WATER QUALITY COMMITTEE MEETING

Courtyard by Marriott
Lincoln, Nebraska

April 24, 2025

Call to Order at: 1:30 p.m. (Central Daylight Time) Scarlet
Conducting: Tom Stiles, Kansas

TAB

1. **Welcome and Introductions**

2. **Approval of Minutes**

3. **Positions – Proposed/Sunsetting**

C

Proposed Position on the Extension of NPDES Permits

Position #481 - regarding Clean Water Act Jurisdiction

4. **Nebraska Water Quality Updates** – Bridger Corkill, Engineer, Nebraska Department of Environment and Energy

5. **Colorado Dredge and Fill Program** – Annette Quill, Senior Policy Advisor, Colorado Water Quality Control Division, and Jojo La

6. **EPA Region 7 Updates** – James Macy, EPA Region 7 Director

7. **Produced Water as a Piece of the Western Water Resiliency Puzzle** – Matthias Sayer, WATR Alliance

8. **Staff Updates**

O

a. Joint Letters in Support of SRFs (CIFA, AWCA, WSWC, et al)
b. EPA Managed Aquifer Recharge, update on internal workshops

P

c. WOTUS Draft Federalism Letter

H

9. **FY2025-2026 Committee Work Plan**

XYZ

10. **Sunsetting Positions for Summer 2025 Meetings** –

Position #484 - regarding Hydraulic Fracturing

11. **Other Matters**

3:30 pm

Adjourn

Tab C – WSWC Policy Positions

Position No.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
THE EXTENSION OF NPDES PERMIT TERMS
~~**Lawrence, Kansas**~~ **Lincoln, Nebraska**
~~**October 23, 2024**~~ **April 25, 2025**

WHEREAS, the Western States Water Council (WSWC) is a government entity representing eighteen states, with members appointed by their respective governors; and

WHEREAS, the WSWC's mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future; and

WHEREAS, the federal Clean Water Act (CWA) created the National Pollutant Discharge Elimination System (NPDES) in 1972, addressing water pollution by regulating point sources that discharge pollutants to waters of the United States; and

WHEREAS, the CWA 33 U.S.C. 1342(b)(1)(B) indicates NPDES permits "are for fixed terms not exceeding five years"; and

WHEREAS, most states are now authorized to implement all or part of the CWA NPDES program; and

WHEREAS, the task of implementing the NPDES program has increased in scope and complexity since 1972, including: the number and type of sources needing permits, the scope of projects under consideration, and the environmental and social considerations to be included in permit writing; and

WHEREAS, for States with approved CWA programs, the role of the Environmental Protection Agency (EPA) is one of oversight and not implementation of core program activities; and

WHEREAS, understanding of water quality issues is constantly evolving, and the resulting increased demands on state-level administrative processes require increased capacity, innovation, efficiency, flexibility, and long-term planning; and

WHEREAS, ~~modern~~ water quality infrastructure investments often involve projects ~~with construction terms~~ that extend beyond five years~~.~~; and ~~many local public agencies cannot complete the planned upgrades before beginning the permitting process anew, requiring them to negotiate new terms and requirements while balancing extensive environmental reviews, project design, scheduling, and labor and construction agreements; and~~

Commented [EO1]: Revised for simplicity

WHEREAS, extending the upper limit of NPDES permit terms to 10 years would provide States discretionary authority to set an appropriate length during the permit writing process, allowing States to maximize the use of limited resources, ~~provide permittees the necessary time to comply with existing permits,~~ better plan and ~~construct~~invest in new technologies ~~and~~, facilities, ~~better support other department responsibilities, and focus on non-point~~ and watershed-based approaches; and

Commented [EO2]: Revised for simplicity. First revision removed "watershed-based approaches", but the subcommittee replaced it.

WHEREAS, EPA tracks permit backlogs and encourages authorized permit programs to work to "increase efficiencies in the permitting process to decrease the NPDES permit backlog" to provide

greater certainty to the business community; and

WHEREAS, States striving to reduce permit backlogs are faced with challenges including a widening universe of permit-seeking facilities~~:~~, stagnant or declining funding~~:~~, increasing federal guidelines, issues with staffing and retention~~; implementation of other regulations:~~, and increasing permit complexity ~~due to numeric water quality standards, Total Maximum Daily Load (TMDL) requirements,~~; and ~~more comprehensive effluent guidelines; and~~

WHEREAS, States have demonstrated the ability and authority to implement other controls using 10-year permit terms including Resource Conservation and Recovery Act (RCRA), solid waste disposal (42 U.S.C. §6925 (c)(3)), and state water pollution control permit programs for ~~Concentrated Animal Feeding Operations (CAFO)~~animal feeding operations where 5-year NPDES permits are not required; and

WHEREAS, permits contain clauses to reopen, amend and/or modify permits following proper administrative procedures to update the appropriate requirements (40 CFR 122.62 and 124.5), allowing permitting authorities to respond to changes in standards, technologies and water quality needs, as well as public concern prior to permit expiration; and

NOW, THEREFORE, BE IT RESOLVED, the Western States Water Council supports amending the federal Clean Water Act 33 U.S.C. 1342(b)(1)(B) to indicate NPDES permits "are for fixed terms not exceeding 10 years," ~~while retaining~~provided existing authority to reopen permit terms based on current law~~.~~ is retained.

BE IT FURTHER RESOLVED, the Western States Water Council encourages Congress and the Administration to provide adequate funding consistent with federal statutory authorities and regulatory mandates, at levels needed for states to fully implement federal environmental programs.

Commented [EO3]: Revised for simplicity

Commented [EO4]: Changed to include a wider range of States' approaches to animal feeding operations. Tom Stiles noted that AFOs were not reflected.

Commented [EO5]: Changed to provide more emphasis that existing authority to reopen should not be removed by language compelling States to use 10 year permits.

Position No. ~~481~~

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
~~Arlington, Virginia~~Lincoln, Nebraska
~~April 6, 2022~~April 25, 2025

WHEREAS, the Western States Water Council (WSWC) is a government entity representing eighteen states, with members appointed by their respective governors; and

WHEREAS, the WSWC's mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future; and

WHEREAS, the Clean Water Act (CWA) is built upon the principle of cooperative federalism in which Congress intended the states, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps) to implement the CWA as partners, delegating co-regulator authority to the states;

WHEREAS, the CWA's cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and western states have made great strides in protecting water quality and coordinating water quality and water quantity decisions; and

WHEREAS, it is imperative that EPA and the Corps actively seek meaningful state consultation, engagement, and participation in the review and development of any new proposed or final rule to define Waters of the United States; and

WHEREAS, States are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks; and

WHEREAS, States have both state statutory and constitutional authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders, and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

WHEREAS, CWA Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act;" and

WHEREAS, the Supreme Court has interpreted the jurisdictional scope of the CWA in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006); and ~~has granted certiorari in~~ *Sackett v. EPA* (#21-424, 143 S. Ct. 1322 (2023)); and

~~**WHEREAS**, perennial streams with a relatively permanent surface water connection to navigable waters are presumptively considered to be under federal CWA jurisdiction consistent with *Rapanos*; and~~

~~**WHEREAS**, Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction; and~~

~~**WHEREAS**, Justice Scalia's plurality opinion in *Rapanos* held that the phrase "waters of the United States" includes only relatively permanent, standing, or continuously flowing bodies of water; and~~

WHEREAS, the U.S. Supreme Court held in *Sackett* that the definition of "waters of the United States" in CWA §1362(7) "encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes" and that this does not apply to all wetlands, but extends only to those wetlands with a continuous surface connection to bodies of water that are "waters of the United States" in their own right, so that they are indistinguishable from those waters; and

WHEREAS, *Sackett* also acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells" and that "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act…that unlawful barrier poses no bar to its jurisdiction;" and

