AGENDA

WATER QUALITY COMMITTEE

The Cliff Lodge
Snowbird, Utah

June 11, 2025

Call to Order at: 10:00 a.m. (Mountain Daylight Time) Room: Superior
Conducting: Jennifer Zygmunt, Wyoming

TAB

	1.	**Welcome and Introductions**
	2.	**Approval of Minutes**
C	3.	**Sunsetting Positions**
		Position #484 - regarding Hydraulic Fracturing
	4.	**Utah Water Quality Issues** – John Mackey
	5.	**EPA Updates –** Council Staff and Roger Gorke
L		a. WOTUS
M		b. CWA §401
	6.	**Roundtable** – Current State Challenges and Opportunities
G	7.	**FY2025-2026 Committee Work Plan –** Jennifer Zygmunt
XYZ	8.	**Sunsetting Positions for Fall 2025 Meetings** – Jennifer Zygmunt
		Position #486 - related to EPA exercise of authority under Section 404(c) of the Clean Water Act
	9.	**Other Matters**
11:00 am		Adjourn

Tab C – WSWC Policy Positions

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
HYDRAULIC FRACTURING

~~**Polson, Montana**~~**Snowbird, Utah**
~~**August 5, 2022**~~**June 12, 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, 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~~ 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.

(See also Position No. 484, 8/5/22;
No. 436, 7/18/19; No. 393, 7/15/16; and No. 353, 6/26/13)

Tab L – WOTUS Update

Agency Review of Waters of the United States (WOTUS) and Summary of State Comments

Agency Review

On March 12, 2025, the Trump Administration EPA and Corps announced they would jointly review the definition of "waters of the United States" (WOTUS) and released field guidance on the proper implementation. The field memo provided updated guidance for implementing WOTUS under both regimes currently operating across the country. Under the previous administration, the agencies entered into joint coordination memoranda to establish a process by which the Corps and EPA would coordinate on jurisdictional determinations "to ensure accurate and consistent implementation" of the regimes. These memoranda included implementation guidelines regarding identification of wetland areas and tributary reaches, whether site specific discrete features can serve as continuous surface connection, and whether natural landforms can provide evidence of a continuous surface connection. Under the newly inaugurated Trump Administration, the EPA set these memoranda to expire on March 27, 2025 (WSW #2626).

The new (March, 2025) memo affirmed the plurality set forth in *Rapanos v. United States*, 547 U.S. 715 (2006), and interpreted "continuous surface connection" as adjacent wetlands that "directly abut the [requisite jurisdictional water] (e.g., they are not separated by uplands, a berm, dike, or similar feature)." The memo noted that wetlands with only an intermittent, physically remote hydrologic connection to WOTUS do not have the "necessary connection" to trigger the CWA. Departing from the prior administration's coordination memoranda, the agencies wrote: "Therefore, an interpretation of 'continuous surface connection' which allows for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands has the potential to violate the direct abutment requirement for 'adjacent wetlands' under the plurality's standard and now Sackett's endorsement of that standard. Therefore, any components of guidance or training materials that assumed a discrete feature established a continuous surface connection are rescinded." See WSW #2652 and https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf

As part of EPA and Army Corps' review, the agencies solicited feedback on key topic areas over a 30-day period (Docket ID No. EPA-HQ-OW-2025-0093). The agencies received over 4200 comments in response to their solicitation for feedback on implementing and defining WOTUS, including comments from the States of Alaska, California, Idaho, Nevada, New Mexico, North Dakota, Utah, Washington, and Wyoming. WSWC prepared a summary of state comments (below). Also see https://westernstateswater.org/policy-letters/2025/cwa-wotus-definition/.

State Comments

Alaska

The Alaska Department of Environmental Conservation (ADEC) highlighted its vast water resources and wetlands, prior congressional carve-outs and exemptions, and unique climatic conditions. ADEC advocated for significant curtailment of the scope of federal jurisdiction, regionalized definitions and

tools, categorical exclusion of permafrost wetlands, and the exclusion of jurisdictional ditches from the definition of WOTUS. They recommended that: (1) "relatively permanent" waters must have measurable flow or seasonal standing water, contribute flow directly to a WOTUS, and have a defined bed/bank with an ordinary high water mark (OHWM) or high tide line; (2) permafrost wetlands must be specifically excluded; (3) use of litter or debris must be eliminated from the OHWM definition; (4) the Sackett two-part test must be used for "continuous surface connection;" (5) non-tidal wetlands abutting a traditional navigable water are only a relatively permanent surface water connection if they have a permanently flooded water regime; (6) "adjacent" must equate to "abut;" and (7) upland ditches draining only uplands with less than perennial flow must be excluded.

ADEC recommended that the term "seasonal" refer to extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought. It should not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. The OHWM should be defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, or change vegetation susceptible to permanent flooding as defined by existing wetland characterization methods."

ADEC agreed with the Agencies' March 12 Field Memo that a "continuous surface connection" refers to a wetland which directly abuts a WOTUS without being separated by uplands, berms, or dikes. They emphasize that only non-tidal wetlands with a permanently flooded water regime meet the "relatively permanent" standard and reject the idea of connecting jurisdictional waters across uplands.

ADEC said that jurisdictional ditches should meet the same criteria as WOTUS tributaries: continuous seasonal flow, existing beyond rain events and feeding into navigable waters. Ditches built solely to manage precipitation and lacking "relatively permanent" flow should be excluded from WOTUS. Rules should clarify that ditches draining uplands are not jurisdictional along the upland-excavated portions.

California

The California State Water Resources Control Board, in conjunction with the California Regional Water Quality Control Boards, highlighted the CWA's vital role in protecting the state's water resources and supporting a wide range of uses. The State urged that future federal actions strengthen the CWA's effectiveness, especially in tackling new challenges like harmful algal blooms and non-point source pollution. California called for the retention of the 2023 WOTUS Rule. Alternatively, California emphasized that any proposed changes must be regionally appropriate and accommodate the hydrology of the arid West. They advised against basing jurisdictional criteria on flow rates, timing, or similar characteristics, warning they would be "unlikely to accommodate" the variable hydrology of the arid West. California's precipitation is highly variable and is expected to intensify in coming years. They urged the Agencies to work closely with all States if they pursue any revisions.

