' rights and prerogatives in the federal hydropower licensing process for over two decades. The WSWC adopted related positions as early as 1991, and most recently in 2006 (attached). The latter largely formed the basis for the current **WGA Water Quality Resolution (11-15)** which states:

B.12 State Water Quality Certification: Section 401 of the CWA [Clean Water Act] requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. This certification authority is a vital tool for Western states as they continue to work closely with federal and private partners to restore fish populations under the Endangered Species Act and, in the face of consent decrees, to develop TMDLs for pollutant discharges into state waters in order to bring them into compliance with federal water quality standards. Section 401 of the CWA is operating as it should and states' mandatory conditioning authority should be retained without amendment.

Of note the **Clean Water Act** includes the following savings clause:

Section 101(g) - It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. 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.

Further, the **Clean Water Act - Section 401** requires "any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters..." to acquire certification from the State that "any such discharge will comply" with applicable state water quality standards to protect designated uses.

The Federal Energy Regulatory Commission (FERC) in issuing licenses for the development of non-Federal hydropower facilities requires that an applicant first acquire Sec. 401 certification from the State with any related conditions. These mandatory conditions are included unchanged in the FERC license.

The **Federal Power Act** of 1920 includes the following savings clause:

16 USC § 821 - State Laws and Water Rights Unaffected - "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Congress has consistently recognized the primacy of state law in the allocation and administration of water rights for all uses because of the need for a comprehensive system of governance. Further, the Congress has also delegated its authority under the Clean Water Act to the states for the protection and conservation of water quality, consistent with state water quality standards and state water rights law and administration. Any federally licensed activity that results in an alteration or hydrological modification of surface waters must be preceded by a Section 401 certification that ensures compliance with all provisions of state law.

The WSWC has supported efforts to integrate and streamline state and federal hydropower licensing requirements, consistent with the States' mandatory conditioning authority under Clean Water Act Section 401 and Congress' longstanding deference to the States with regard to the allocation of water for all uses, including hydropower. The WSWC has opposed administrative and legislative effort to weaken or eliminate States' mandatory conditioning.

Given our past experience, maintaining the Governors' current position and this critical state prerogative is vital. The States' mandatory conditioning authority has been a point of contention with FERC and the hydro industry since the 1980s. There have been repeated unsuccessfully attempts to convince Congress to strip the States of this authority and allow FERC to balance all environmental and natural resources considerations.

The Supreme Court has twice addressed FERC hydropower licensing and State authorities. On May 21, 1990, in *California v. FERC (Rock Creek Case)*, the Court unanimously affirmed FERC's exclusive jurisdiction to determine minimum bypass flows for federally licensed hydropower projects to protect fish and wildlife, and invalidated California's claim of authority under FPA Section 27 to impose additional requirements. Forty-nine States provided amicus support for California's interpretation of Section 27 as protecting States' rights.

The Court distinguished the holding from its *California v. United States* decision (1978) related to Section 8 of the Reclamation Act; and *First Iowa* (1946) which it interpreted as integrating rather than duplicating federal and state jurisdictions, saying that the Federal Power Act envisioning a broader and more active oversight role for FERC in hydropower development.

However, on March 31, 1994, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Court upheld the State Supreme Court's holding that "the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows, and that § 401 authorized the stream flow condition and conferred on States power to consider all state action related to water quality in imposing conditions on § 401 certificates." The Supreme Court held: "Washington's minimum stream flow requirement is a permissible condition of a § 401 certification."

As it now stands, States must certify that any federal action, including FERC licensing, is consistent with State adopted water quality standards and States may impose mandatory license conditions. FERC must include those conditions in any license.

The Council has in the past tried to work with FERC and the hydropower industry and would support WGA efforts in this regard. In 1992, the WSWC suggested to FERC development of a Memorandum of Agreement that would formally recognize state water rights permitting processes and provide greater consideration of state water planning decisions, while providing better information for FERC decisionmaking, greater certainty for licensees, and State protection of mandated instreamflows. FERC abruptly ended our discussions after about 18 months.

Areas for future discussion might include the timing and completeness of the request for State certification, when the one-year period mandated by the FPA for action begins, the potential use of eminent domain, and subordination of hydropower to future upstream water development.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
urging the
CONGRESS AND ADMINISTRATION
TO CONTINUE TO RECOGNIZE STATE PRIMACY REGARDING
WATER RIGHTS AND WATER QUALITY CERTIFICATION
in the
FEDERAL LICENSING OF HYDROELECTRIC PROJECTS
Washington, D.C.
March 29, 2006
(revised and updated)**

WHEREAS, water is the lifeblood of each of the arid Western States and its allocation affects the future of each Western State's economic and environmental well-being, as well as social and cultural strength; and

WHEREAS, each Western State has developed comprehensive systems for the appropriation, use and distribution of water for myriad uses and tailored to its unique physiographic, hydrologic and climatic conditions; and

WHEREAS, western states support the appropriate development of our regional hydropower resources as an important part of a balanced national energy policy; and

WHEREAS, hydropower development can have a profound impact on water flow regimes and other beneficial water uses; and

WHEREAS, Congress has consistently recognized the primacy of state law in the allocation and administration of water rights for all uses because of the need for a comprehensive system of governance; and

WHEREAS, Congress has also delegated its authority under the Federal Clean Water Act to the states for the protection and conservation of water quality, consistent with state water quality standards and state water rights law and administration; and

WHEREAS, Section 401 of the Federal Clean Water Act empowers states to certify that any federally authorized, permitted or licensed projects or other activities are consistent with applicable state water quality standards; and

WHEREAS, any federally licensed activity that may result in any discharge into navigable waters must be preceded by a Section 401 certification that ensures compliance with all provisions of state law; and

WHEREAS, states have primary jurisdiction over the integration of water quantity and water quality issues; and

WHEREAS, the Federal Energy Regulatory Commission (FERC) has made changes to streamline the licensing process that affect Section 401 certification requirements and other federal environmental reviews within its hydropower licensing authority under the Federal Power Act; and

WHEREAS, FERC recognizes the states' mandatory conditioning authority under Section 401; and

WHEREAS, the new FERC dispute resolution process should not affect the independent authority of state agencies with water quality certification authority to require applicants to provide needed information; and

WHEREAS, FERC should make the study dispute resolution process available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act; and

WHEREAS, FERC should provide for preparation of a single environmental document that can be used by all agencies that require preparation and circulation of environmental documentation before those agencies can issue a decision, including water quality certification; and

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports continuing efforts to integrate and streamline existing state and federal hydropower licensing requirements, while recognizing the states' mandatory conditioning authority under Clean Water Act Section 401 and Congress' longstanding deference to the states with regard to the allocation of water for all uses, including hydropower.

BE IT FURTHER RESOLVED that these rules provide for a dispute resolution process that is available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act, that is binding only for purposes of determining what studies FERC will require the applicant to conduct, but is not binding on states exercising their independent authority over water quality certification.

BE IT FURTHER RESOLVED that the Western States Water Council supports the change made by FERC in Section 5.23 of the new Integrated Licensing Process (ILP) regulations requiring that the license applicant file their request for Clean Water Act (CWA) 401 water quality certification from the State no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis.