WHEREAS, a one-size-fits-all national approach to federal regulations, guidance, and programs pertaining to the CWA does not recognize specific conditions and needs in the West, where water and precipitation can be scarce and a variety of unique waterbodies exist, including small ephemeral washes and arroyos, snow dependent intermittent streams, effluent dependent and dominated streams, prairie potholes, playa lakes, and terminal lakes, as well as numerous man-made reservoirs, impoundments, and water and stormwater conveyance structures; and

WHEREAS, physical, biological, and chemical differences between waters, and hydrologic differences, both spatially and temporally, as well as considerable differences in legal doctrines that govern water in western states, mean that any federal effort to clarify CWA jurisdiction will inevitably impact each state differently, thus underscoring the need to thoroughly involve states in developing and implementing any rule so as to clearly respect and avoid conflict with state authority over the regulation of water quality and the allocation of waters and water rights within their respective borders; and

WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government; and

WHEREAS, as co-regulators, states are separate and apart from the general public, and have a unique role with the federal government in the development and implementation of any rule to clarify or redefine CWA jurisdiction; and

WHEREAS, information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the Corps to develop and implement federal CWA jurisdiction efforts in authentic partnership with the states; and

WHEREAS, uncertainty and differences of opinion have and continue to exist regarding CWA jurisdiction among states, and challenge EPA and the Corps to develop and implement any new rule in cooperation with the states, based on principles of cooperative federalism, and together to provide greater certainty and a clearer definition of the limits of federal jurisdiction; and

WHEREAS, substantial and recurring changes to regulatory definitions, policies, and programs between federal administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits.

NOW, THEREFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction and define Waters of the United States:

1. Creates an enduring and broadly supported definition

2. Acknowledges and addresses the needs, priorities, and concerns of states as co-regulators.

3. Includes robust, meaningful, and representative state participation and consultation in the development and implementation of any rule, acknowledging the inherent federalism implications.

4. Gives full force and effect to Congress' intent to maintain a reasonable balance of state and federal authority and the purposes of CWA Sections 101(b) and 101(g).

5. Complies with the limits set by Congress as interpreted by the Supreme Court, and appropriately incorporates those limits.

6. Specifically identifies waters and features outside the scope of the CWA jurisdiction including but not limited to groundwater and historically recognized agricultural and silvicultural exemptions. Additionally, for states with (or seeking) CWA Section 404 delegated authority, provides states with the opportunity to establish processes for defining jurisdictional determinations based on scientifically defensible practices and those limits set by Congress as interpreted by the Supreme Court.

7. Acknowledges that states have authority to protect all "waters of the state," and that excluding waters from federal jurisdiction does not always mean that they will be exempt from state regulation and protection.

8. Continues to provide access to appropriate technical and financial assistance to the states to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations.

9. Provides a clearly delineated process for resolving differences of opinion over federal and non-federal jurisdiction, and jurisdiction between different States and tribes (treated as states).

10. Provides for mapping of jurisdictional waters as a joint federal/state/tribal effort employing the best available data and tools, with appropriate provisions and processes for map maintenance, and recognizing that verification of jurisdiction still needs to be coordinated with the state.

11. Includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling states to take such actions as may be necessary to address any gaps in state law, regulation and protection, and to ensure sufficient time for tools to be developed by federal agencies, in collaboration with states, that facilitate implementation of the new rule.

12. Recognizes the need to balance definitional clarity with flexibility in implementation to address the unique landscapes, flow regimes, and legal frameworks in various regions of the Nation and appropriately weighs all factors of science, law, and effective policy to draw jurisdictional conclusions that are appropriate, and that do not impinge on the rights of States.

13. Considers a regional approach to the definitions of terms for foundational and any categorical waters in the rule including terms such as "relatively permanent" and "significant nexus" and defines regions building upon existing classification systems based on hydrology, geology, and climate.

14. Provides, in the rule development process, a representative number of states, as co-regulators, with diverse perspectives and regions to engage actively in an integrated way with the EPA and Corps staff to provide direct and effective feedback on the implementability of a proposed rule which requires ample time for development of new regulatory language.

Revised and Readopted
(*see former Positions No. 481 – 4/06/22;No. 472 – 9/16/2021; No. 427 –10/26/2018; No. 410 – 6/29/2017; and No. 369 – 7/18/2014)*

Tab O – Joint Letters in Support of SRFs

April 11, 2025

The Honorable Mike Simpson
Chairman
U.S. House Appropriations Subcommittee on
Interior, Environment and Related Agencies
Washington, D.C. 20515

The Honorable Lisa Murkowski
Chair
U.S. Senate Appropriations Subcommittee on
Interior, Environment and Related Agencies
Washington, D.C. 20510

The Honorable Chellie Pingree
Ranking Member
U.S. House Appropriations Subcommittee on
Interior, Environment and Related Agencies
Washington, D.C. 20515

The Honorable Jeff Merkley
Vice Chair
U.S. Senate Appropriations Subcommittee on
Interior, Environment and Related Agencies
Washington, D.C. 20510

Re: 2026 Fiscal Year Appropriations for the Clean Water and Drinking Water State Revolving Funds (SRFs)

Dear Chairman Simpson, Chair Murkowski, Ranking Member Pingree and Vice Chair Merkley:

As your Committees begin prioritizing funding for fiscal year 2026, the undersigned national and state organizations urge full funding of the Clean Water and Drinking Water State Revolving Funds (SRFs) at congressionally authorized levels of $3.25 billion each.

Clean, safe water is essential to human health, which is inextricably linked to America's prosperity and high standard of living.

Individual wellness and healthy communities are the foundation of robust, successful economies that attract investment and create high paying jobs. Communities without clean waterbodies or a safe, reliable supply of drinking water are communities without socioeconomic stability, economic opportunity, or upward mobility.

Fully funding the SRFs at congressionally authorized levels of $3.25 billion, each, will expand access to affordable financing for infrastructure that provides safe drinking water, suitable recycled water, wastewater services and stormwater management in thousands of communities across the nation every year. Adequate federal funding for this basic public health infrastructure is needed to reduce the risk of preventable waterborne diseases from poor water quality and water scarcity, which increase healthcare costs and cause a loss of economic productivity.

Over the next 20 years, America must invest more than $1 trillion in water infrastructure to protect human health.

According to recent surveys, the need for investment in drinking water, recycled water, wastewater and stormwater infrastructure over the next 20 years exceeds $1.255 trillion. Fully funding the SRFs at $6.5 billion will allow the SRFs to play a key role in closing the funding gap and help make investments in water infrastructure more affordable for communities.

- According to the Clean Watershed Needs Survey Report to Congress, America needs to invest $630 billion over the next two decades to clean wastewater and stormwater before reusing it or returning it to the environment.
- According to the results of EPA's Drinking Water Needs Survey and Assessment 7th Report to Congress, America needs to invest $625 billion over the next two decades to provide safe drinking water to hundreds of millions of households across the nation.

The demand for affordable SRF financing has increased exponentially in recent years.

Adequate federal funding is needed to meet the growing demand for SRF low interest loans, which has skyrocketed due to the increased cost of planning, design, construction and financing.

- While inflation has stabilized, the cost of planning, design and construction remains well above pre-pandemic levels, especially in small and rural communities that can least afford it.
- Higher construction costs are compounded by higher financing costs from rising interest rates on the municipal market.
- Complying with more stringent water quality standards requires new investments in sophisticated and often expensive treatment technologies.

The SRFs are fiscally-responsible, effective and efficient state-federal partnerships.

Since Congress established the SRFs, $90 billion in cumulative federal funding has generated $244 billion in financial assistance for water infrastructure projects, producing a combined return-on-investment of $3 for every $1 in federal funding. Today, decades-old congressional

appropriations for the SRFs are being reused and reinvested, with more than $100 billion in loan repayments permanently revolving and financing new water infrastructure projects.