Idaho

The Idaho Departments of Agriculture and Environmental Quality advocated for a clear, predictable, and administratively implementable rulemaking. They stressed the importance of cooperative federalism and strongly supported the 2020 Navigable Waters Protection Rule (NWPR), basing their proposed definitions on the previous rulemaking.

Idaho recommended defining "relatively permanent" narrowly and clearly by limiting the term to waters with continuous flow at least seasonally (typically three months), excluding ephemeral features (those flowing only in direct response to precipitation), and requiring traceable, demonstrable surface connectivity. They recommended avoiding "speculative or historical determinations regarding the condition of a waterbody at the time of impoundment."

Idaho defined "continuous surface connection" to explicitly require the wetland to abut or be indistinguishable from a jurisdictional water. They urged clarification that connections via ditches, culverts, or swales do not satisfy this requirement, and the establishment of field-ready criteria for assessing "indistinguishability."

They suggested strengthening the exclusion for ditches used solely for agricultural return flows. They supported keeping the NWPR's clear exclusion of ditches that are entirely in uplands, do not have relatively permanent flow, and are artificial conveyances not originating in jurisdictional waters. The State also urged reinstating exclusions from the 1986 guidance and NWPR – such as prior converted croplands, artificially irrigated lands that return to dry status, and man-made conveyances without permanent flow. Idaho addressed the need for straightforward exclusions for highway and roadside ditches.

Nevada

The Nevada Division of Environmental Protection (NDEP) supported creating a durable WOTUS rule but stressed the need for user-friendly tools — including a national mapping system, reliable hydrologic data, and transparency in resources used to make jurisdictional determinations — to help the public identify jurisdictional waters and make informed permitting decisions.

NDEP emphasized cooperative federalism and warned that unclear federal rules could force States to create equivalent programs, increasing costs for regulated entities. To strengthen co-regulator partnerships, NDEP made the following recommendations: "(1) The Corps needs to actively solicit state involvement and provide the state with a meaningful role when making [Jurisdictional Determinations] JDs; (2) JDs made by one of the agencies (i.e., USACE) should apply to other applications of the [CWA] (i.e., §402); and (3) Case-by-case JDs should remain in place for longer than 5 years…. Enabling approved JDs (AJDs) to remain in place until they are revisited, updated, or challenged would improve Rule durability and provide greater certainty to both the regulator and stakeholder communities." They recommended a recourse mechanism for States and Tribes to challenge incorrect jurisdictional determinations

NDEP asserted that political boundaries should factor into WOTUS definitions when interstate waters are impaired, as federal oversight is crucial in resolving cross-state water quality issues. "Nevada values EPA

oversight and partnership as a co-regulator in restoration of waterbodies that cross state lines and believes issues would be resolved more readily if federal jurisdiction over these waters is maintained."

NDEP opposed using a single, nationwide definition of "relatively permanent" waters, arguing it fails to reflect the hydrologic variability of arid regions. They advocated for a hydrology-based approach that considers environmental variability and avoids excluding ecologically important waters from federal oversight. They urged the Agencies by rule to account for regional hydrologic differences and to clearly maintain the exemption of groundwater, including shallow subsurface flow, from WOTUS definitions.

NDEP recommended evaluating characteristics such as flow regime, seasonality, hydroperiod, vegetation, and soil and emphasized the need to account for regional differences in land use, ecology, and climate. NDEP suggested using federal tools such as the U.S. Geological Survey's (USGS) National Hydrography Dataset, EPA's ecoregions framework, U.S. Department of Agriculture's Land Resource Regions, USACE's Delineation Manual, the National OHWM Field Delineation Manual for Rivers and Streams, and the regionally-developed supplements to the delineation manual. They highlighted the Streamflow Duration Assessment Models (SDAMs) as a tool that enables rapid assessment of stream flow duration, "one of the most ecologically important aspects of a stream's hydrology."

They argued that streams, wetlands, and lakes that dry up due to drought or seasonal variation should still qualify as WOTUS if they materially contribute to the chemical, physical, or biological integrity of downstream waters. Physical traits like a defined bed, bank, and course should be included in assessments of relative permanence in arid areas.

NDEP stated that wetlands should be considered abutting a WOTUS if they materially contribute to its chemical, physical, or biological integrity, and that evaluations should consider the natural state of aquatic systems before human alteration to support future beneficial uses. NDEP emphasized that temporary interruptions in surface connectivity are common in many regions and should not automatically sever jurisdiction. They criticized the Agencies' March 12 Field Memo interpretation that discrete features (like berms or roads) can sever a continuous surface connection. Functional and environmental significance should take precedence over strict adjacency when determining WOTUS jurisdiction. "The permanent loss of these features could not have been considered in light of these new parameters during USACE's historic permitting decisions, nor were they necessarily subject to compensatory mitigation requirements when USACE authorized the structures severing jurisdiction."

NDEP supported explicitly excluding agricultural ditches from the WOTUS definition and recommended the rule clarify this exclusion. They emphasized that this should not conflict with existing exemptions for agricultural stormwater and irrigation return flows, and noted that ditches are not naturally considered "waters." NDEP described ditches that divert from and do not return to WOTUS as "distributaries" and endorsed the NWPR's definition of ditches, but urged that ditches be evaluated based on their use.