BE IT FURTHER RESOLVED that the Western States Water Council opposes any administrative or legislative effort to weaken or eliminate states' mandatory conditioning authority under Section 401, and supports efforts to fully recognize the states' authority to allocate and regulate water uses for all purposes, including hydropower.

WESTERN STATES WATER COUNCIL
Summary of State Responses
Clean Water Act Section 401 Water Quality Certification Activities
April 2014

The Council surveyed its 18 member states. Responses have not yet been received from Nebraska, North Dakota and Washington.

Hydropower permitting-related requests vary widely by state as might be expected, with little or no hydropower development and related 401 certification requirements in most Plains States. Even in the Rocky Mountains there appear to be relatively few active requests. West Coast States have more certification and permitting actions.

It appears that 401 certifications related to CWA Section 404 permitting dominate the number of certification requests. Coordination and collaboration between the States and Corps often expedite the process, but projects requiring an individual 404 permit can be time consuming.

CWA 401 certifications are also used to inform state 402 NPDES permits issued by states, and would be required in those states without primacy to issue 401 permits, which would include Idaho and New Mexico.

1. In your opinion is State 401 certification authority a significant obstacle to timely federal licensing and permitting activities? Specifically hydropower licensing? Other permits (such as CWA Section 404 permits)?

States unanimously reported that the CWA 401 State Water Quality Certification is not usually an obstacle in itself to timely federal licensing and permitting, provided that all applications are complete and ancillary federal activities are complete or nearly complete (e.g. public notice, study requirements, a complete EIS, mitigation requirements, etc.).

States report certification applications filed with missing signatures, illegible maps, and/or required documents such as a CWA Section 404 application. Often substantive details of the proposed action requirement certification can also change. Many times certification requests are filed before the Corps has completed their assessment. Certifications may also be held up by the applicant not responding to requests for additional information, or failing to comment on proposed project conditions.

EPA and other federal agency comments, conditions and other actions can delay certification. It is not uncommon for example for 404 permitting applications to be elevated to Corps/EPA Headquarters for consideration.

The complexity and long duration of the FERC licensing and relicensing process is a major contributing factor in those States with related 401 certification requests pending. FERC's Integrated Licensing Process (ILP) takes a minimum of five years to complete.

Some States have separate environmental review requirements, such the California Environmental Quality Act (CEQA) process required for non-governmental entities (which can be time consuming). The federal NEPA process is the starting point for CEQA. Further, the California State Water Resources Control Board, consistent with maintaining a transparent and public process, provides a public comment opportunity on draft certification decision before issuance. As project licenses typically range from 30-50 years, this is considered to be important, though this is not a required step.

Oregon has a separate state hydropower licensing process, in parallel to the federal process.

2. How long does it usually take for your State to act on a certification application? It there a specific goal or timeline for action?

This varies by state, but all are within the one year period allowed by law. The majority, on average, fall between 40-90 days, while some may process certification requests within a couple of weeks. Action on a request can depend on a number of factors, such as a 30-day public comment period requirement. Other reasons for delay are listed below under Question #3.

States generally do have a process and specific rules outlining a formal timetable or goal for action, but where there is not, every effort is made to issue the certification or a waiver in a timely manner.

Alaska has a goal of processing 401 certification requests within 10 days after the close of the public notice and comment period.

Similarly, the Texas Commission on Environmental Quality (TCEQ) reviews 401 certification requests in parallel with federal licensing and 404 permitting activities, and based on an memorandum of agreement (MOA) with the Corps Southwestern Division, TCEQ make a decision within 10 days of the Corps having reached a permitting decision (certification is required before a permit is issued).

3. Does the State currently have a backlog of certification applications? If so, what is the size of the backlog? What types of licenses or permits are most likely to be delayed? What are the primary reasons for delays (incomplete applications, study requirements, state staff or other resource limitations, etc.)?

The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of study requirements, and constraints on state resources, including staff limitations. Often, 401 certification is a part-time duty for staff, assigned as needed. State turnover is another problem, and often entry level staff is assigned 401 certification responsibilities. Given the length of the FERC permitting process staff may change over time.

California reported the most delayed FERC projects and certification requests (only 2-3 staff are devoted to requests). California is working on certification for sixteen FERC licensed projects where their license

has expired. Most should be completed within two years. Post-licensing monitoring of certification and permitting conditions, which may involve continuing studies given the uncertainty regarding future conditions, also place an increasing burden on staff time.

Oregon does have two large hydropower projects which haven't been certified within one year of the original application, one due to ongoing federal activities, and ongoing mitigation studies have delayed the other.

At least one state will no longer accept 401 certification applications as complete until required federal actions have already been approved or completed.

4. What actions has the state taken to simplify or expedite the certification process (such as interagency MOUs, online applications, etc.)? Please provide references and copies.

States have undertaken various process improvements, including coordinating state and federal environmental reviews, some through formal memoranda of understanding.

The Alaska Department of Environmental Conservation has developed a waiver process applied to individual 404 permits issued by the U.S. Army Corps of Engineers. Criteria are based on the potential risk of a particular activity that may affect water quality, such as the size of the wetlands fill, the type of activity, the proximity to a waterbody and the particular wetlands functions and values.

On November 19, 2013, The California State Water Resources Control Board (SWRCB) executed a memorandum of understanding (MOU) with FERC that covers coordination of pre-application activities that include "consultation, environmental scoping, study planning, and submittal of and commenting on the applicant's preliminary licensing proposal." A copy of the MOU is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/ferc_mou/index.shtml

Also, with the support of the California Hydropower Reform Coalition and FERC licensees, SWRCB is ramping up staffing resources and increasing fees. Three 401 certification requests were completed within an eight month period. Each project request is also assigned a back-up staff person to assure continuity. There are templates for standard letters and more common certification conditions, and SWRCB is developing a program manual and training staff on up-to-date techniques.

For large, complex projects the Colorado Department of Public Health and Environment works with applicants prior to formal filing of a certification request to streamline the review process and minimize requests for additional information. In 2010, Colorado executed an MOU with FERC, and also hired a contractor to identify a number of small projects that were reviewed and certified, but the contract was not renewed and FERC has not informed the State of new conduit or other small scale hydropower project licensing applications, though some potential projects have come to light through public information and conversations with Corps staff.

Idaho has used settlement agreements to develop FERC 401 certifications.

New Mexico has expedited the certification process through the use of general permits and established procedures. The “New Mexico Implementation Plan” governs the process for issuing NPDES permits.

Oklahoma meets regularly with the Corps to coordinate procedures for public notice and processing of permit and certification applications.

Oregon Department of Environmental Quality staff work with applicants on study design and data review early on to ensure a 401 request is complete. Oregon also has a statute outlining state review of hydropower relicensing in coordination with federal relicensing to avoid duplication through a Hydroelectric Application Review Team (HART) with staff from DEQ, the Department of Water Resources, and the Department of Fish and Wildlife. Other state agencies may participate as well.

HART may provide applicants with an estimate of costs for relicensing work, including certification, and one applicant entered into an agreement to pay the state agencies’ costs. HART addresses relicensing, but state agencies coordinate as needed for any new project to reduce inefficiencies. Also, DEQ invoices all 401 certification applicants for costs incurred in processing, providing the revenue necessary for timely action, including reassigning staff work.