Over the last three years, these state-managed programs have executed more than 3,000 loans, on average, each year. Two thirds of these projects were built in small and rural communities with fewer than 10,000 people, many of which couldn't qualify or afford financing in the municipal or private lending markets. The cost of administering the SRFs is capped at 4% of annual federal funding.

Drinking water, recycled water, wastewater and stormwater utilities face a funding cliff.

Supplemental federal funding for the SRFs in the Infrastructure Investment and Jobs Act (IIJA) ends next year. When that one-time funding ultimately dries up, many communities will lose access to a source of affordable financing to build infrastructure to meet national standards for safe and clean water, jeopardizing the health of millions of Americans.

Funding the Clean Water and Drinking Water SRFs at congressionally authorized levels of $3.25 billion, each, for fiscal year 2026 will avert this funding cliff and maintain the pipeline of projects for water infrastructure that protects human health and the environment.

Thank you for your continued support of the Clean Water and Drinking Water SRFs.

Alabama Rivers Alliance
Alliance for Water Efficiency (AWE)
American Council of Engineering Companies (ACEC)
American Public Works Association (APWA)
American Water Works Association (AWWA)
Association of Clean Water Administrators (ACWA)
Association of Metropolitan Water Agencies (AMWA)
Association of State Drinking Water Administrators (ASDWA)
California Association of Sanitation Agencies
Clean Water Action
Council of Infrastructure Financing Authorities (CIFA)
Environmental Council of the States (ECOS)
Environmental Policy Innovation Center (EPIC)
Government Finance Officers Association (GFOA)
Moonshot Missions
National Association of Clean Water Agencies (NACWA)
National Municipal Stormwater Alliance (NMSA)
National Utility Contractors Association (NUCA)
Texas Water Association
Texas Water Infrastructure Association (TXWIN)
US Water Alliance
The Water Research Foundation (WRF)
Water and Wastewater Equipment Manufacturers Association (WWEMA)
Water and Sewer Distributors of America (WASDA)

Water Environment Federation (WEF)
Water Finance Exchange (WFX)
WaterNow Alliance
WateReuse Association (WRA)
Western States Water Council (WSWC)

An important message from 37 national and state organizations about the future of federal funding for water infrastructure that protects human health and the environment.

February 20, 2025

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: 2025 and 2026 Fiscal Year Appropriations for the Clean Water and Drinking Water State Revolving Funds (SRFs)

Dear Administrator Zeldin:

The undersigned organizations urge the U.S. Environmental Protection Agency to support full funding of the Clean Water and Drinking Water State Revolving Funds (SRFs) at congressionally authorized levels of $3.25 billion for each program for each fiscal year.

Clean, safe water is essential to human health.

Fully funding the SRFs will expand access to affordable financing for infrastructure that provides safe drinking water, suitable recycled water, wastewater services and stormwater management in thousands of communities around the nation every year. Adequate federal funding for this basic public health infrastructure is needed to reduce the risk of preventable diseases from poor water quality and water scarcity for millions of Americans.

The demand for affordable SRF financing has increased exponentially in recent years.

Adequate federal funding is needed to meet the growing demand for SRF subsidized loans, which has skyrocketed due to the increased cost of planning, design, construction and financing.

- While inflation has stabilized, the cost of planning, design and construction remains well above pre-pandemic levels, particularly in rural communities that can least afford it.
- Higher construction costs are compounded by higher financing costs from rising interest rates on the municipal market.
- The nation continues to face a backlog of projects to rehabilitate and modernize aging infrastructure.
- Complying with more stringent water quality standards requires new investments in sophisticated and often expensive treatment technologies.

Drinking water, recycled water, wastewater and stormwater utilities face a funding cliff.

Supplemental federal funding for the SRFs in the Infrastructure Investment and Jobs Act (IIJA) ends in 2026. When that one-time funding ultimately dries up, many communities will lose

access to a source of affordable financing to build infrastructure to meet national standards for safe and clean water, jeopardizing the health of millions of Americans.

Funding the Clean Water and Drinking Water SRFs at congressionally authorized levels of $3.25 billion for each for fiscal years 2025 and 2026 will provide much needed access to affordable financing for water infrastructure that protects human health and the environment.

Thank you for your continued support of the SRFs.

Alabama Rivers Alliance
Alliance for Water Efficiency (AWE)
American Council of Engineering Companies (ACEC)
American Public Works Association (APWA)
American Rivers Action Fund
American Water Works Association (AWWA)
Association of Clean Water Administrators (ACWA)
Association of Metropolitan Water Agencies (AMWA)
Association of State Drinking Water Administrators (ASDWA)
Clean Water Action
Council of Infrastructure Financing Authorities (CIFA)
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Government Finance Officers Association (GFOA)
Moonshot Missions
National Association of Clean Water Agencies (NACWA)
National Municipal Stormwater Alliance (NMSA)
Rural Community Assistance Partnership (RCAP)
Texas Water Association
Texas Water Infrastructure Association (TXWIN)
U.S. Water Alliance
The Water Research Foundation (WRF)
Water and Wastewater Equipment Manufacturers Association (WWEMA)
Water Environment Federation (WEF)
WaterNow Alliance
WateReuse Association (WRA)
WateReuse Arizona
WateReuse California
WateReuse Colorado
WateReuse Florida
WateReuse Kansas
WateReuse Mid-Atlantic
WateReuse Nevada
WateReuse Ohio
WateReuse Pacific Northwest

WateReuse Texas
Western States Water Council

An important message from 37 national and state organizations about the future of federal funding for water infrastructure that protects human health and the environment.

February 20, 2025

The Honorable Mike Simpson
Chairman
U.S. House Appropriations Subcommittee on Interior, Environment and Related Agencies
Washington, D.C. 20515

The Honorable Lisa Murkowski
Chair
U.S. Senate Appropriations Subcommittee on Interior, Environment and Related Agencies
Washington, D.C. 20510

The Honorable Chellie Pingree
Ranking Member
U.S. House Appropriations Subcommittee on Interior, Environment and Related Agencies
Washington, D.C. 20515

The Honorable Jeff Merkley
Vice Chair
U.S. Senate Appropriations Subcommittee on Interior, Environment and Related Agencies
Washington, D.C. 20510

Re: 2025 and 2026 Fiscal Year Appropriations for the Clean Water and Drinking Water State Revolving Funds (SRFs)

Dear Chairman Simpson, Chair Murkowski, Ranking Member Pingree and Vice Chair Merkley:

As your Committees finalize appropriations for fiscal year 2025 and begin the appropriations process for fiscal year 2026, the undersigned national and state organizations urge full funding of the Clean Water and Drinking Water State Revolving Funds (SRFs) at congressionally authorized levels of $3.25 billion for each program for each fiscal year.

Clean, safe water is essential to human health.

Fully funding the SRFs will expand access to affordable financing for infrastructure that provides safe drinking water, suitable recycled water, wastewater services and stormwater management in thousands of communities around the nation every year. Adequate federal funding for this basic public health infrastructure is needed to reduce the risk of preventable diseases from poor water quality and water scarcity for millions of Americans.

The demand for affordable SRF financing has increased exponentially in recent years.

Adequate federal funding is needed to meet the growing demand for SRF subsidized loans, which has skyrocketed due to the increased cost of planning, design, construction and financing.

- While inflation has stabilized, the cost of planning, design and construction remains well above pre-pandemic levels, particularly in rural communities that can least afford it.
- Higher construction costs are compounded by higher financing costs from rising interest rates on the municipal market.

- The nation continues to face a backlog of projects to rehabilitate and modernize aging infrastructure.
- Complying with more stringent water quality standards requires new investments in sophisticated and often expensive treatment technologies.

Drinking water, recycled water, wastewater and stormwater utilities face a funding cliff.