New Mexico

The New Mexico Environment Department, Department of Game and Fish, Interstate Stream Commission, and Energy, Minerals and Natural Resources Department advocated for the continued

protection of as many waters as possible that "feed and influence the chemical, physical, and biological character" of downstream traditional navigable waters. They recommended that agencies either implement regionally appropriate definitions or allow flexibility in implementation. They noted that 97% of New Mexico's streams are characterized as ephemeral or intermittent but still deliver significant quantities of water, sediment, nutrients, and woody debris to jurisdictional waters. Ephemeral and intermittent streams can significantly impact downstream navigable waters – especially in the Southwest – and should be included in WOTUS where regionally appropriate. For ephemeral waters, New Mexico proposed using alternative criteria like watershed area, stream order, or sediment load to determine jurisdiction.

New Mexico stressed the importance of genuine consultation with States and Tribes throughout the rulemaking process, and recommended the Agencies explicitly "codify the importance of recognizing regional differences in [WOTUS] determinations and definitions to signal an intent to work through these approaches in collaboration with state and tribal co-regulators." They highlighted the need for the Agencies to use any new rulemaking as an opportunity to build long-term federal investment in water quality programs. They called for direct funding to States and Tribes with financial need, ensuring that they can implement pollution control and water management programs effectively.

New Mexico advised against defining "seasonality" as a fixed three-month duration, arguing that hydrologic patterns vary regionally. Instead, they recommended defining "relatively permanent" waters to include perennial streams, intermittent streams, prominent ephemeral streams, and wetlands – excluding those that flow solely in response to precipitation, without needing to specify flow duration or sources.

New Mexico said the Agencies and JDs should rely on the best available science – including biological, geomorphological, and hydrological indicators – to identify "relatively permanent" tributaries and wetlands in the field. New Mexico also highlighted EPA's Streamflow Duration Assessment Methods (SDAMs), arguing that they offer consistent, scientifically valid ways to classify streamflow duration (perennial, intermittent, ephemeral) based on observable indicators in a single site visit. Guidance for identifying "relatively permanent" waters should undergo peer review and include robust public participation. To ensure efficient, predictable implementation and avoid permitting delays, the federal workforce must be sufficiently staffed and trained to carry out field determinations. They also highlighted USGS NHDPlus HR, and USFWS NWI as resources which should inform decisions about surface connection and adjacency.

New Mexico said "continuous surface connection" determinations should be based on connections under natural, undisturbed conditions, even if surface flow is temporarily dry or occurs as shallow subsurface flow, as this still maintains ecological and hydrological connectivity. Definitions of "adjacent" and "abut" should consider surface and shallow subsurface connections under natural conditions. New Mexico recommended defining "adjacent" as "bordering, continuous, or neighboring," and suggested this could be further refined by physical distance or hydrologic connection. They also said that wetlands separated by barriers like dikes, levees, or roads should still be considered adjacent and jurisdictional in western states because they are functionally linked to nearby waters. They emphasized that natural or artificial

disruptions (e.g., sediment plugs, log jams, flood gates) should not sever jurisdictional connectivity, especially in arid environments where flow may temporarily shift subsurface during drought.

New Mexico recognized the importance of shallow subsurface connections in the exchange of water, nutrients, and organic matter which are essential to the health of the stream system. Narrowing the scope of federal jurisdiction would lead to a loss of benefits provided by wetlands such as flood control and attenuation, pollution control, resistance to wildfires, wildlife habitat, and recreation. Droughts or dry spells should be treated as temporary interruptions, not disqualifiers for jurisdiction. Instead, surface and shallow subsurface connections should be evaluated under "normal" conditions, which, in arid areas, may naturally include periods of dryness. The Agencies should consider historical hydrologic data when assessing these connections, particularly in light of the ongoing megadrought in the Southwest since 2000.

New Mexico stated that ditches transport water and should therefore be considered jurisdictional if they meet specific criteria. They recommended evaluating flow regime, physical characteristics, location (e.g., upland vs. natural channel), and biological indicators (like the presence of aquatic life) to distinguish jurisdictional from non-jurisdictional ditches. They also noted that the ditch's type or use could help inform these determinations. They specifically support the current scope of jurisdiction over acequias and other irrigation ditches that divert from and are directly connected to wet areas where aquatic species use them as habitat.

North Dakota (et al.)

Attorneys General (AGs) from eighteen States, including North Dakota, Montana, Nebraska, and Oklahoma joined in a letter in support of a definition that "recognizes state authority over intrastate waters and that presumes waters are not WOTUS unless it is affirmatively established that they are." They stressed that state primacy in managing diverse water features – such as prairie potholes, mountain streams, and marshes – cannot be replaced with one-size-fits-all federal rules. They urged the Agencies to use the Sackett ruling as a turning point to restore the proper balance of federal and state power in CWA implementation. They outlined overarching legal principles that should inform the Agencies' rulemaking. They said WOTUS must be defined with clear and bright-line rules, centered on navigability. They emphasized a high standard of indistinguishability that may exclude certain impoundments and wetlands.

The AGs urged the Agencies to adopt a bright-line rule that limits federal jurisdiction to water features with naturally occurring, continuous, year-round flow (not dependent on rainfall or temporary events). They recommended excluding small streams and tributaries from federal jurisdiction by default, unless and until established otherwise. They approved of the NWDR's use of "perennial" and "ephemeral" as stream categories, but rejected the rule's use and definition of "intermittent," then meaning "surface water flowing continuously during certain times of the year and more than in direct response to precipitation." They said, "Any definition of WOTUS that classifies such 'intermittent' streams as constituting WOTUS is too vague to be workable, not capable of being understood by a reasonable landowner, and should be rejected by the Agencies…. The Agencies should not define WOTUS to include ephemeral waters or those that flow only intermittently…. Permanent does not mean intermittent. Permanent means permanent. And a relatively permanent water feature is one that has a naturally occurring, flow of water

year-round, excepting only for 'temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells.'"

The AGs defined "continuous surface connection" as water that flows from one feature to the other so that they are "indistinguishable" under normal conditions. Natural landforms like berms do not automatically break the connection if the natural landforms evidence a continuous surface connection.