A Texas/Corps MOA implements a tiered classification system for projects that require an individual CWA 404 permit, which require certification reviews for proposed projects that directly impact aquatic resources of greater than three acres or 1500 linear feet of stream (Tier II projects). For Tier I projects (below that threshold), TCEQ waives certification if the permit applicant agrees to incorporate specific best management practices.

In Wyoming, electronic delivery of certification requests directly from the USACE (Corps) Wyoming Regulatory Office to the Department of Environmental Quality facilitates timely review and processing. WY DEQ encourages project proponents to contact the agency prior to submitting their 404 application to the Corps. Lastly, Wyoming has categorically certified several nationwide permits, further expediting the process.

5. What public information regarding 401 certification is available from the State (include state websites and addresses)?

Many states provide information in advance to assist applicants in navigating the 401 certification process, including online resources. This may include current program activity, staffing, current project-specific webpages, 401 certifications issued, etc. FERC also posts 401 certification information on its website. Further, Corps Districts may post information on 404 permit applications.

AK: <http://dec.alaska.gov/water/wwdp/wetlands/index.htm>

AZ: <http://www.azdeq.gov/enviro/water/permits/cwa401.html>

CA: http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/

CO: <http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596872987>

ID: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification.aspx>

This is Idaho's 401 certification website. The 401 certification list of projects is on these webpages:

NPDES: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401-certifications-npdes-permits.aspx>

404 Permits: <http://www.deq.idaho.gov/water-quality/surface-water/standards/401-certification/401-certifications-dredge-fill.aspx>

MT: All FERC related 401 water quality certifications are posted on the FERC website. Montana shares the public notice with the Army Corps of Engineers for individual 404 related 401 water quality certifications.

NV: <http://ndep.nv.gov/bwqp/401cert.htm>

NM: Section 404 program can be found at <http://www.nmenv.state.nm.us/swqb/404/>. The web site for the NPDES program can be found at <http://www.nmenv.state.nm.us/swqb/Permits/>.

OK: http://www.deq.state.ok.us/wqdnew/401_404/index.htm.

Public notices for the Section 404 permits are located on the U.S. Army Corps of Engineers, Tulsa District website: <http://www.swt.usace.army.mil/Missions/Regulatory/PublicNotices.aspx>

OR: <http://www.deq.state.or.us/wq/sec401cert/hydro.htm>

SD: <http://denr.sd.gov/des/sw/401.aspx>

TX: The TCEQ maintains several public web pages containing information about the TCEQ 401 certification program. Each page can be accessed from the following URL:

<http://www.tceq.texas.gov/permitting/401certification>

UT: <http://www.waterquality.utah.gov/permits/index.htm>

WA:

WY: The USACE Wyoming Regulatory Office website provides a link to the Wyoming Department of Environmental Quality website that contains information on specific State 401 certification.

6. Do you anticipate an increase in the number of 401 certification requests in the future, and what might be the impact on State administrative resources?

Most states do not anticipate a significant increase in 401 certification requests. Some do. Some states have actually seen significant declines in requests. Again, most requests appear to be related to 404 permitting, which in turn increase with general economic conditions and related construction starts, oil and gas development, etc.

[Expansion of CWA jurisdiction as may be proposed by new rules could have an undetermined impact on the number of requests related to any increase in Section 404 permitting requirements.]

California expects an increase in requests due to FERC relicensing, license amendments, and new projects. Further, as described post-licensing monitoring of conditions, as well as non-hydropower certification requests will significantly impact the State's administrative resources. FERC currently lists 115 non-federal hydropower projects in California, not including transmission line projects, with varying expiration dates. Since 2000, 22 FERC project licenses have expired, and another 26 will expire through 2029, necessitating either relicensing or surrender of the license. Decommissioning can also have water quality impacts. SWRCB is already involved in a number of relicensing pre-application activities. The Division of Water Rights Water Quality Certification Program also certifies non-hydropower projects that involve water rights.

Colorado does not anticipate a significant increase in the number of requests, but does anticipate 4-5 very large and complex project certification requests from water diversion and storage projects over the next 3-4 years.

Idaho does expect an increase in requests, as well as additional review requirements related to antidegradation reviews and analyses associated with federal permits, placing greater demands on static staff.

New Mexico noted drought limits the viability of hydropower projects.

Oregon has certified several projects through the federal relicensing process over the past several years. Currently there are only a few projects under relicensing review. Oregon anticipates ongoing interest in retrofitting both irrigation and drinking water systems with hydro turbines, but many will be exempt from licensing and no 401 certification will be required. Many preliminary permit applications have not proceeded to licensing, making certification requirements difficult to estimate.

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RECOMMENDATIONS OF THE AD HOC WORKGROUP TO ASSURE STRONG WATER DATA AND SCIENCE IN A CONSTRAINED/SHRINKING BUDGET

JANUARY 27, 2014 **DRAFT**

Long-term water quantity and quality data collection, especially in critical watersheds, aquifers, and water-short areas, is crucial for the economic strength of the Nation. The U.S. Geological Survey (USGS) plays an indispensable role in helping the nation maintain a reliable, high quality foundation of water information and science. This foundation supports water planning, management, research, and investment by federal, regional, state, tribal and local agencies, as well as by universities and businesses. The USGS role and the foundation it supports have been put at risk by today's shrinking budget environment. USGS has dealt with budget limitations for some time. In an age where more science is needed for better decision-making, it has been a challenge to find funds to develop and apply our water science to serve a wide variety of purposes more efficiently.

Management and protection of water resources in the United States require coordination on many levels. The USGS capability to collect data and provide analyses enables the Nation to make challenging decisions for the allocation, protection, and treatment of water and to maximize economic opportunities, environmental quality and public safety in a changing world. Water availability is critical to the long-term sustainability of ecosystems, communities, and economies. As such, the USGS has the key responsibility to lead the Nation in collecting long-term data, synthesizing the data, and providing projections of future conditions and needs; this is accomplished in conjunction with many federal and non-federal partners.

Budget decisions should support the USGS water resources mission to provide the reliable, impartial, and timely information needed to understand and manage water resources in the Nation, and to actively promote the use of this information by decision-makers to:

- Minimize the loss of life and property as a result of water-related natural hazards such as floods, droughts, and land movement;
- Effectively manage groundwater and surface-water resources for domestic, agricultural, commercial, industrial, recreational, and ecological uses;
- Protect and enhance water resources for human health, aquatic health, and environmental quality; and
- Contribute to wise physical and economic development of water resources for the benefit of present and future generations.

The Workgroup Task. In July 2012, the Advisory Committee on Water Information (ACWI) formed an *ad hoc* Workgroup to ensure the efficient collection of strong water data and support of science in an environment of constrained or shrinking budgets; this report and the recommendations described below are the result of the Workgroup deliberations. The Assistant Secretary of the Interior for Water and Science asked the ACWI to provide advice and recommendations to the Department of the Interior (DOI) and the USGS on approaches and options that might help sustain and enhance water monitoring and related science in the face of federal funding constraints in the coming years¹. Her request reflected the increasing need for water data and science and the likely constraints on federal resources in coming years, and expressed an intention that USGS continue and strengthen its leadership of the nation's water monitoring, assessment and research despite those constraints.