Supplemental federal funding for the SRFs in the Infrastructure Investment and Jobs Act (IIJA) ends in 2026. When that one-time funding ultimately dries up, many communities will lose access to a source of affordable financing to build infrastructure to meet national standards for safe and clean water, jeopardizing the health of millions of Americans.

Funding the Clean Water and Drinking Water SRFs at congressionally authorized levels of $3.25 billion for each program for fiscal years 2025 and 2026 will provide much needed access to affordable financing for water infrastructure that protects human health and the environment.

Thank you for your continued support of the Clean Water and Drinking Water SRFs.

Alabama Rivers Alliance
Alliance for Water Efficiency (AWE)
American Council of Engineering Companies (ACEC)
American Public Works Association (APWA)
American Rivers Action Fund
American Water Works Association (AWWA)
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U.S. Water Alliance
The Water Research Foundation (WRF)
Water and Wastewater Equipment Manufacturers Association (WWEMA)
Water Environment Federation (WEF)
WaterNow Alliance

WateReuse Association (WRA)
WateReuse Arizona
WateReuse California
WateReuse Colorado
WateReuse Florida
WateReuse Kansas
WateReuse Mid-Atlantic
WateReuse Nevada
WateReuse Ohio
WateReuse Pacific Northwest
WateReuse Texas
Western States Water Council

Tab P – WOTUS Status

WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: www.westernstateswater.org

DRAFT

Date:

The Honorable Lee M. Zeldin
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW, MC: 1101A
Washington, DC 20460
zeldin.lee@epa.gov

The Honorable Peggy Browne
Acting Assistant Administrator
for the Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue NW, MC: 4101M
Washington, DC 20460
brown.peggy@epa.gov

Dear Administrator Zeldin and Acting Administrator Browne,

The Western States Water Council (WSWC) is a bi-partisan government entity created by Western Governors in 1965 that represents eighteen states. Our members are appointed by and serve at the pleasure of their respective Governors, advising them on water policy issues. Our mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

We offer the following comments in response to the agencies' federalism consultation initiated by forthcoming rulemaking on the Implementation of the Definition of Waters of the United States (Docket ID No. EPA-HQ-OW-2025-0093). We understand the aim of this agency action is to revise the definition of Waters of the United States (WOTUS) to better align with legal requirements, provide clarity, protect the nation's navigable waters, and streamline regulatory processes. Specifically, the states will give feedback regarding the scope of "relatively permanent waters," "continuous surface connection," the definition of "adjacent" and the scope of jurisdictional ditches. We urge you to recognize that it is the states who best understand their own unique landscapes, flow regimes, and seasonality that these definitions must reflect, as well as the impact that proposed language will have on implementation within their borders. It is the position of the WSWC that any federal effort to clarify or define WOTUS must, among other efforts: (1) create an enduring and broadly supported definition; (2) acknowledge and address the needs, priorities, and concerns of states as co-regulators; (3) provide for a clearly delineated process for resolving differences of opinion over jurisdictional determinations; (4) provide for mapping and map maintenance of jurisdictional waters as a joint federal/state/tribal effort; and (5) consider a regional approach to the definitions of terms for foundational and any categorical waters and defines regions building upon existing classification systems based on hydrology, geology, and climate.

I. Cooperative Federalism

The CWA is built upon the principle of cooperative federalism, especially as noted under CWA §101(b) and (g). Efforts to redefine or clarify CWA jurisdiction have numerous federalism implications,

with the potential to significantly impact states, and the potential to alter the distribution of power and responsibilities among the states and federal government. The WSWC strongly encourages the agencies to proactively reach out to the states individually, as co-regulators in early meaningful consultation and to acknowledge States' authorities over "waters of the state."

The WSWC urges the agencies to provide opportunities for a representative number of states across different regions with diverse perspectives to actively engage in the rule development process with the agencies, to provide direct and effective feedback on the implementability of concepts or language that might be considered in a proposed rule. As co-regulators, the states would like to work together with the agencies to develop and implement a rule that seeks to strike a balance between the critical importance of protecting the quality of the nation's waters and preserving the sovereignty of states over their land and water resources.

II. Technical and Financial Assistance

The WSWC supports continued access to federal technical and financial assistance to the states to protect and improve water quality under existing EPA programs. These nonregulatory federal measures have been meaningful for the states to address point and non-point source pollution through state regulatory and voluntary programs tailored to fit unique state needs.

The six components used in the Water Pollution Control State grant allotment formula are: Surface Water Area; Groundwater Use; Water Quality Impairment; Point Sources; Nonpoint Sources; and Population of Urbanized Area (40 CFR 35.162). Many states use a combination of state funds, fee funds, and federal water pollution control grant funds to implement their water pollution control programs. The WSWC does not support any reduction in Water Pollution Control State or other grant funding for western states due to the WOTUS changes.

III. Mapping and Geospatial Datasets

The WSWC supports the development of geospatial datasets for mapping jurisdictional waters through a joint federal, state, and tribal effort. WSWC supports joint federal-state efforts to identify and employ the most up-to-date data and tools, and appropriate provisions and funding for field verification of map accuracy and ongoing data and map maintenance. Regardless of how WOTUS is defined, there has long been a need for a national mapping structure that provides clarity to regulators and the regulated community with respect to jurisdiction.

IV. Dispute Resolution Mechanism

Uncertainty and differences of opinion exist between states regarding CWA jurisdiction, as evidenced by the many lawsuits brought by states either objecting to or supporting both the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule. Further, substantial and recurring changes from one Administration to the next create uncertainty, inconsistencies, and indecision not only for states as co-regulators, but also for the regulated community. This challenges the EPA and Army to work more closely with the states to develop and implement a more reliable, enduring, and broadly supported definition of WOTUS and end the regulatory whiplash.

The WSWC supports a clear process for resolving differences of opinion over federal and non-federal jurisdiction, as well as jurisdictional disputes between different states and tribes with Treatment-as-States

authority. For example, although 40 CFR §131.7 provides a dispute resolution mechanism between states and tribes with differing water quality standards, this does not appear to apply to jurisdictional disputes between one state and another state, or between one tribe and another tribe, or between a state/tribe and a federal agency, e.g. if a federal agency determines a water is jurisdictional as a "water of the US" and a state claims it is instead a "water of the state."

Thank you for the opportunity to comment.

Sincerely,

Tab H – Draft FY25-26 Committee WorkPlan
Water Resources / Executive / Water Quality / Legal

WATER QUALITY COMMITTEE
WORK PLAN
July 1, 2024 to June 30, 2025

1. WATER QUALITY/QUANTITY NEXUS

Background: Western Governors' Association (WGA) Policy Resolution 2024-07, Water Resource Management in the West, states: "Western Governors believe effective solutions to water resource challenges require an integrated approach among states and with federal, tribal and local partners. Federal investments should assist states in implementing state water plans designed to provide water for municipal, rural, agricultural, industrial and habitat needs, and should offer financial and technical support for development of watershed and river basin water management plans when requested by states. Integrated water management planning should also account for flood control, water quality protection, and regional water supply systems. Water resource planning must preserve state authority to manage water through policies which recognize state law and the financial, environmental, and social values of water to citizens of western states today and in the future." (Paragraph (B)(3), emphasis added)

Work-to-Date: On October 6-7, 2015, the Water Quality Committee held a workshop in conjunction with the WSWC's 2015 fall meetings in Manhattan, Kansas. The workshop provided insights on: (1) how state water quantity and quality (WQ2) 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. WSWC staff prepared a preliminary report of the meeting, which included recommendations for WSWC next steps.

During the WSWC October 2019 meeting in Breckenridge, Colorado the Committee heard a presentation from Alex Davis, Deputy Director of Water Resources for the City of Aurora about the city's challenges related to the water quantity-quality nexus and the complex efforts to ensure adequate source water protection across several water basins.