The AGs urged the agencies to abandon the term "abut," and return to Congress's use of the term "adjacent." They interpreted adjacent to mean "separated by no more than one geologic feature, such as a naturally occurring berm, which still leaves the features, 'as a practical matter indistinguishable' from one another." The AGs argued that artificial structures like flood gates or pumps should only make a wetland "adjacent" to a WOTUS if there is a real, consistent surface water connection under normal conditions. If the connection only occurs during irregular precipitation or unusually wet periods, it should not trigger federal jurisdiction. They also urged the Agencies to exclude the "catch-all" category included in the 2023 Rule.

The AGs urged the Agencies to eliminate "jurisdictional ditches" as a separate WOTUS category and instead apply the same criteria to both artificial and natural water features when determining federal jurisdiction. If the category is kept, they asked the Agencies to confirm that ditch determinations will follow the same standards as those for natural waterways, noting that applying the standard WOTUS tests to artificially created ditches would naturally exclude ditches that purely serve an irrigational or drainage purpose.

Oregon

The Oregon Attorney General signed onto a letter with the Attorneys General of New York, Illinois, Massachusetts, and Michigan. The AGs expressed concern that limiting the scope of the CWA creates risk for uncontrolled pollution. They opposed "any attempt to further limit [CWA] protections beyond the limits under the Sackett decision." They argued that the strong science demonstrating the functional connectivity of small streams and wetlands to larger waters indicates a need to "strengthen, not weaken, clean water protections for all Americans." They urged the agencies "not to take any action to further limit the vital protections afforded by the [CWA]."

Utah

Utah strongly advocated for a narrower, more precise definition of WOTUS in alignment with the Supreme Court's Sackett decision, and preserves state authority over the majority of water resources. The State advocated for a definition that limits federal jurisdiction, emphasizes state authority over water resources, and reduces permitting burdens on rural communities and essential land uses such as agriculture, mining, and housing development. "A broader definition expands federal permitting requirements to a larger number of water bodies. Conversely, a narrower definition grants the State greater flexibility in establishing its mechanisms to protect Utah's waters consistent with the State's goals and management objectives." Utah recommended simplifying the process for States to assume CWA

Section 404 permitting authority. They requested that the agencies provide more categorical exclusions "essential to Utah's farmers, ranchers, and rural communities."

Utah proposed a Clean Water Rule that defines WOTUS as: (1) navigable-in-fact interstate waters used or usable in commerce, including territorial seas; (2) relatively permanent streams, rivers, and lakes with an indistinguishable surface connection to such waters; and (3) adjacent wetlands that are permanent and continuously connected to those waters. It explicitly excludes groundwater, intermittent or ephemeral channels, and manmade structures used mainly for agriculture, flood control, or stormwater.

Utah's proposed rule defines "relatively permanent" waters as those waters whose "normal status quo state is year-round – or at a minimum 290 days per year – presence or existence, and for which non-existence (i.e. drying up) during its typical period of presence or existence is an extraordinary circumstance and have an indistinguishable surface connection with navigable-in-fact waters." Utah proposed including only "those adjacent wetlands that are a relatively permanent body of water and have a continuous surface connection with and are indistinguishable" from navigable-in-fact interstate waters. "Indistinguishable means that the waters have merged, so there is no clear demarcation between the two." They defined "adjacent" as "having a continuous aquatic surface." Utah would explicitly exclude ditches, conveyances, and other structures, manmade or otherwise, used primarily for agricultural, or flood abatement or storm-water control purposes.

Washington

The Washington Department of Ecology said that narrowing the definition of WOTUS would limit regulatory oversight, potentially causing harm to Washington's waters and threatening public and environmental health by allowing unregulated pollution or circumvention of CWA Section 401 certification. While supportive of the Agencies simplification goals, they said "the effort should not exclude broad categories of waters with a connection to downstream traditionally navigable waters." The State supported a definition that includes intermittent and relatively permanent waters, adjacent wetlands (even when connected through features like pipes or ditches), and jurisdictional ditches based on hydrologic connectivity – not solely on their purpose or structure. Washington urged the Agencies to collaborate closely with States as co-regulators under the CWA and to use regionally appropriate tools and methods for determining jurisdiction. The State favors a flexible, science-based approach that accounts for diverse hydrologic conditions, avoids overly rigid numeric flow criteria, and maintains strong protections for water resources.

Washington recommended defining "relatively permanent" waters to include perennial and intermittent tributaries, lakes, and ponds that connect to traditionally navigable waters during a normal water year. "We include intermittent connections because flows naturally vary over the course of a year. We view this as consistent with a continuous surface connection…. We urge the inclusion of a provision that is 'based on a normal water year' to account for changes resulting from an annual drought period, a dry year, or flood conditions." The State advised against rigid flow duration metrics, urging the use of regional tools like the USACE Antecedent Precipitation Tool and the Oregon Streamflow Duration Method to assess flow regimes. It also suggested field identification rely on physical features like banks, beds, and OHWM, as well as contribution to flow of a downstream traditionally navigable water,

determined regionally. Evaluations should be based on normal precipitation years, supported by diverse data sources such as USGS topographical maps, aerial photography, Light Detection and Ranging (LIDAR), satellite imagery, National Hydrography Dataset, National Wetland Inventory maps, fish presence maps, and streamgage data.

Washington said continuous surface connections should include both hydrologic and hydric soil connections, applying to adjacent wetlands, lakes, and ponds. The definition should include discrete features such as ditches, culverts, pipes, and tide gates that maintain a hydrologic connection to a relatively permanent water. "In other words, a wetland, pond, lake or tributary should not lose regulatory protection under the [CWA] merely because they flow through uplands, a pipe, a ditch, or another discrete feature."