Beginning in August 2012, all members and interested followers of the ACWI were invited to participate in a series of telephone conferences to prepare recommendations for the ACWI to consider, and the Workgroup continued meeting twice each month with WebEx-supported conference calls between December 2012 and December 2013. USGS staff provided valuable briefings concerning the three monitoring networks and related science programs between November 2012 and March 2013, and the meeting notes and PowerPoint files from those briefings are available on the ACWI website. In June 2013, the first draft recommendations were provided for preliminary review by USGS senior staff and Interior Department. Workgroup participation² was strong and consistent, and represented a broad range of the diverse stakeholder community, although several elements of the community were not able to make this commitment of time and consideration.

There is one significant element of the Assistant Secretary's request for which the Workgroup has been unable to provide helpful recommendations, namely the request to identify new or alternative funding sources. While several options were considered, they are unlikely to produce significant or reliable revenue, and the options for generating significant revenue seem inconsistent with the national character of these functions, their relation to federal responsibilities, the lean budget currently available and the congressional efforts to reduce the cost of government programs. However, it may be that the ACWI will want to dedicate further effort in the future to this quest.

Federal Funding is Warranted by Federal Responsibilities and National Benefits. Congress has made clear that federal responsibilities and national benefits require the enhancement or development of a national water science program to inform water resource management in the United States³. The Workgroup is cognizant of the specific federal responsibilities and national benefits that warrant federal funding.

¹ The November 6, 2012 [letter from the Assistant Secretary](#) is posted on the [ACWI website](#).

² A list of the individuals who dedicated a generous portion of their time and the organizations they represent will be posted on the ACWI website.

³ Public Law 111-11, Sections 9507(a) and (b) are among the most recent indications of this Congressional mandate.

Federal responsibility is based on many factors, including negotiation and compliance with international water treaties, interstate water compacts and tribal water agreements, the implementation, evaluation and improvement of federally funded programs.

National benefits result from USGS leadership as a federal science agency in initiatives that transcend specific state, regional or local boundaries. These include, for example, monitoring, modeling, and assessment required to forecast flooding; providing safe and sustainable water supply; protecting and restoring ecosystems; understanding the sustainability of intergovernmental water allocation agreements; investing in water infrastructure; enhancing the value of data collected by others; and generally helping officials, leaders, and the public understand and utilize the science associated with climate, flooding, droughts, sea level rise, water pollution, endangered species, and ecosystems. National benefits are also derived from open public deliberation and from the opportunities for education and innovation created by USGS scientists working directly with water managers to meet local, state, regional, and national needs.

Finally, America's water resources support hundreds of billions of dollars in commerce, provide safe drinking water for millions of Americans, supply essential habitat for fish and wildlife, affect public safety, and provide a variety of other important benefits, including recreation, irrigation, power generation, and manufacturing⁴. Each of these benefits has national economic implications, and USGS leadership in water science is essential in the national effort to maximize sustainable economic development.

GUIDING PRINCIPLES

To fulfill its mission, the Workgroup identified the following set of six principles to guide decisions affecting the USGS water program budget. The goal is to ensure that such decisions safeguard the ability of the USGS to provide the reliable, impartial, and timely information needed by other federal agencies, non-federal agencies, businesses, universities, and the general public to understand and manage water resources. The Workgroup believes that these six principles, when applied as a package, will help USGS and DOI leaders make budget decisions that will not impair this overarching goal:

- Water Data and Science Should Inform Decisions,
- Water Science Should Address the Whole Water Cycle,
- Water Science Requires Continuity of Water Data,
- Reducing Uncertainty and Risk Should be Weighed Against Costs and Benefits,
- Research Should Strengthen Water Science, and
- Collaboration Should Leverage Ideas and Resources.

⁴ The evidence of these benefits to the Nation is described in many places, and most recently in the [*Principles and Requirements for Federal Investments in Water Resources*](#) adopted by the President's Council on Environmental Quality in March 2013.

WATER DATA AND SCIENCE SHOULD INFORM DECISIONS: Water data is the foundation of water science, and water science⁵ is the basis for sustainable water management⁶. The USGS must continue to provide the timely, high quality, and unbiased water data and science necessary for informed decision making.

America needs the USGS to lead its water science efforts. The USGS must continue providing essential “backbone” elements of a national water data collection and delivery system and serve as an objective science expert for other federal agencies and for interstate, state, tribal, and local agencies with responsibility for public health and for managing water and related resources throughout the United States.

WATER SCIENCE SHOULD ADDRESS THE WHOLE WATER CYCLE: The elements of the water cycle⁷ are inextricably linked. The Nation must understand the entirety of the water cycle, including both quantity and quality, if it is to manage, use, and protect its water resources intelligently. The USGS must continue serving a leadership role in developing and supporting the necessary science.

The national water data network must be able to clearly characterize each element of the water cycle if the appropriate agencies are to understand the hydrologic system and manage water sustainably. Research has repeatedly shown that these components must be considered together for effective water resources management. The Nation depends on the USGS to anchor the collection and assessment of water cycle information and support the development of interpretive and forecasting tools that depend on accurate measurements.

WATER SCIENCE REQUIRES CONTINUITY OF WATER DATA: Understanding water resources and the threats to them requires a sustained commitment to research, data collection, and assessment across short and long spatial and temporal scales. The USGS provides a national perspective and expertise, without regulatory or resource management responsibilities, and applies the consistent methods necessary to meet these demands and to lead America’s water science community.

Understanding relationships, trends, and variations over the long term is a prerequisite for predicting effects on water resources and providing the information that is crucial to land and water managers. Long-term monitoring is needed to distinguish short-term variation from long-term drivers, such as land use and climate variability. Existing long-term records provide

⁵ The term “water science” is used in this report to refer to analysis, interpretation, research, and application of water monitoring needed to support water management; this support is provided in the form of maps, models and other decision support products. The term “water data” is used in this report to refer to water data collection, management, and delivery.

⁶ The term “water management” is used in this report to include the full spectrum of protection and utilization activities to support all existing and future needs.

⁷ The USGS has included useful graphics that illustrate the water cycle in its recent progress report to Congress concerning its National Assessment of Water Availability and Use ([Circular 1384](#), see page 5) and in its Water Science Strategy report ([Circular 1383-G](#), see pages 20-21).

important information on trends of water quality and water availability that are used for future projections. Continuing the development of these irreplaceable records will provide invaluable information about the impacts of current and future water withdrawals and use, climate impacts, and land use changes.

The USGS application of consistent monitoring methods across hydrogeologic and ecological regions at various appropriate scales provides important and comparable information on quality trends, impaired waters, water use, ecosystem impacts and management alternatives.

REDUCING UNCERTAINTY AND RISK SHOULD BE WEIGHED AGAINST COSTS

AND BENEFITS: Understanding water resources requires an understanding of the uncertainty that is inherent in measurement, analysis, and assessment. The USGS should invest resources to reduce uncertainty where risks are high and the cost of reducing that uncertainty is reasonable. The goal is to balance the desired level of confidence in understanding water resource management and protection options with the cost to attain it. For example, with the added uncertainty created by cutting back on the frequency of monitoring flow in a stream, comes added risk from estimating flood or low flows incorrectly. A constrained budget environment might lead to reducing the effort invested in updating the rating curves for certain streamgages, but the resulting uncertainty in the estimation of flows at ungaged sites, the validation of remote sensing data and other applications should be clearly understood first. At this point, the current network of monitoring sites is insufficient relative to the national and regional needs; quality assurance should not be compromised due to our heavy reliance upon estimating conditions where we are not able to measure them. The challenge is to avoid cost-cutting where the increased uncertainty in understanding stream flow is likely to have large consequences in designing and operating measures to reduce flooding, provide water supply, or protect water quality. In turn, extra spending to keep uncertainty low where the risk to investments in people and ecosystems would also be low makes little sense in a shrinking budget.