Beginning January 2022, WestFAST held a monthly Wildfire Webinar Series. The series continued for a full year and covered topics regarding science, policy, and outreach. Technical topics explored include wildfire prediction, restoration and resilience-building, and the relationship of wildfire to water quality and water availability. Other policy topics explored the intersection of wildfire with property insurability and public health. WestFAST also covered engagement topics such as community planning, investment in watershed health, NASA's FireSense strategy, and available risk reduction tools.

From February to May 2023, WestFAST held a three part webinar series on Pumped Storage Hydropower. The first in this series gave an overview of types of pumped storage systems, and their benefits and challenges. The following two installments covered various permitting processes for new pumped storage hydropower projects, including the Federal Energy Regulatory Commission licensing process, compliance requirements, and Reclamation's lease of power privilege process.

From July to December 2023, WestFAST held a four part Stream Restoration webinar series. They covered introductory concepts, the science of stream restoration, as well as stream restoration and water rights in Utah, Colorado, Nebraska and California.

2024-2025: The Committee supports WGA Resolution 2024-07, and directs staff to follow up on the next steps recommended in the 2015 WQ2 workshop, including: (1) create a nexus Toolbox of useful and accessible information, including interagency MOUs, instream flow legislation, case studies, and reports of additional workshops, to provide a resource for the states seeking to learn from each other's experiences; (2) identify and coordinate with federal agencies and other technical or national organizations with common interests to co-host educational workshops or symposia on relevant nexus topics, both to develop better relationships and to find additional potential solutions to nexus problems; and (3) provide updated information from states on current water quality-water quantity issues at Council meetings. Initial conversations with the subcommittee have occurred.

Time Frame: Ongoing

WQ2 Nexus Workgroup – goal to re-establish in 2024

2. CLEAN WATER ACT ISSUES

There are several 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*

Background: : 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 decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). This was followed by the Clean Water Rule (2015 WOTUS Rule), finalized on June 29, 2015 (80 FR 37054). Many of our member states filed lawsuits challenging the 2015 WOTUS Rule in federal court. The 2015 WOTUS Rule was rescinded, and was replaced by the Navigable Waters Protection Rule (2020 WOTUS Rule), finalized on April 21, 2020 (85 FR 22250). Several of our member states filed lawsuits challenging the 2020 WOTUS Rule in federal court. The 2020 WOTUS Rule was vacated, and was replaced by the Revised Definition of the "Waters of the United States" Rule (2023 WOTUS Rule), finalized on January 18, 2023 (88 FR 3004). On May 25, 2023, the U.S. Supreme Court issued its decision in *Sackett v. EPA* (#21-454). Citing the Justice Scalia plurality opinion in *Rapanos*, the five-Justice majority Court concluded that the definition of WOTUS in Clean Water Act (CWA) §1362(7) "encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." The Court held that WOTUS does not apply to all wetlands, but extends only to those wetlands with a continuous surface connection to bodies of water that are WOTUS in their own right, so that they are indistinguishable from those waters. The Court acknowledged that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." In footnote 16, the Court

said: "Although a barrier separating a wetland from a water of the United States would ordinarily remove a wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act…that unlawful barrier poses no bar to its jurisdiction." On August 29, 2023, the EPA and Corps issued an Amended 2023 Rule to conform key aspects of the regulatory text to the *Sackett* decision.

On August 29, 2023, the EPA and Corps issued an Amended 2023 Rule (88 FR 61964) to conform key aspects of the regulatory text to the Sackett decision. Two state lawsuits have challenged the Amended 2023 Rule: Texas v. EPA (TX, ID), and West Virginia v. EPA (AK, AL, AR, FL, GA, IA, IN, KS, LA, MI, MO, MT, ND, NE, NH, OH, OK, SC, SD, TN, UT, VA, WV, and WY). Both cases issued preliminary injunctions on the 2023 WOTUS Rule. A third case, Kentucky v. EPA, did not issue an injunction, but the rule is stayed while the decision is on appeal. The agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* for these 27 states until further notice. For the remaining 23 states, the District of Columbia, and the Territories, the agencies are implementing the Amended 2023 Rule.

Work-to-Date: WSWC adopted positions #369 and #373 regarding CWA rulemaking efforts and state-federal collaboration. Position #369 was revised and readopted as Position #410, while Position #373 was allowed to sunset and acknowledged as a letter with continued historical value. At the October 2018 meeting in Coeur d'Alene, Idaho, Position #410 was revised and readopted as #427, with the State of Washington abstaining from the vote. At the September 2021 meeting in Deadwood, South Dakota, Position #472 was again revised and adopted, with the understanding that further efforts would be made to improve the position the following Spring. WSWC sent various letters and comments to EPA and the Corps. At the April 2022 meeting in Arlington, Virginia, Position #481 was revised and adopted, replacing #472.

In the Summer of 2022, WSWC hosted a series of workshops to consider the technical and policy implications of a regional approach to WOTUS implementation, and prepared a white paper to document this effort for future use: https://westernstateswater.org/wp-content/uploads/2022/10/WSWC-WOTUS_RegionalConcepts_Technical_Whitepaper_Final.pdf

2024-2025: The Committee will continue to work with the Water Resources and Legal Committees through the Workgroup to understand and share how states are affected by and dealing with the changes to the "waters of the United States" definition. Staff will track any developments in agency actions regarding the WOTUS definition, and report on potential impacts to states.

Time Frame: Ongoing

CWA Rulemaking Workgroup: Tom Stiles (KS), Jennifer Carr (NV), Jojo La (CO), Julie Pack (AK)

*See Item 2 of the Legal Committee Workplan

b. Water Reuse

Background: In 2011, the WSWC prepared a report summarizing state responses to survey questions on water reuse standards, regulations, issues, projects and funding titled "Water Reuse in the West: State Programs and Institutional Issues." Given that it has been nearly a decade since those responses were compiled, the Committee decided to update the report. At the October 2019 meeting in Breckenridge, the Committee expressed interest in coordinating survey responses with the Association of Clean Water Administrators (ACWA) and other organizations. Additionally, the Environmental Protection Agency recently unveiled their Water Reuse Action Plan (WRAP), a collaborative effort across federal agencies, water organizations and the private water sector. This is the first of its magnitude, intended to innovate, scale and implement water reuse technologies and policies. The WRAP identifies 37 actions and 200 implementation milestones. WSWC's and ACWA's survey update will help implement action 2.2.1: Compile Existing State Policies and Approaches to Water Reuse.

Work-to-Date: From November 2019 – January 2020, WSWC staff and council members worked with ACWA and other organizations to update survey questions. These questions were somewhat different from the 2011 questions and provided a comprehensive picture of what is happening in water reuse across the states. States submitted responses to the survey in mid-2020, and staff compiled these into a final report. This report is available at: https://westernstateswater.org/publications/other-reports/2021/2021-water-reuse-report/

2024-2025: With the report finalized, staff will work with ACWA to determine next steps, including potential publication in a national water policy or law journal.

Time Frame: 2021-2022

c. State Revolving Funds (SRFs) and Infrastructure Financing

Background: The Clean Water and Drinking Water SRFs provide states with capitalization grants that are leveraged with state contributions to offer financial assistance to cities, towns, communities and others to improve and construct water quality infrastructure. These programs are widely used and have been critically important for improving and maintaining water infrastructure at the local level. Over the years, some budget requests from the Administration have proposed cuts to the SRF programs. Various acts of Congress have also authorized or retained a number of limitations on the use of SRF funds, including: (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.

When Congress enacted the Water Infrastructure Finance and Innovation Act (WIFIA) in 2014, there was some concern that the subsequent WIFIA loan and guarantee program would redirect critical funds from the SRF programs. Thus far, this has not been the case (see table below). Since 2017, the WIFIA program has invited a total of 89 projects to apply for funding, with over $13B in financing requests. SRFs have access to this funding and are also able to jointly fund projects in conjunction with WIFIA loans. In 2019, both types of funding mechanisms were used by projects. To date, 16 WIFIA loans have been closed totaling over $3.5B in credit assistance to help finance $8B for water infrastructure projects and create 16,000 jobs.