They consider "abutting" to include wetlands connected to relatively permanent waters through a discrete feature such as a pipe, culvert, or ditch, and do not believe natural berms preclude a continuous surface connection. In Washington's view, flood and tide gates, pumps, or similar artificial features do not remove a wetland from being considered adjacent as they "manage the flow of water between wetlands and the adjacent tributary or traditionally navigable water, maintaining the continuous surface connection between the two." Other artificial features, such as shallow buried water conveyances, like pipes, should also be treated as maintaining federal jurisdiction and protection. "Allowing these features to sever jurisdiction today, even though upstream waters still flow to a jurisdictional waterbody makes no logical or ecological sense. It also defeats the purpose for which the pipes were installed."

Washington recommended only categorically excluding ditches excavated in upland areas in order to drain them, while determining the jurisdiction of ditches with channelized streams or those built in wetlands on a case-by-case basis. They supported using physical features and downstream connections to assess whether a ditch is jurisdictional, rather than excluding ditches based on their intended use. Relocated tributaries should retain their jurisdictional status even when flowing through ditches. Biological criteria alone, such as the presence of fish, should not determine jurisdiction for ditches. The standard should be whether a ditch's flows contribute to jurisdictional waters. They suggest using various mapping and imagery tools to determine if a ditch was constructed in an upland area or in a natural feature.

In summary, Washington suggested using Geologic Land Office survey maps to determine whether a ditch contains a tributary or was constructed in a wetland. It also highlighted National Wetland Inventory Maps, LIDAR, historical aerial photography, USGS topographic maps, fish presence maps, stream gauge data, satellite imagery, the USACE's Antecedent Precipitation Tool, regional streamflow duration methods, and National Hydrography Dataset as important tools.

Wyoming

The Wyoming Department of Environmental Quality (WDEQ) expressed support for amending the rule in favor of a clear, consistent, durable, and objective definition that recognizes the limits of federal authority and is easily understood by the public. Wyoming's state water quality standards apply to all

surface waters, regardless of federal WOTUS status. WDEQ advocated for a definition that maintains balanced federal-state collaboration.

WDEQ defined “relatively permanent” for perennial waters to mean “surface water flowing continuously during a typical year.” They recommended the inclusion of intermittent waters as “relatively permanent” provided they have a continuous hydrologic connection to a traditional navigable water for at least three consecutive months (equivalent to a season) during a “typical year.” They suggested incorporating the definition of “typical year” from the 2020 NWPR as well as incorporating 30-year precipitation normals developed by the National Oceanic and Atmospheric Administration (NOAA). Wyoming recommended categorically excluding intermittent waters with continuous flow for less than three months, as well as all ephemeral streams. They suggested removing the interstate water category as the term “navigable waters” is not constrained by political boundaries.

For identifying ”relatively permanent” waters in the field, WDEQ recommended using observed or modeled stream flows rather than field indicators. They advocated for the geospatial mapping of WOTUS to improve regulatory certainty and transparency. “Initial mapping efforts could focus on traditional navigable waters, territorial seas, and many of the excluded waters, followed by the more complex jurisdictional waters such as tributaries, lakes and ponds, and ultimately adjacent wetlands…. [T]hese maps could be periodically updated (e.g., every five years) to be consistent with the effective duration of jurisdictional determinations and to reflect long-term changes in the hydrology of the nation’s waters.”

WDEQ recommended that a “continuous surface connection” means the feature physically abuts or has a direct “relatively permanent” hydrologic connection to a jurisdictional water during a “typical year.” They consider “physically abut” and “physically adjacent” to be synonymous.

WDEQ recommended clarifying that a ditch must have “relatively permanent” flow in a “typical year” to be considered jurisdictional. They suggest building on the 2020 NWPR’’s definition of a ditch, which describes it as a surface water conveyance constructed for specific purposes like drainage, irrigation, stockwater or municipal use, or transport. Ditches that lack “relatively permanent” flow or originate or terminate in uplands would be categorically excluded from the CWA.

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

June 2, 2025

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 (WOTUS). We understand the aim of this agency action is to revise the definition of WOTUS to better align with legal requirements, provide clarity, protect the Nation's navigable waters, and streamline regulatory processes. Our States will give their respective feedback regarding the appropriate 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 the potential for a regional approach to implementation, building upon existing classification systems based on hydrology, geology, and climate.

I. Cooperative Federalism

The Clean Water Act (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 non-regulatory 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: (1) Surface Water Area; (2) Groundwater Use; (3) Water Quality Impairment; (4) Point Sources; (5) Nonpoint Sources; and (6) Population of Urbanized Area (40 CFR 35.162). Some of these components have the potential to be impacted in the event that certain waters are no longer considered WOTUS, but are still protected as waters of the State. 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. While the currently available data lacks the quality and resolution needed for an accurate and comprehensive map of all jurisdictional waters, an initial joint effort could be made toward identifying traditionally navigable waters.

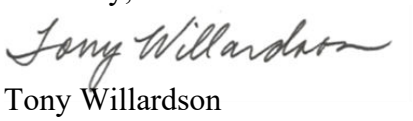
IV. Dispute Resolution Mechanism

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 the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule, and the 2023 Revised Definition of WOTUS 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 United States" and a State claims it is instead a "water of the State."

Thank you for the opportunity to comment.

Sincerely,



Tony Willardson
Executive Director

Tab M – CWA §401 Update

OFFICE OF WATER
WASHINGTON, D.C. 20460

May 21, 2025

MEMORANDUM

SUBJECT: Clarification regarding the Application of Clean Water Act Section 401 Certification

FROM: Peggy S. Browne, Acting Assistant Administrator

Consistent with the overall cooperative federalism framework of the Clean Water Act, Section 401 authorizes states and authorized Tribes to play a role, but a specific and limited one, in the federal licensing or permitting process. The U.S. Environmental Protection Agency, as the lead federal agency for administering the CWA, is responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including Section 401. The agency promulgated regulations on CWA Section 401 certifications in September 2023 (2023 Rule). Recently, some stakeholders have raised questions about potential applications of the 2023 Rule's scope of certification.[1] The purpose of this document[2] is to reiterate the EPA's longstanding position that states and Tribes must utilize CWA Section 401 only for its statutory purpose – to protect water quality – and not as a weapon to shut down projects for reasons with no basis in the statute or applicable regulations. A certifying authority's evaluation is limited to considering adverse impacts to water quality, and only such impacts insofar as they prevent compliance with applicable water quality requirements.