RESEARCH SHOULD STRENGTHEN WATER SCIENCE: Research defines, develops, and refreshes the understanding of water resources and the programs designed to manage these resources. Research conducted by the USGS provides an essential feedback mechanism to help optimize data collection and science.

Research that supports the national scientific mission, including applied research that directly supports the operational parts of USGS water science, has the greatest long term benefit. In the short term, the greatest emphasis should be placed on research with the strongest relation to the most immediate water management challenges, provided the interruption of promising in-progress basic research can be minimized.

COLLABORATION SHOULD LEVERAGE IDEAS AND RESOURCES: Collaboration builds partnerships and enhances opportunities for collecting data and understanding water science, draws attention and resources to immediate management challenges, builds support for water management activities, and leverages private, local, state and federal dollars, ideas, experience, and capabilities.

Collaboration is needed to support integrated science in concert with partners in other disciplines, mission areas, and agencies. Collaboration is a natural outcome of the goal of being responsive to a wide range of decision-makers. Important science activities in which integration occurs are ecology, energy, public health, and natural hazards.

RECOMMENDATIONS

The USGS reputation for delivering solid, unbiased information and science is its greatest asset. This reputation for reliability is grounded in decades of high quality performance. In considering ways to address the challenges of monitoring in a shrinking budget environment, every caution should be taken to avoid actions that put this reputation, or the record of performance that underlies it, at risk. Within these constraints, the Workgroup has identified recommendations that may be useful, if the current shrinking budget concerns make this necessary, while preserving the USGS capability to carry out its vital mission. These recommendations, like the guiding principles identified above, are not necessarily listed in order of priority.

- 1) **Sustain the national monitoring network** for surface water, groundwater and water quality and extend coverage to address any significant gaps in the network which interfere with the fulfillment of federal responsibilities or the maintenance of national benefits. This includes capturing efficiencies already planned in national monitoring network operations, which can be achieved in line with the guiding principles identified above.

To the extent that USGS operation of high priority monitoring sites becomes threatened as the result of funding decisions by other federal agencies, USGS should sustain those operations through collaboration with other reliable partnerships or at its expense. USGS should continue identifying those high priority monitoring sites in collaboration with other agencies and stakeholders.

- 2) **Sustain funding to continue cost-shared investigations, studies and research**, to the extent that identified, national or regional needs will be served. **Defer less critical grants, interpretive investigations, analytical studies and research** (new projects first, but ongoing efforts if necessary; including any monitoring that is needed primarily for these projects), to the extent necessary to sustain the USGS monitoring network and in a manner that will minimize both immediate and long-term adverse consequences for water resource management decisions. The USGS Senior Staff are best positioned to evaluate which grants, studies, analyses and research can be deferred with the least adverse impact to water management decisions.
- 3) **Continue providing incentives for projects and programs that build partnerships and leverage additional resources for water data and science.** A flexible approach should be designed to support these partnerships and, where possible, to increase the funding support from partners that directly benefit from USGS activities.

- 4) USGS should characterize “**uncertainty**” in scientific terms that data users and decision makers understand⁸, including uncertainty associated with water monitoring; modeled estimates for watershed and aquifer conditions at monitored and unmonitored sites; and other interpretative and forecasting applications. USGS should continue to explore cost savings in sustaining national and long-term monitoring networks, while maintaining its rigor and consistent methodology because such standards are required to address multiple needs of a myriad of stakeholders and users. USGS should better educate its stakeholders about the value of high quality data and trade-offs in reducing current standards for monitoring and analysis.
- 5) The USGS Water Science Centers (WSCs) should convene regular meetings with the other federal and state agencies responsible for water monitoring and prepare reports to the Associate Director for Water regarding the distribution of monitoring responsibilities, what the shared priorities are, and where there are significant **opportunities to increase efficiency and reliability** in case of further budget cuts.
- 6) Anticipate and **support an increased role for other agencies**, universities, businesses, monitoring councils, *etc.*, who demonstrate the opportunity and capability to collect, manage and contribute useful data to the National Water Information System (NWIS). As an initial step, USGS should evaluate the situations in which other agencies have taken responsibility for significant elements of nationally-relevant monitoring and summarize the experience; the analysis should identify the circumstances that lead to successful collaboration. USGS is a leader in setting standards and providing training for data collection and management. The water data available nationwide will be greatly enhanced if their standards are more frequently discussed and compared with the practices of other experts.
- 7) Evaluate the current **distribution of funding to the National Streamflow Information Program** (NSIP) over the entire streamgauge network, in lieu of a fully funded NSIP, and redistribute funds to maximize stability of the streamgauge network and ultimately provide the “backbone” network central to the NSIP objective. To the greatest extent possible, partially funded gages should be minimized in favor of fully funded NSIP gages. Prioritization of those gages to be fully NSIP funded should be completed by USGS and consistent with the 5 criteria set forth to establish an NSIP gage. In prioritizing an eligible gage, consideration should be given to the number of criteria the gage meets as well as the population the gage serves.
- 8) Distribute **funding of the National Ground Water Monitoring Network** (NGWMN) to maximize its stability toward providing the quantity and quality monitoring capability that is central to the framework design⁹. Until full funding can be achieved, partial funding should be allocated by the management organization described in that framework design, which is

⁸ This correlates with the 2012-2022 Strategic Directions for USGS Water Science [OFR-1066](#) (see Strategic Action 8 on page 21 and Strategic Action 16 on page 29, for example)

⁹ The framework design was developed by the ACWI Subcommittee on Ground Water and is available at [A National Framework for Ground-Water Monitoring in the United States](#), and the management function is described in pages 49-53

founded on key network design principles of stakeholder involvement and partnering of the USGS with data-owners/providers.

- 9) Encourage the USGS Water Science Centers (“WSCs”) to **collaborate on monitoring site maintenance** responsibilities (among the WSCs and with other agencies) to reduce travel and maintenance expenses.
- 10) Extend the **water data portal** capabilities that have been developed for groundwater and water quality data to include surface water data (stage and flow), although it requires new or reallocated funding. USGS should foster and facilitate a flexible approach that stems from proven application by all data providers of industry-accepted standards for data collection and data management. The design of the National Groundwater Monitoring Network serves as a useful example.
- 11) Maintain a clear **design strategy for each of the three monitoring networks**, along with a statement explaining how they support each other. Include network maps and implementation progress assessment in an annual update. Without a clear, strategic design, it appears that USGS operates disparate networks based on various plans and authorities, and it is more difficult to assure that USGS is making the most strategic investment of the available resources.
- 12) Since recommendations 1-11 suggest a reduction in **support for research and development**, it will be especially important for ACWI and USGS, in consultation with stakeholders, to recognize that reducing these functions too much or for too long will be detrimental to the future of water science, water management and to the USGS mission. One way to accomplish this would be to establish a new ACWI **Subcommittee for Research, Development and Innovation (SRDI)** to identify and propose innovations that can reduce costs and improve data quality for water and watershed monitoring by Federal and non-Federal agencies through the following: (1) use of new technologies, (2) enhancement in monitoring processes, and (3) increasing efficiencies. Although the SDRI organization and function may require new or reallocated funding in the near-term, it should evaluate innovation opportunities in the context of technical, economic, and environmental benefits.