Congressional Appropriations for Water Infrastructure (FY2017-19), in millions

	Clean Water SRF & Title II	Drinking Water SRF	WIFIA
FY2017	$1,393.9	$863.2	$30.0
FY2018	$1,696.9	$1,163.2	$63.0
FY2019	$1,694.0	$1,164.0	$68.0

Source: Congressional Research Service Report R43871

When Congress enacted the 2022 Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58) it authorized significant but short-term federal funding for SRFs. However, a substantial portion of those increases were earmarked for Congressionally-directed spending on earmarked projects.

Work-to-Date: During the July 2018 meeting in Newport, Oregon, the Committee heard reports from Kansas and Washington on the process they went through to apply for WIFIA loans during the first round, and on the water projects that were built with these low-interest loans. Since then, projects in member states Arizona, California, Nebraska, North Dakota, Oklahoma, Oregon and Utah have been funded. Overall, WIFIA funded projects are larger than typical SRF-funded projects, while both programs prioritize those that are shovel-ready and credit-worthy.

WSWC Position #496 urges the Administration and Congress to provide greater flexibility and fewer restrictions on state SRF management, to provide stable and continuing appropriations to the SRF capitalization grants at adequate funding levels, and to ensure that states' allocations are not reduced or harmed by directed congressional earmarks. Appropriations should be adequate to help states address their water infrastructure needs and meet federal mandates. WGA Policy Resolution 2021-10, Water Quality in the West, also supports the SRFs as "important tools" and requests greater flexibility and fewer restrictions on state SRF management.

On August 21, 2023, WSWC joined a coalition of organizations led by the Council of Infrastructure Financing Authorities (CIFA) urging Congressional leaders to fund the CW and DW SRFs to their maximum authorized amount of $3B each for FY2024, and noting concerns with Congressional earmarks. WSWC joined a letter of similar language, urging continued funding and protections through FY2025, which CIFA sent to the House and Senate Appropriations Committee on December 14, 2023. In February of 2024, WSWC joined a CIFA-led letter to the House Committee on Appropriations, again urging full funding for FY2024 (which had not yet been appropriated due to a series of continuing resolutions which extended into March).

2024-2025: The Committee will continue to support the WGA and WSWC positions. WSWC staff will update the Committee on developments within Congress and the Administration that have potential to impact SRFs. As needed, Committee members and WSWC staff will meet with the Administration and Congress officials to further the objectives of the WGA and WSWC positions. Some topics for discussion include state experiences with Buy American and Davis-Bacon, whether there are otherwise eligible entities, but for the limitations, and how many are walking away from SRFs because of these restrictions, as well as options for a right of first refusal by the SRFs prior to funding projects through WIFIA.

Time Frame: Ongoing

d. EPA's Water Transfers Rule

Background: On January 18, 2017, the 2nd Circuit upheld the EPA's Water Transfers Rule, 40 CFR §122.3(i), in *Catskills Mountains Chapter of Trout Unlimited v. EPA*, No. 14-01991. The Court of Appeals reversed the decision of the U.S. District Court for the Southern District of New York, which previously vacated the EPA's rule. On February 26, 2018, the Supreme Court denied the petition for certiorari, allowing the Water Transfers Rule to stand.

WGA Policy Resolution 2021-10 (paragraph B(2)(c)) and WSWC Position #469 support EPA's Water Transfers Rule, which clarifies that water transfers from one "navigable" water to another 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.

On February 18, 2020, WGA sent a letter to the Committee on Energy and Natural Resources in support of the Drought Resiliency and Water Supply Infrastructure Act (S. 1932), in which it suggested including language to affirm the rule in federal statute in order to "add a needed measure of stability and certainty to western water planning and drought mitigation efforts." WSWC and other state organizations also signed onto this letter.

2024-2025: 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 future litigation and possible efforts by EPA to reconsider the rule; (3) inform the WSWC of ongoing developments; and (4) take any other actions needed to support the WGA/WSWC positions regarding the rule.

Time Frame: Ongoing

e. Nutrients

Background: EPA's Office of Water released the Joel Beauvais memo *Renewed Call to Action to Reduce Nutrient Pollution and Support for Incremental Actions to Protect Water Quality and Public Health* on September 22, 2016, and the Radhika Fox memo *Accelerating Nutrient Pollution Reductions in the Nation's Waters* on April 5, 2022.

The Beauvais memo highlights the continued need for action by states and other stakeholders to reduce the threat of nutrients to water quality and public health by:

- Reducing nitrates in sources of drinking water and nitrogen and phosphorus pollution contributing to harmful algal blooms;
- Reducing nutrients from point and nonpoint sources;
- Prioritizing watersheds and setting load reductions;
- Strengthening water quality standards;
- Highlighting high priority incremental actions of states;
- Issuing biennial reports that assess progress and provide accountability, and
- Encouraging EPA to continue to provide support and financial assistance.

The Fox memo sets forth five "governing principles" to guide the EPA Office of Water as it works with states, tribes, and local partners to reduce nutrient pollution. The guiding principles are: (1) Advance equity and environmental justice; (2) Build and foster partnerships; (3) Follow the science and invest in data-driven solutions; (4) Support innovation; (5) Scale successful initiatives.

The memo also outlines EPA's primary strategies and secondary strategies to drive reductions in nutrient pollution.

- **Deepen collaborative partnerships with agriculture**. Secondary strategies to this end include collaboration with USDA, engagements with agricultural stakeholders, and improving on-the-ground collaboration between USDA, states, territories, tribes, and stakeholders.
- **Redouble our efforts to support states, tribes, and territories to achieve nutrient pollution reductions from all sources.** Secondary strategies include encouraging states to use One Water approach, championing innovative financing and use of CWA flexibility for implementing market-based approaches, and prioritizing support to disadvantaged communities.
- **Utilize EPA's Clean Water Act authorities to drive progress, innovation, and collaboration.** Secondary strategies include urging adoption of numeric nutrient criteria into Water Quality Standards, more fully using the Clean Water Act assessment and listing process, supporting development of TMDLs for nutrient pollution, and further reducing nutrient loads from point sources.

Work-to-Date: The Committee and WSWC staff continue to follow and update the WSWC on EPA efforts involving nutrients. Various Committee meetings have featured presentations from EPA and state officials on federal and state nutrient management efforts. At the October 2019 meeting in Breckenridge, the Committee heard from Jennifer Carr, Deputy Administrator of the Nevada Division on Environmental Protection, on multi-agency coordination on harmful algal blooms in several water bodies in Nevada.

Remote sensing is also becoming an increasingly important method for monitoring water quality and water supplies. Landsat 8 can provide images in near-real time that provide water quality managers with information on where harmful algal blooms may be forming and allows them to rapidly respond. WSWC was instrumental in ensuring Landsat 8 was equipped with the data collection tools needed for these assessments.

On August 14, 2019, EPA and USDA co-hosted a workshop titled Innovative Financing Strategies for Reducing Nutrients. The workshop explored private, state, and federal funds that could be combined and leveraged for nutrient reduction projects, and ways that the agencies could increase funding opportunities and awareness of innovative funding approaches.

On March 14, 2024 Tom Stiles provided an overview of the Association of Clean Water Administrators' (ACWA) 11 standing principles on nutrients policy as a preamble to Council discussions on a possible position. On March 15, the Committee established a Nutrients subcommittee for further discussion. The subcommittee met in Spring 2024 and prepared a position for full council review and input.

2024-2025: The Committee and WSWC staff will monitor and update the Council on any changes to EPA's nutrient efforts, including those related to Harmful Algal Blooms (HABs) and cyanotoxin criteria. Each state is encouraged to develop its own strategy to control nutrient pollution. The Committee will ask states with a strategy to share highlights from their nutrient

and HABs strategies and efforts that they think could benefit other Council member states. The Association of Clean Water Administrators has a Nutrients Reduction Progress Tracker that has some state strategies that the Committee can use as a starting point.