The scope of certification refers to the purview of a certifying state's or authorized Tribe's analysis when it evaluates a request for certification related to an application for a federal license or permit, to determine whether it will issue certification, deny certification, or waive certification. The most common examples of federal licenses or permits that may be subject to CWA Section 401 certification are CWA Section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act Sections 9 and 10 permits issued by the Army Corps of Engineers; hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission; and CWA Section 402 National Pollutant Discharge Elimination System permits issued by the EPA in jurisdictions where the EPA administers the NPDES permitting program.

---

[1] *See, e.g.*, America Builds: Clean Water Permitting and Project Delivery Hearing before Subcommittee on Water Resources and Environment, 119th Cong. (2025) (statement of Robert D. Singletary, Executive Director, Oklahoma Department of Environmental Quality, statement of Noah Hanners, Executive Vice President, Nucor Corporation, on behalf of the National Ass'n of Manufacturers).

[2] This document is not a regulation, nor does it change or substitute for any applicable regulations. Thus, it does not impose legally binding requirements on the EPA, states, Tribes, other federal agencies or the regulated community. This document neither alters legal rights or obligations nor changes or creates law. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling.

Accordingly, energy, critical mineral, infrastructure and development projects that are key to economic growth and the EPA's "Powering the Great American Comeback" initiative are often subject to CWA Section 401.

The 2023 rule and all prior EPA regulations and guidance documents have consistently stated that CWA Section 401 is limited to addressing only water quality-related impacts. Similarly, the regulations do not authorize a certification condition based on generalized concerns about water quality untethered to noncompliance with a specific applicable water quality requirement or requirements. It would be inconsistent with CWA Section 401 to deny or condition a certification based on potential impacts not connected to water quality (e.g., based solely on potential impacts to air quality, traffic, noise, project preference, or economic impacts that have no direct connection to water quality). If a certifying authority imposes certification conditions or denies certification for a reason or reasons such as these, then that certification decision would not comply with CWA Section 401 or the EPA's regulations.

The agency will use a forthcoming Federal Register notice and recommendations docket to identify additional areas of implementation challenges and regulatory uncertainty related to the 2023 Rule's scope of certification to be later addressed through additional guidance or rulemaking.

Tab G – Draft FY25-26 Committee Work Plan
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. See https://westernstateswater.org/topical-resources/wildfires/

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. A summary of the Pumped Storage Hydropower webinars, and other resources regarding the topic, are available at https://westernstateswater.org/topical-resources/pumped-storage-hydropower/.

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. See https://westernstateswater.org/topical-resources/stream-restoration-and-water-rights/

2025-2026: 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 (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. Currently, 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.

For both regulatory regimes, the agencies entered into joint coordination memoranda to establish a process by which the Corps and EPA would coordinate on jurisdictional determinations "to ensure accurate and consistent implementation" of the regimes. These memoranda included implementation guidelines regarding identification of wetland areas and tributary reaches, whether site specific discrete features can serve as continuous surface connection, and whether natural landforms can provide evidence of a continuous surface connection. Under the newly inaugurated Trump Administration, the EPA set these memoranda to expire on March 27, 2025 (WSW #2626).

On March 12, 2025, the Trump Administration EPA and Corps announced they would jointly review the definition of "waters of the United States" (WOTUS) and released field guidance on the proper implementation of "continuous surface connection." The field memo provided updated guidance for implementing WOTUS under both regimes currently operating across the country. Affirming the plurality set forth in *Rapanos v. United States*, 547 U.S. 715 (2006), the agencies interpreted "continuous surface connection" as adjacent wetlands that "directly abut the [requisite jurisdictional water] (e.g., they are not separated by uplands, a berm, dike, or similar feature)." The memo noted that wetlands with only an intermittent, physically remote hydrologic connection to WOTUS do not have the "necessary connection" to trigger the CWA. Departing from the prior administration's coordination memoranda, the agencies wrote: "Therefore, an interpretation of 'continuous surface connection' which allows for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands has the potential to violate the direct abutment requirement for 'adjacent wetlands' under the plurality's standard and now Sackett's endorsement of that standard. Therefore, any components of guidance or training materials that assumed a discrete feature established a continuous surface connection are rescinded." See WSW #2652.

EPA and Army Corps received over 4200 comments in response to their solication for feedback on implementing and defining WOTUS (Docket EPA-HQ-OW-2025-0093), including comments from the States of Alaska, California, Idaho, Nevada, New Mexico, North Dakota, Utah, Washington, and Wyoming. WSWC prepared a summary of state comments which can be accessed at https://westernstateswater.org/policy-letters/2025/cwa-wotus-definition/.

Work-to-Date: WSWC adopted Position #369 Regarding Clean Water Act Jurisdition on June 18, 2014. It has seen minor revisions and been continually readopted. The most recent iteration is

Position #531, adopted at the April 2025 meeting in Lincoln Nebraska. (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). WSWC also adopted Position #373 to clarify the scope of Clean Water Act Jurisdiction, but it was soon allowed to sunset and acknowledged as a letter with continued historical value.

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. See https://westernstateswater.org/wp-content/uploads/2022/10/WSWC-WOTUS_RegionalConcepts_Technical_Whitepaper_Final.pdf

On June 2, 2025, WSWC sent a letter in response to the federalism consultation initiated by the agencies' March 12 approach to WOTUS. WSWC highlighted state authority, and the impact of the rulemaking on states. The letter stated the WSWC position that any federal effort to clarify or define WOTUS must "create an enduring and broadly supported definition; acknowledge states as co-regulators; provide a clear process for resolving jurisdictional determination differences; provide for joint federal/state/tribal mapping of jurisdictional waters; and consider a regional approach to implementation based on hydrology, geology, and climate." The full letter can be accessed at https://westernstateswater.org/policy-letters/2025/wswc-letter-wotus-federalism/.