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

Position #330.5

July 29, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

On behalf of the Western States Water Council, representing the governors of 18 western states, we are writing to provide our comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. Before commenting on the guidance, we wish to express our preference for EPA and the Corps promulgating a clarifying rule, as opposed to legally unenforceable guidance.

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*¹ and *Rapanos v. United States (Rapanos)*² decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

The guidance provides no clear and concise limits to federal jurisdiction. Further, it could actually lead to an expansion of claims of jurisdiction beyond the limitations delineated in *SWANCC* and *Rapanos*, and if promulgated as regulations, once applied, would likely lead to further litigation.

A. State Water Resources Allocation and Water Rights Administration

Section 101(g) of the CWA expressly states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. 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."

Section 101(b) of the CWA further states: "It is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"

¹ 531 U.S. 159 (2001).

² 547 U.S. 715 (2006).

The guidance and any subsequent regulations regarding the extent of CWA jurisdiction should reference Sections 101(b) and 101(g), and should not infringe upon the states' primary authority to allocate water and administer water rights within their borders and protect water quality.

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a “watershed” approach for satisfying Justice Kennedy’s “significant nexus” test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or “other waters,” no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA’s jurisdiction is not without limits.³

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a “watershed” approach instead of a “case-by-case” determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that “absent more specific regulations,” a “case-by-case” analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.⁴ Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential overbreadth” of the federal regulations at issue in *Rapanos*.⁵ The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

With respect to CWA jurisdictional determinations for tributaries, the draft guidance states that a significant nexus is presumed to be established if it can be shown that the tributary: (1) contains a bed, bank, and ordinary high water mark; and (2) drains, or is part of a network of tributaries that drain, into a downstream navigable water or interstate water. However, the draft guidance does not address how much water a tributary is required to drain in order to meet this test, leaving open the possibility that an ephemeral or other stream with a *de minimis* volume of flowing water is enough to constitute a jurisdictional tributary. This could create uncertainty and lead to further confusion about the types of waters subject to CWA jurisdiction, particularly in the arid West where there are a variety of waters with minimal flows.

In light of the above, the Council urges EPA and the Corps to ensure that the guidance and any related regulations comply with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on CWA jurisdiction. In carrying out these tasks, EPA and the Corps should also ensure that the guidance does not displace nor circumvent the regulatory and legislative processes.

C. Groundwater

Page 16 of the draft guidance states that a wetland can be deemed to be “adjacent,” and therefore jurisdictional, if there is an unbroken “surface or shallow sub-surface hydrologic connection between the wetland and the jurisdictional waters.” Although the draft guidance does not use the term “groundwater,” nor define the term “shallow sub-surface hydrologic connection,” it could be interpreted as referring to

³ See *Rapanos*, 547 U.S. at 739 (stating, “The Corps’ expansive interpretation of the ‘waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction “...whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). *Id.* at 778-79 (Kennedy concurring)

⁴ *Id.* at 782.

⁵ *Id.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

Groundwater is not subject to the CWA and states are solely responsible for protecting, allocating and administering water rights pertaining to this resource. Accordingly, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” The guidance and any related regulations regarding the extent of CWA jurisdiction should make clear that such jurisdiction does not extend to groundwater, and that groundwater allocation and water rights administration fall under the exclusive purview of the states.

D. States as Co-Regulators

The states, EPA, and the Corps have made progress in working together to carry out the CWA’s goal of controlling water pollution. The EPA and Corps should continue to view states as co-regulators and should ensure that state water managers have a robust and meaningful voice in the development of any guidance and/or regulations regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

E. Conclusion

In sum, the guidance and/or regulations that EPA and the Corps may promulgate regarding CWA jurisdiction should: (1) provide clear and concise limits to federal jurisdiction; (2) not infringe upon the states’ primary authority to allocate water and administer water rights within their borders; (3) be consistent with *SWANCC* and *Rapanos*, while also providing clear and recognizable limits on the extent of CWA jurisdiction; (4) make clear that CWA jurisdiction does not extend to groundwater and that groundwater allocation and water rights administration fall under the exclusive purview of the states; and (5) be developed with robust and meaningful state participation.

We very much appreciate the opportunity to comment on the draft guidance, and look forward to continuing our work with EPA and the Corps to address water quality in the West. Thank you again for considering the Council’s views on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Weir Labatt III". The signature is fluid and cursive, with the last name "Labatt" being more prominent.

Weir Labatt, III
Chair, Western States Water Council

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
REGARDING PREEMPTION OF STATE LAW IN FEDERAL LEGISLATION**

Bend, Oregon
July 29, 2011

WHEREAS, the future growth, prosperity and economic and environmental health of the West and the Nation depend upon the availability of adequate quantities of water for myriad uses; and

WHEREAS, Western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both groundwater and surface water, including protection of water quality, instreamflows and aquatic species; and

WHEREAS, the Congress has historically deferred to state law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and myriad other statutes; and

WHEREAS, any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states; and

WHEREAS, federal deference to state water law is based on sound principles for the protection of private property rights and the collective public interest in managing our water resources and the environment; and

WHEREAS, states are primarily responsible and accountable for their own water development, management and protection challenges, and are in the best position to identify, evaluate and prioritize their needs and plan and implement strategies to meet those needs; and

WHEREAS, any legislation related to any federal water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water laws, agreements, and management processes; and

WHEREAS, the federal government should explicitly recognize and provide support for ongoing watershed and state water management efforts both in and between the states, tribes and local entities, closely consult with the states and provide appropriate technical and financial assistance; and

WHEREAS, the federal government should avoid strategies that increase unilateral mandates on state, tribal and local governments; and

WHEREAS, from time to time federal legislation and regulatory actions have been proposed that are not consistent with sound federalist principles and primary state water related laws, authorities and responsibilities; and

WHEREAS, legislation preempting or discharging requirements for compliance with state law is not consistent with a balanced federalism approach;

NOW, THEREFORE, BE IT RESOLVED, that nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed management; (b) the control, appropriation, use, or distribution of water used in irrigation, municipal, environmental, or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement.

BE IT FURTHER RESOLVED, that the Administration and Congress should strive to ensure federal laws, policies, rules and regulations are consistent with the principles set forth herein.

Testimony of
Anthony Willardson, Executive Director
Western States Water Council

before the

House Committee on Natural Resources
Subcommittee on Water and Power

Legislative Hearing on H.R. 1837
The San Joaquin Valley Water Reliability Act

June 13, 2011

Introduction

Mr. Chairman and members of the subcommittee, my name is Tony Willardson and I am the Executive Director of the Western States Water Council (WSWC). Our members are appointed by the Governors of eighteen western states. We are a nonpartisan government entity serving as an advisory body on water policy issues, and are very closely affiliated with the Western Governors' Association (WGA). We appreciate the opportunity to testify.

Since H.R. 1847 was only recently introduced, the Council has not had an opportunity to adopt a specific position on the legislation. However, I will address general principles related to federal-state relations that are useful in evaluating specific legislation – including H.R. 1837 – and other actions addressing the serious water-related challenges facing the West and the Nation. During the Council's regular meetings next month, we will have an opportunity to more fully consider H.R. 1837 and will share any further comments thereafter.