Time Frame: Ongoing

Nutrients Subcommittee: Jojo La (CO), John Mackey (UT), Tom Stiles (KS), Jennifer Zygmunt (WY)

f. Section 401 Certifications

Background:

In 2019, the Trump administration issued Executive Order 13868, leading to EPA's issuance of the 2020 CWA Section 401 Certification Rule (2020 Rule)(85 FR 42210). The 2020 rule narrowed the authority of states to determine certification timeframes, application materials requirements, and the scope of certifications. WSWC and WGA submitted comments and letters to the administration, congress, and EPA prior to Executive Order 13868 and throughout the rulemaking process, opposing changes which may diminish state authority. In January 2021, the Biden administration issued Executive Order 13990, directing agencies to review and address regulations promulgated under the Trump administration. On April 21, 2022, WSWC sent a letter to the Administration encouraging the accelerated review of the CWA 401 Certification Final Rule and requesting the involvement of states as co-regulators.

In June 2022, the Environmental Protection Agency (EPA) released a pre-publication version of a revised rule for CWA (Clean Water Act) §401 certification. In August, the Council of State Governments-West (CSG-West) and the WSWC submitted a comment letter to EPA, commending the proposed rule's cooperative elements, but criticizing its provision that a pre-filing meeting cannot occur until the federal agency has drafted the license. They argued that it placed states at the end of the federal permitting process and limited collaboration. They expressed support for early substantive consultation with states.

On September 14, 2023 the Environmental Protection Agency (EPA) announced the final *Clean Water Act Section 401 Water Quality Certification Improvement Rule* (2023 Rule) (88 FR 66558), which went into effect in November 2023 (WSW #2575). The rule provides the following: (1) allows states to specify additional application requirements, beyond EPA baselines; (2) maintains the 30-day pre-filing meeting time period; (3) limits the scope of state certifications to the water quality impacts of the "activity as a whole", rather than point source only; and (4) limits EPA's certification review to only the timeliness of action, rather than the substance of the determination.

On December 4, 2023 a coalition of states (including AK, MT, OK, and WY) and regulated entities challenged the 2023 Rule in the U.S. District Court of the Western District of Louisiana (*State of Louisiana et al. v. U.S. Environmental Protection Agency et al.*, case No. 2:23-cv-01714). The petitioners requested an order declaring that the 2023 Rule violates the CWA and the Administrative Procedure Act (APA); vacating and setting aside the 2023 Rule; and enjoining EPA from applying or enforcing the 2023 Rule. In January 2024, 18 states including California, New Mexico, Oregon, and Washington jointly filed a motion for leave to intervene for the purpose of defending the 2023 Rule (WSW #2592). The intervenor defendant states

argued that they have a "clear and direct interest in upholding the 2023 Rule to preserve their sovereign authority over water quality within their respective states under section 401 of the CWA."

Work-to-Date: In 2020, the Committee formed a workgroup to explore the possibility of developing a template for Memorandums of Understanding between states and federal agencies that will be implementing the new 401 certification rule. The new rule expands the number of federal agencies responsible for obtaining 401 certifications, many of which have not previously engaged in this process. States are concerned about maintaining and opening lines of communication regarding project activities so that they can conduct their process to certify projects without waiving their ability to do so due to the strict time constraints. This workgroup has created a list of needs and wants from such a document, and are now moving towards determining what outputs would be most helpful.

2024-2025: Staff will continue to facilitate the 401 MOU workgroup, track the implementation of the rule, and report on challenges or experiences that states have had regarding how the changes are working on-the-ground.

Timeframe:

g. Tribal Treatment as States

Background: In 2016, EPA finalized two separate but related rulemaking efforts regarding the tribes' ability to obtain "treatment as states" (TAS) status under CWA Section 518, necessary for delegation of regulatory programs to the tribes. The first involved an interpretive rule regarding inherent authority of tribes, considering CWA Section 518 an express delegation of authority from Congress. The second rule sets forth a regulatory process for TAS status to operate impaired listing and total maximum daily load (TMDL) programs. WSWC and various states sent letters commenting on concerns with how the programs would be implemented.

EPA also engaged in a pre-rulemaking outreach to states, tribes, and other stakeholders, soliciting input on setting federal baseline water quality standards for tribes without TAS status. WSWC submitted comments in December 2016. EPA heard from 12 tribal governments and associations and 11 state officials, agencies and associations, among others, and reported that most tribes were largely supportive while most states raised concerns. In 2023, EPA published its proposed rule, Federal Baseline Water Quality Standards for Indian Reservations (88 FR 29496). At least 12 of our member states provided substantive comments. See WSW Special Report #2571.

In December 2022, EPA issued a proposed rule, Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights (87 FR 74361). At least 10 of our member states provided substantive comments. See WSW Special Report #2548.

Work-to-Date: In December 2016, the WSWC submitted a letter commenting on the ANPR proposing federal baseline WQS for tribes. In May 2023, the WSWC approved a new policy position #490 regarding Water Quality Standards, Protecting Tribal Reserved Rights, and Federal Baseline Water Quality Standards for Indian Reservations. In August 2023, the WSWC submitted a comment on EPA's proposed rule for federal baseline WQS for tribes.

2024-2025: The Committee will continue to monitor the potential rulemakings and their implementation and engage with EPA as appropriate.

Time Frame: Ongoing

h. Abandoned Hardrock Mine Remediation

Background: The West has an undetermined number of abandoned hardrock mines that have the potential to or unknowingly already do affect water quality. "Good Samaritan" bills have been introduced in Congress over the years to protect public entities that are willing to voluntarily clean up these sites from legal liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the CWA. These bills have been unsuccessful due to concerns about the potential impacts of amending the CWA and perceptions that sufficient protections already exist under CERCLA. However, considerable uncertainty exists as to whether CERCLA and other existing authorities provide Good Samaritans with sufficient protection.

In December 2012, EPA issued a memorandum to clarify administrative protections for Good Samaritans. It clarified 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."

In September 2020, EPA announced a new office, the Office of Mountains, Deserts, and Plains, to primarily work with Good Samaritan organizations and tribes, and ensure more efficient clean-up of both Superfund and non-Superfund sites in the West, including abandoned mines.

In September 2021, the WSWC passed Position #477 regarding Abandoned Hard Rock Mine Cleanup. On February 3, 2022, Senator Martin Heinrich (D-NM) introduced the Good Samaritan Remediation of Abandoned Hardrock Mines Act (S. 3571). On July 28, 2022, WSWC sent letters to Congress and to the Administration regarding the Good Samaritan bill and joint efforts to address abandoned hardrock mine cleanup.

On September 13, 2023 Senators Martin Heinrich (D-NM) and Jim Risch (R-ID) reintroduced the bipartisan Good Samaritan Remediation of Abandoned Hardrock Mines Act (S. 2781)(WSW #2577). On January 10, 2024 the WSWC sent a letter to the Senate leadership and the Environment and Public Works Committee, supporting and making recommendations on the bill. The letter included WSWC Policy Position No. 447 and recommended financial flexibility for states, the establishment of a formal consultation process under the bill's pilot program, and the establishment of a permanent program through which states can administer Good Samaritan permits (WSW #2591). In January 2024, the bill was reported favorably by the Senate Environment and Public Works Committee and placed on Senate Legislative Calendar No. 312.

Work-to-Date: The WGA and WSWC have long supported legislation to amend the CWA to protect Good Samaritans from inheriting perpetual liability for the site under the CWA (WGA Policy Resolution 2024-08). 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 former WGA-organized Task Force focused on crafting an exemption for Good Samaritan activities by state governments.