2025-2026: 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/

2025-2026: With the report finalized, staff will work with ACWA to determine next steps, including potential publication in a national water policy or law journal.

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 2018, the WIFIA program has closed 140 loans totaling $22B in credit assistance to help finance $48B for water infrastructure projects. 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.

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
FY2020	$1,638.8	$1,126.1	$60.0
FY2021	$1,638.8	$1,126.1	$64.5
FY2022	$3,087.2	$2,630.3	$69.5
FY2023	$2,977.8	$2,718.9	$75.6

Source: Congressional Research Service Report R43871; IF11485; IF11724; IF12130; IF12309; IF12617

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.

On May 2, the Office of Management and Budget (OMB) released President Trump's recommendations on discretionary funding levels for FY2026. The "skinny budget" called for a reduction to Clean and Drinking Water SRFS to $305M total, a reduction of $2.4B. The proposal

said the original intent of SRFs has been bypassed through Congressional earmarks, and that SRFs are duplicative of the WIFIA program. WIFIA funding was not specifically mentioned in the request (WSW #2659). In a hearing, EPA Administrator Lee Zeldin pointed again to the earmarks and encouraged lawmakers to have a conversation about the use of earmarks, and its effect on SRF funding. See WSW #2662.

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.

Between August 2023 and April 2025, the Western States Water Council (WSWC) repeatedly joined coalitions led by the Council of Infrastructure Financing Authorities (CIFA) and other organizations to advocate for full funding of the Clean Water (CW) and Drinking Water (DW) State Revolving Funds (SRFs) at their congressionally authorized levels. These efforts included multiple letters to House and Senate Appropriations Committees and EPA leadership, urging that the SRFs be funded at $3 billion each for FY2024 and later at $3.25 billion each. The coalitions also expressed concern about the impact of Congressional earmarks and continuing resolutions on timely appropriations.

2025-2026: 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.

2025-2026: 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. Postion #469, Water Transfers and NPDES Discharge Permits was adopted on July 26 at the meeting in Fargo, North Dakota.

2025-2026: 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.

Michelle Bushman will examine the possibility of inviting Natural Resources Conservation Service (NRCS) staff for a facilitated discussion, with an emphasis on mutual conversation, examining: (1) How state nutrient reduction strategies are considered in NRCS programs, and how NRCS helps states implement those strategies; (2) What farmers are expressing to NRCS regarding nutrients and application of feritlizers and manure; (3) Whether soil health practices have been well-adopted by farmers working with NRCS. Bushman will also examine the possibility of mutual discussion with EPA regarding the new Trump Administration's approach to nutrients and plans for future memos.

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." On May 14, the Court granted EPA's unopposed motion to hold the case in abeyance for 60 days while the new administration reviewed the rule.

On May 21, EPA issued a memo entitled "Clarification regarding the Application of Clean Water Act Section 401 Certification" to clarify that CWA Section 401 authority is "limited to addressing only water quality-related impacts" and they do not authorize conditions based on "generalized concerns about water quality untethered to… a specific applicable water quality requirement." EPA also announced plans to issue a Federal Register notice to receive feedback identifying additional implementation challenges to be later addressed with additional rulemaking. See WSW #2662 .

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.

2025-2026: Staff will continue to facilitate the 401 MOU workgroup, track the implementation of the rules, 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. The Federal Baseline Water Quality Standards for Indian Reservations was withdrawn on Januaray 10, 2025.

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. The states generally expressed concern about the Constitutional authority of EPA, the states, and the Tribes to undertake the effort to quantify tribal treaty rights. They noted anticipated costs and the complexity of navigating state-tribal relationships when disagreements arise between sovereigns. On June 3, 2024, EPA's final rule went into effect (89 FR 35717). Under the new rule, if a Tribe formally asserts a tribal reserved right to a state and the EPA, the state must consider the value of the waters or protecting the tribal reserved right and the potential future exercise of the right. Where the state has adopted designated uses, the state must establish water quality criteria that encompasses the tribal reserved right. See WSW #2612. A week later, twelve states filed *State of Idaho v. EPA* (1:24-cv-00100) challenging the rule as unconstitutional and seeking preliminary injunction. Twelve tribal nations, including Nez Perce, Quinault Indian Nation, Bay Mills Indian Community, and the Confederated Salish & Kootenai Tribes of the Flathead Reservation intervened. See WSW #2621.

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.

2025-2026: 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). On December 17, 2024 President Biden signed S.2781 into law (P.L. 118-155) (WSW #2639). Under the pilot program authorized by the act, EPA is allowed to provide up to 15 Good Samaritan permits and 15 investigative sampling pemits. EPA is working on the process for applicants to submit permit applications.

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.

WSWC was invited by the EPA Good Sam Workgroup to present on the water aspects of abandoned mines. Michelle Bushman presented a high-level overview of what western states are working on regarding abandoned mines, the challenges they face, and how they prioritize various sites. The workgroup expressed interest in having further discussion with states about abandoned mine projects they are working on.

2025-2026: 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. See 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. On May 14, EPA announced plans to rescind and reconsider the regulations for PFHxS, PFNA, HFPO-DA (commonly known as GenX), and the Hazard Index mixture of these three plus PFBS, to ensure that the determinations and any resulting regulation follow the legal process in the Safe Drinking Water Act. EPA also intends to extend compliance deadlines for PFOA and PFOS, establish a federal exemption framework, and initiate enhanced outreach to water systems, especially in rural and small communities.

2025-2026: The Committee will continue to monitor PFAS developments and revisit this issue as needed..