My testimony today is based specifically on a July 2010 Council policy position entitled, "A Shared Vision for Water Planning and Policy," as well as a June 2006 WGA Water Report entitled, *Water Needs and Strategies for a Sustainable Future*, the 2008 WGA "Next Steps" Water Report, and ongoing policy discussions. Our 2010 position and the WGA Water Reports include a number of policy statements and recommendations related to federal programs and projects under this Subcommittee's jurisdiction, and which we would hope would be carefully considered as you evaluate H.R. 1837.

With regard to provisions related to preemption of state law, the last paragraph of the Council's position related to A Shared Vision for Water Planning and Policy, states: "...Nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed planning; (b) the control, appropriation, use, or distribution of water used in irrigation or for municipal or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement."

This language was intentionally patterned after Section 8 of the Reclamation Act of 1902 (and similar Congressional directives). Any weakening of the deference to state water law as now expressed in Section 8 is of concern to the Council – including Section 202 of H.R. 1837. Provisions of this nature are inconsistent with the policy of cooperative federalism that has guided Reclamation Law for over a century, and are a threat to water right and water right administration in all the Western States.

Recognizing that the “future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality,” western governors created the Council in 1965 to address the need for an accurate and unbiased appraisal of present and future [water] requirements...and the most equitable means of providing for...such requirements....” On a west-wide regional level, the governors charged the Council “...to accomplish effective cooperation among western states in planning for programs leading to integrated development by state, federal and other agencies of their water resources.” Since its creation, the Council has served as a unified voice on behalf of western governors on water policy issues.

Over the years, the Council has continually sought to develop a regional consensus on westwide water policy and planning issues, including many federal initiatives and legislation. The Council strives to collectively protect western states’ interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management. With respect to the latter, the Council and eleven federal agencies have signed a Declaration of Cooperation creating what we call our Western Federal Agency Support Team (WestFAST), to increase collaboration on water issues of mutual concern.

The Council has long recognized the importance of planning and policy in protecting and wisely managing our water resources for the benefit of our present and future generations, including our environment. The water development, management and protection challenges in the Sacramento-San Joaquin Bay-Delta System are not unique to California, but are reflected across the West and the Nation. Similarly, any solution to California’s water and environmental needs (and compliance with state and federal mandates) affects the rest of the West to a greater or lesser extent. Perhaps this is best illustrated by California’s physical dependence not only on the waters of northern and central California, but also the Colorado River Basin, shared by six other basin states.

In recent years there has been a growing debate over national water policy and the need to elevate water issues as a national priority. The Council has been and continues to be actively involved in those policy discussions.

The States are primarily responsible for allocating and administering rights to the use of water for myriad uses; and are in the best position to identify, evaluate and prioritize their needs. States and their political subdivisions share primary responsibility for planning and managing our Nation’s water resources, both surface and ground water, both quantity and quality.

2006/2008 Western Governors' Association Water Reports

The WGA's 2006 Water Report declared: "States have the primary responsibility for water allocation and management. They have jurisdiction to sanction both new appropriations and transfers of existing uses. They also have the primary responsibility for integrating water quantity allocation and water quality protection. As a result, states can play a critical role relating to growth in the West where water is a scarce resource and competing demands vie for rights to its use." (p.4)

The WGA's 2008 Next Steps Report reiterated: "States have the pivotal role in water planning, as well as allocating and protecting the resources. But in the West, where the federal government is a substantial landowner and has a significant regulatory presence, the federal role is also critical. Cooperation among the states and the federal government continues to be vital. To support the state leadership role, the federal government should help by providing a rational federal regulatory framework, together with technical and appropriate financial assistance.... Developing optimal solutions to the challenges...will require an integrated approach and greater partnerships among state, local and federal agencies. This approach should consider all needs together, develop effective solutions which are complementary rather than conflicting, and provide direction for selecting the most appropriate...solutions. (p. I)

2011 WSWC Shared Water Vision Policy Position

The following WSWC recommendations are presented as a guide for evaluating actions related to federal-state relations and water resources, including H.R. 1837.

- Any vision for any water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water plans and planning processes.
- Federal legislation should explicitly recognize and provide support for ongoing watershed efforts in and between the states, tribes and local entities and closely consult with the states in the implementation of any new federal program(s).
- Any federal legislation should avoid strategies that increase mandates on state, tribal and local governments.
- Comprehensive plans developed under state or tribal leadership with federal assistance should: (a) reduce inefficiencies caused by project-specific responses to competing demands; (b) reduce contradictory actions by multiple state, local and federal agencies; and (c) minimize hastily conceived reactions to the latest real or perceived crisis.
- Federal agencies should use state water plans: (a) to help determine water policy and planning priorities that best align federal agency support to states; (b) to inform decision making regarding regional water issues; and (c) to coordinate investment in water infrastructure.

- Nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed planning; (b) the control, appropriation, use, or distribution of water used in irrigation or for municipal or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement.

Water, the Economy and Environmental Policy

Clean, reliable water supplies are essential for communities throughout the West and the Nation to maintain or improve their citizens' quality of life. Strong state and national economies require sufficient supplies of good quality water, which in turn depend on protection of water supply sources and the environment and adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West.

A clean and safe environment and vibrant economy will best be achieved when government actions are focused on outcomes, not programs, and when innovative approaches to achieving desired outcomes are rewarded. Federal, state and local policies should encourage "outside the box" thinking in the development of strategies to achieve desired outcomes. Solving problems rather than just complying with programs should be rewarded. Governments should reward innovation and take responsibility for achieving environmental goals.

Successful environmental policy implementation is best accomplished through balanced, open and inclusive approaches at the ground level, where interested stakeholders work together to formulate critical issue statements and develop locally based solutions to those issues. Collaborative approaches often result in greater satisfaction with outcomes and broader public support, and they can increase the chances of involved parties staying committed over time to the solution and its implementation.

To better identify and understand opportunities for win-win solutions, an assessment of the costs and benefits of different options should be made looking at life-cycle costs and economic externalities. These assessments can illustrate the relative advantages of various methods of achieving common public goals. However, not all benefits and costs can be easily quantified or translated into dollars. There may be other non-economic factors such as equity within and across generations that should also be fully considered and integrated into every assessment of options. The assessment of options should consider all of the social, legal, economic and political factors while ensuring that neither quantitative nor qualitative factors dominate.

Conclusion

In conclusion, again as declared by western governors in 1965, the "future growth and prosperity of the western states depend upon the availability," and they could have added reliability, "of adequate quantities of water of suitable quality." We must address this reality in the context of balancing current economic and environmental needs and demands – recognizing

the importance of intergovernmental partnerships, respecting our diverse responsibilities and roles, and maintaining the historic deference to state water law embodied in Section 8 of the Reclamation Act. Legislation preempting or discharging requirements for compliance with state law is not consistent with this balanced approach.