At the Fall 2020 WSWC meeting, Roger Gorke presented an update on the creation of the new Office, including that it will be lead by Shamid Mahmud. Mahmud has decades of experience leading the Good Samaritan Abandoned Mine Internal Working Group.

2024-2025: The Committee will continue to 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. 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, including the possible reactivation of a workgroup and/or developing a workshop to bring together interested stakeholders to identify ways to facilitate abandoned hardrock mine remediation. Staff will also track activities of the Office of Mountains, Deserts, and Plains and report back to the Committee any developments of interest.

Time Frame: Ongoing

i. Per-and Polyfluoroalkyl Substances (PFAS)

Background: The widespread use and persistent nature of PFAS chemicals presents a complex environmental problem that affects water quality, human health, and ecosytems in varying degrees around the nation. Water sources with high levels of contamination in some instances must be replaced by alternative water sources, which can be costly and difficult in the arid west. Additionally, cleanup efforts may require coordination between state, federal, tribal, and local authorities.

Work-to-Date: In 2022-23, the Subcommittee explored the possibility of WSWC position and actions that might be taken to address PFAS water contamination in a collaborative way. The WSWC hosted a States-only PFAS Roundtable and prepared a summary of the meeting: https://westernstateswater.org/events/states-only-pfas-roundtable/ In May 2023, the Committee determined not to pursue a PFAS policy position at this time, but to continue to keep an eye on PFAS developments.

2024-2025: The Committee will continue to monitor PFAS developments and revisit this issue as needed..

Subcommittee: Buck Smith (WA), Jennifer Zygmunt (WY), Julie Pack (AK)

j. NPDES Permits

Background: On March 14, 2024 Jennifer Zygmunt reiterated South Dakota's interest in proposing a new resolution on NPDES, with particular interest on whether to support legislation that would extend NPDES permit terms from five years to ten.

On March 21, 2024 the House passed H.R. 7023, the Creating Confidence in Clean Water Permitting Act which would allow the term extension. OMB has issued a statement inopposition to the bill.

2024-2025: A Subcomitte will explore the possibility of a position on NPDES permits.

Subcomittee: Tom Stiles (KS), Trevor Baggiore (AZ), Joaquin Esquivel (CA), Mark Mayer (SD), Jennifer Zygmunt (WY), Jennifer Carr (NV), Leslie Connelly (WA)

k. Maui and Groundwater

Background: The U.S. Supreme Court issued a ruling in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), holding that the provisions of the Clean Water Act require a National Pollution Discharge Elimination System (NPDES) permit when there is a "functional equivalent of a direct discharge," which may include some discharges through groundwater. The Court noted that many factors may be relevant in determining whether a pollutant discharged through groundwater is a functional equivalent of a direct discharge to navigable waters. Time and distance will be the most important factors in most cases. The Court offered the examples of: (1) a 100-year migration of pollutants through 250 miles of groundwater to a river, which would not ordinarily require a permit; (2) where a pipe ends 50 miles from navigable waters and the pollutants mix with groundwater and other materials in the aquifer, ending up in navigable waters many years later, in which case permitting requirements likely would not apply; and (3) where a pipe emits pollutants only a few feet through groundwater before discharging into a navigable water. Other relevant factors might include the nature of the aquifer material, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount discharged at the point source, how or where the pollutant enters the navigable waters, and the degree to which the pollution has maintained its specific identity.

In January 2021, EPA issued a notice of implementation guidance (86 FR 6321) which was rescinded in September 2021 (86 FR 53653). EPA issued a new draft guidance in November 2023 (88 FR 82891). Several WSWC member states submitted comments on the proposed guidance (WSW Special Report #2591). Two federal cases have analyzed the application of the "functional equivalent" standard: *Cottonwood Environmental Law Center v. Edwards*, 86 F.4th 1255 (9th Cir. 2023) (over-irrigation of golf course leaching nutrients into groundwater) and *Stone v. High Mountain Mining Company*. #22-1340 (10th Cir. 2024) (discharge from unlined settling ponds seeping into groundwater).

2024-2025: The Committee will work with the Water Quality Committee through the Workgroup to follow and comment on federal actions regarding Maui guidance in accordance with the WSWC's and WGA's positions, as well as consider the impacts of any guidance or rules on state policies, programs and regulations.

Time Frame: Ongoing

Maui Workgroup: Jennifer Zygmunt (WY), John Mackey (UT), Julie Pack (AK)

3. STATE GROUNDWATER REGULATION

Background: In 2023, various news organizations began publishing articles on the use of groundwater in the nation, with a particular focus on groundwater overuse in the West. While the articles highlighted genuine challenges (depletion, pollutants, subsidence, lack of monitoring), they lacked information about the nuances of western water laws, and did not include the efforts and progress states have made over the past several decades to address those challenges. Several of the articles called for federal regulation of groundwater, asserting that the states would not or could not do enough to address the groundwater management challenges.

In 2024, the White House solicited input from the public to address questions regarding groundwater use, recharge, and storage across the United States. The President's Council of Advisors on Science and Technology (PCAST) issued specific questions regarding methods for timely collection of data, effective modeling and prediction of groundwater changes, efficient scaling of groundwater recharge, ensuring clean and safe groundwater availability, community engagement, and strategies to limit groundwater overuse. The PCAST briefing read: "In the western states especially, groundwater resources are being depleted at an alarming rate, mostly from agricultural withdrawal. The problem of groundwater depletion is exacerbated by climate change and precipitation variability and in many aquifers, groundwater withdrawal has outpaced natural and artificial recharge. There is a need to explore the consequences of artificial recharge and to identify successful recharge approaches that might be scaled across the country…. Groundwater is managed locally, with best practices that vary from state to state, but there is an opportunity to develop and scale approaches to restore clean water in every community."

Work to Date: On July 1, 2024, the WSWC submitted a comment letter along with two policy positions on groundwater allocation and groundwater quality. On July 22, 2024, Council staff participated in the PCAST workshop.

2024-2025: The Council will explore the potential of hosting a groundwater workshop in the coming year, with opportunities for states to share with each other challenges and developments in technologies, resources, and regulations.

Subcommittee: Raquel Rancier (OR), Anna Pakenham Stephenson (MT), Mathew Weaver (ID), Melissa Flatly (NV), Chris Brown (WY), Joaquin Esquivel (CA), Sara Schecter (UT), Theresa Wilhelmson (UT), Jesse Bradley (NE). Ex-Officio members: Dan Yates (GWPC)

Tab XYZ – Sunsetting Positions for Summer 2025 Meetings (#482 - #485)

Position No. 484
(See also Position #436, 7/18/19; #393, 7/15/16; and Position #353, 6/26/13)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
HYDRAULIC FRACTURING

Polson, Montana
August 5, 2022

WHEREAS, hydraulic fracturing is a process that injects sand, water, and other fluids, including various chemical compounds, underground to aid in the extraction of oil and natural gas; and

WHEREAS, hydraulic fracturing has been used for over 60 years in oil and gas production, with over one million wells having been fractured in the United States alone; and

WHEREAS, states have primary and exclusive authority over the allocation and administration of rights to the use of water used in hydraulic fracturing operations; and

WHEREAS, states have decades of experience, knowledge, and information regulating hydraulic fracturing and other oil and gas activities, and making decisions regarding the protection of their water resources; and

WHEREAS, states are best positioned to regulate hydraulic fracturing because of their understanding of regional and local conditions and their ability to tailor regulations to fit the needs of the local environment.

NOW, THEREFORE, BE IT RESOLVED, that federal efforts involving hydraulic fracturing, including efforts to study potential adverse impacts on water quantity and quality, should leverage state knowledge, experience, policies, and regulations.

BE IT FURTHER RESOLVED, that federal efforts to study the potential impacts of hydraulic fracturing on water resources should be based upon sound science and driven by states' research and policy priorities.

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 water resources used in hydraulic fracturing.