Subcommittee: Jennifer Zygmunt (WY)

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 but it did not pass the Senate. The proposal was introduced, the subcommittee met and drafted a position, and introduced the draft at the fall meeting in Lawrence, Kansas. Following robust discussion, it was decided to allow more time for the committee to review and edit. Expecting the change in permit terms to happen sooner-than-later, and a "bull rush of requests for longer permits," Zygmunt and Stiles raised concerns about implementation and suggested the subcommittee draft a guidance document to outline benefits, opportunities, stipulations, and potential challenges. The guidance or implementation document would outline suggestions such as what conditions suggest a 10-year or 5-year term. It would be intended to help member states navigate decision-making and conversations if future conflict arises among the regulated community. The subcommittee met to make final adjustments to the position. It was adopted as

Position #527 – Regarding the Extension of NPDES Permit Terms on April 25, 2025 at the meetings in Lincoln, Nebraska.

2025-2026: A subcommittee will review the possibility of drafting an implementation document regarding extended NPDES permit terms. They will examine the scope, need, and intent of such a document and determine what details, foreseen challenges, and implementation suggestions should be included.

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 (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). At the Spring, 2024 meeting in Washington, DC, Jennifer Zygmunt presented the results of a survey on workplan priorities. The majority of respondents were in favor of framing new resolutions on *Maui* groundwater discharge.

2025-2026: 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)

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." See WSW #2610.

In Summer of 2024, PCAST held a workshop in Arizona, which convened government agencies, key groundwater users, and commutiy stakeholders. Acknowledging the government's limited jurisdiction over groundwater, and the need for some kind of government policy, the Working Group talked about the possibility of developing a central repository of groundwater data for use by water managers. They noted the need for enhanced tracking and measurement of groundwater quality and quantity. They shared some of what they were seeing from public comments, including the sentiment that currently available science and technology could reduce uncertainty and increase suppy. They also noted the feedback that many locations have already taken effective action. See Special Report #2622.

On September 23, Governor Brad Little (R-ID) and Lt. Governor Scott Bedke (R-ID) sent a letter to the White House expressing concern about the PCAST inquiry, framing it as an effort to increase federal oversight: "…the federal government has no place in groundwater management. has long left those actions up to the states and has limited its involvement to funding of projects and technology advancements" WSW #2630.

On December 14, PCAST released its report recommending the White House establish an interagency working group, expand technology research, establish a network of regional data and research hubs, procide incentives for sustainable groundwater management, develop accounting methodologies for natural capital, and campaign to develop groundwater science and management workforce. See WSW #2643.

On January 31, President Trump rescinded the Executive Order establishing PCAST. See Special Report #2646.

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. On April 22, 2025, WSWC held a Groundwater Workshop at the meeting in Lincoln, Nebraska (WSW #2658).

2025-2026: 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. The Council will examine the possibility of another groundwater workshop in California.

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

Tab XYZ – Sunsetting Positions for Fall 2025 Meetings (#486 - #489)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT § 404(c)

Sulphur, Oklahoma
October 21, 2022

WHEREAS, the Western States Water Council's (WSWC) 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) does expressly "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…." CWA § 101(b); and

WHEREAS, there is a continuing need for greater collaboration between and among federal agencies, state agencies, local governments, and public/private organizations and businesses; and

WHEREAS, CWA § 401 grants States the right to issue certifications articulating project conditions necessary to ensure compliance with State water quality standards;

WHEREAS, CWA § 404 establishes a permitting program for the disposal of dredge or fill material administered by the U.S. Army Corps of Engineers (USACE), unless delegated to a State or Tribe; and

WHEREAS, CWA § 404(c) grants the Environmental Protection Agency (EPA) Administrator the power "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and...deny or restrict the use of any defined area…as a disposal site, whenever he determines...that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas;" and

WHEREAS, in 1992, as directed by CWA Section 404(q), EPA and USACE executed a Memorandum of Agreement ("1992 MOA") that bound the two agencies to specific procedures for resolving potential disagreements, including "elevation of specific individual permit cases...that involve aquatic resources of national importance;" and

WHEREAS, EPA's actions in the § 404 permitting process have recently been inconsistent with established protocols, creating challenges for States' engagement and public and private investment in projects requiring § 404 permits.

NOW THEREFORE BE IT RESOLVED, that the WSWC supports the promulgation of regulation and guidance: (a) improving predictability in § 404 permitting, specifically the (c) and (q) processes; (b) improving communication between federal agencies and states; and (c) requiring EPA to adhere to established § 404 permitting processes and protocols.

BE IT FURTHER RESOLVED, that the WSWC urges regulation and guidance expressly limiting exercise of EPA's § 404(c) power to the time period between USACE's indication of its intent to issue a permit, and USACE's final issuance of that permit.

BE IT FURTHER RESOLVED, that the WSWC urges EPA to:

(1) communicate with the state's environmental agency in which the § 404 permit is to be issued prior to exercise of its § 404(c) power and provide the State with a meaningful opportunity to address EPA's concerns;

(2) see the CWA § 404(q) process through to completion, prior to any proposed § 404(c) veto;

(3) abstain from issuing a § 404(c) veto unless and until the affected State's time period for issuing a § 401 certification has expired;

(4) update the existing 1992 MOA to reflect a procedure that the EPA and the Corps are committed to following;

(5) document the rationale for any § 404(c) veto, including:
- (a) verification that impacted waters are Waters of the United States;
- (b) findings from any Final Environmental Impact Statement pertaining to the proposed project;
- (c) impacts to municipal water supplies, shellfish beds, fishery areas, wildlife, and recreational areas; and
- (d) resolved issues emanating from discussions between the USACE and EPA; and

(6) abstain from issuing a § 404(c) veto until after discussion with the state's environmental agency on the rationale behind the 404(c) veto.

BE IT FURTHER RESOLVED, that the WSWC pledges to work with the Administration to reduce the uncertainties and inconsistencies in EPA's § 404(c) power, as it has been exercised to date.