Thank you for the opportunity to testify.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
supporting
FEDERAL RESEARCH AND DEVELOPMENT OF UPDATED HYDROCLIMATE
GUIDANCE FOR EXTREME METEOROLOGICAL EVENTS

Bend, Oregon
July 29, 2011

WHEREAS, Western states have recently been experiencing near-record flooding, droughts, or wildfires that threaten public safety, tax aging water infrastructure, and/or have significant economic consequences; and

WHEREAS, before the first half of 2011 was over, the year had already set records for extreme weather events, with the nation having experienced eight \$1 billion-plus disasters, according to the National Oceanic and Atmospheric Administration (NOAA); and

WHEREAS, extreme weather events have grown more frequent in the U.S. since 1980, according to NOAA; and

WHEREAS, the top twelve warmest years on record globally all have occurred since 1997, and we must manage for frequency, extent, and/or severity of floods, coastal inundation, and droughts; and

WHEREAS, some of NOAA's probable maximum precipitation estimates used by water agencies for dam safety analyses have not been updated since the 1960s and the federal Guidelines for Determining Flood Flow Frequency Analysis (published as Bulletin 17B) have not been revised since 1981, and neither of these guidance documents address hydroclimate non-stationarity; and

WHEREAS, flood frequency analyses are used by public agencies at all levels of government to design and manage flood control and stormwater infrastructure, with Bulletin 17B still representing a default standard of engineering practice; and

WHEREAS, federal funding for hydrology research has waned since the 1970s-1980s, and alternative statistical methodologies for flood frequency analyses or deterministic analytical procedures are not being supported and transitioned to common engineering practice; and

WHEREAS, the Federal Emergency Management Agency has adopted a process for local communities to explicitly incorporate "future conditions hydrology" in the national flood insurance program's flood hazards mapping; and

WHEREAS, a federal agency committee composed of the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, NOAA, U.S. Geological Survey, and U.S. Environmental Protection Agency held a 2010 national science workshop on non-stationarity, hydrologic frequency analysis, and water management, to identify information gaps and the state of the science for handling hydroclimate uncertainty; and

WHEREAS, the Council co-sponsored a 2011 workshop on hydroclimate non-stationarity and extreme events, to identify actions that could be taken at planning to operational time scales to improve readiness for extreme events; and

WHEREAS, the federal and the Council workshops identified multiple approaches that could be employed at the planning time scale, including ensembles of global circulation models, paleoclimate analyses, and alternative techniques for flood frequency analysis; and

WHEREAS, advances in weather forecasting research, such as that of NOAA's Hydrometeorological testbed program on West Coast atmospheric rivers, demonstrate the potential for improving extreme event forecasting at the operational time scale; and

WHEREAS, the 2006 Western Governors' Association (WGA) report on *Water Needs and Strategies for a Sustainable Future* and the follow-up 2008 WGA *Next Steps* report identify addressing climate change impacts as a priority for moving forward, and make specific recommendations for actions that the federal government and the states should take to support adaptation, including detailing research and planning needs.

WHEREAS, WGA and NOAA signed a memorandum of understanding on June 30, 2011, regarding state adaptation to climate variability and change that focuses on climate extremes, variability and future trends as they relate to disaster risk reduction and improved science for coastal and marine resource management; and

WHEREAS, the Draft Vision and Strategic Framework for a Climate Service in NOAA includes changes in extremes of weather and climate as one of the four key societal challenges that will initially be a focus of the climate service.

NOW, THEREFORE, BE IT RESOLVED, that the federal government should update and revise its guidance documents for hydrologic data and methodologies – among them precipitation-frequency estimates, flood frequency analyses, and probable maximum precipitation – to include subsequently observed data and new analytical approaches; and

BE IT FURTHER RESOLVED, that the Western States Water Council supports development of an improved observing system for Western extreme precipitation events, to aid in monitoring, prediction, and climate trend analysis associated with extreme weather events; and

BE IT FURTHER RESOLVED, that the Western States Water Council urges the federal government to support and place a priority on research related to extreme events, including research on better understanding of hydroclimate processes, paleoflood analysis, design of monitoring and change detection networks, and probabilistic outlooks of climate extremes.

BE IT FURTHER RESOLVED, that the Western States Water Council will work with NOAA in supporting efforts on climate extremes, variability, and future trends as called for in the WGA-NOAA memorandum of understanding.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Bend, Oregon
July 29, 2011

WHEREAS, in the West, water is indeed our “life blood” - a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life - the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

WHEREAS, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in seventeen western states, to be continually invested and reinvested; and

WHEREAS, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homesteads, to use and develop it for themselves and for their children and children’s children...;”¹ and

WHEREAS, the Secretary of the Interior was authorized and directed to “locate and construct” water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service – today’s U.S. Bureau of Reclamation; and

WHEREAS, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the “ultimate greatest good of the greatest number;” and

WHEREAS, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 58 hydroelectric power plants, enough to serve 3.5 million home, and further providing flood control, recreation, and fish and wildlife benefits; and

¹State of the Union Address, 1907

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return about \$600 million to the United States Treasury, prevent some \$500 million in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

WHEREAS, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

WHEREAS, according to the Administration's FY 2009-2011 requests actual and estimated appropriations from the Reclamation Fund are \$981 million for FY 2007, \$1.05 billion for FY 2008, \$870 million for FY 2009, \$974 million for FY 2010, \$950 million for FY 2011 and \$906 million for FY2012 -- compared to actual and estimated receipts of \$1.85 billion, \$2.09 billion, \$2.49 billion, \$1.729 billion, \$1.794 billion and \$2.013 billion respectively; and

WHEREAS, the unobligated balance in the Reclamation Fund continues to grow from an actual balance of \$5.67 billion at the end of FY 2006, to an estimated \$9.368 billion by the end of FY 2012; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties –
but these receipts are only available for expenditure pursuant to annual appropriation acts; and

WHEREAS, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger, while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully utilize the funds provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the future. Such "needs" may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

BE IT FURTHER RESOLVED, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of the
WATER RESOURCES RESEARCH INSTITUTES
Bend, Oregon
July 29, 2011

WHEREAS, in the West, water is a vital and scarce resource the availability of which has and continues to circumscribe growth, development, our economic well being and environmental quality of life; and

WHEREAS, the wise use, conservation, development and management of our water resources is critical to maintaining human life, health, safety and property; and

WHEREAS, water resources research, the dissemination and application of research results and technology transfer are increasingly important to meeting our present and future water needs; and

WHEREAS, the Water Resources Research Act of 1964 authorized a program that included the establishment of state water resources research institutes (WRRIs) or centers in each state to address our water resources challenges; and

WHEREAS, today's institutes and centers provide a research infrastructure that uses the capabilities of universities to greatly assist and provide important support to western state water agencies in long-term planning, policy development and management of the increasingly complex challenges associated with water in the West; and

WHEREAS, these challenges are exacerbated by the uncertainty surrounding population growth, climate, and economic and environmental water demands; and

WHEREAS, the Council and its member states continue to work with the institutes/centers and the academic community to ensure research investments are relevant to our most pressing water problems and allow each state to solve its problems by methods most appropriate to its own situation; and

WHEREAS, the institutes/centers' outreach and information transfer services and activities are very valuable to the water communities in the various western states; and

Position No. 334
Revised and Readopted
(formerly Position No. 305 – 7/11/08)

WHEREAS, this is a very worthwhile federal-state partnership that promotes collaboration, cooperation and the conservation of limited physical, financial and personnel resources;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to maintain the federal authorization and financial support for the state water resources research institutes program – requesting and appropriating funds as appropriate.