

**Written Testimony of the
WESTERN STATES WATER COUNCIL**

**Submitted to the
House Committee on Transportation and Infrastructure
Water and Power Subcommittee Hearing**

America Builds: Clean Water Act Permitting and Project Delivery

February 11, 2025

On behalf of the Western States Water Council (WSWC), we wish to express our appreciation for the opportunity to provide written testimony on Clean Water Act (CWA) Permitting and Project Delivery. The WSWC is a bi-partisan government entity created by Western Governors in 1965, representing 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. The WSWC has long supported legislation that addresses needs related to the challenges of aging and inadequate infrastructure, while ensuring a reliable and secure water supply. The WSWC also has a long history of involvement in discussions between states and the federal government related to CWA Sections 401, 402, and 404, including state permitting authorities and jurisdiction over waters of the States and waters of the United States (WOTUS).

Water in the West is a limited resource. Water must be recognized as a critical public policy priority given the importance of the resource to our public health, economy, food security, environment, and the western way of life. We must cultivate a western water conservation ethic through a greater understanding of and appreciation for water's value. A secure and sustainable water future will be determined by our ability to maintain, replace, expand, and make the most efficient use of critical water infrastructure. Sustainable water resource management should enhance the protection and restoration of significant aquatic ecosystems and improve economic and environmental security.

The West and the Nation depend on an intricate and aging system of weirs, diversions, dams, reservoirs, pipelines, aqueducts, pumps, canals, laterals, drains, levees, wells, stormwater channels, and water and wastewater treatment and hydroelectric power plants. Substantial and sustained investments in water project construction, maintenance, rehabilitation, and replacement are necessary and pay long-term dividends to the economy, public health and safety, and the environment. The federal government has a significant role in financing and cost-sharing for water-related infrastructure, given federal economic and environmental objectives, federal tribal trust and treaty obligations, past commitments, and federal regulatory mandates. See WSWC positions #481, #486, #519, and #521 -- [Resolutions Summary | Western States Water Council](#).

The CWA Section 101(b) expressly recognizes, preserves, and protects “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....” and Section 101(b)(7) commits resources “to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.”

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

State Certifications (CWA 401)

The Western States strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of States’ authority to allocate, manage, and protect their water resources. The Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water resource and water quality management, protection, and planning authorities to balance competing water uses. The development of hydropower and other federally permitted and licensed projects involving activities that may impact states’ water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401.

States have responsibly exercised their delegated authority under the CWA Section 401 and under state water quality statutes to protect water quality, and they must consider proposed activities and discharges in light of the States’ designated water uses and related water quality standards. An overly narrow reading of Section 401 would deprive the States of the ability to maintain the very beneficial uses that the CWA was designed to protect, and would threaten the existing partnership between state and federal agencies based on cooperative federalism.

CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the process has been historically well-understood, reliable and supported by case law that provides certainty for both state and federal agencies, and the regulated community. The vast majority of Section 401 certification requests are processed by States within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions. Most delays are typically due to submission of an incomplete application, applicants’ non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources.

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

Actions taken by the federal government under the 2020 CWA Section 401 Certification Rule (85 FR 42210) caused some Western States to issue an increased number of denials, due to inflexible deadlines that did not accommodate state public engagement laws or allow sufficient time to gather adequate information on project impacts. The 2020 rule revision led to federal agencies waiving reopener conditions in nationwide permits imposed on federal projects by States under CWA Section 401, inconsistent with CWA Sections 101(b) and 101(g), Section 27 of the Federal Power Act, and the Supreme Court ruling under *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*.

The 2023 CWA Section 401 Water Quality Certification Improvement Rule (88 FR 66558) identified 16 national parks that EPA declared to be “lands of exclusive federal jurisdiction” and

asserted that EPA is the Section 401 certifying authority in those parks, although States have been the certifying authority in some of those parks for decades.

The WSWC strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority. WSWC encourages EPA to consult with affected states regarding certifying authority in national parks designated as “lands of exclusive federal jurisdiction” in order to resolve any jurisdictional disputes in a manner that upholds the CWA’s direct grant of Section 401 certifying authority to States and its intent to empower States to protect water quality within their boundaries.

The WSWC supports any changes that strengthen the deference to state water laws and do not diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

In 1994, the U.S. Supreme Court issued a 7-2 decision declaring that minimum streamflow requirements are a permissible condition of CWA Section 401 certifications. A Washington city and local utility district sought a license to build a hydroelectric project on the Dosewallips River. The proposed project would reduce the water flow below the state’s minimum stream flow requirement to protect fish habitat, a state designated use of the water under Section 303 of the CWA. The Washington Department of Ecology issued a Section 401 certification imposing a minimum stream flow requirement as a condition of the hydropower license, and the applicants objected to the state’s authority to impose water flow requirements.

In *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court upheld a state’s authority to impose conditions under the Section 401 certification process where necessary to protect a designated use for fish habitat. The Court rejected the argument that water quality requirements were limited to discharges under the CWA, noting that Washington’s instream flow requirement was necessary to enforce the designated use of the river. The Court said that the CWA preserves each state’s authority to allocate water quantity between users and does not limit Section 401 to water quality concerns when protecting designated uses. Importantly, the Court also rejected an effort to read “implied limitations” into Section 401 based on a perceived conflict between Section 401 state certifications and FERC authority under the Federal Power Act and the interpretation in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).

Again in 2006, the Supreme Court recognized that State 401 certification authority is “...essential in the scheme to preserve state authority to address the broad range of pollution.” *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

NPDES Permits and Water Transfers

The CWA prohibits discharging “pollutants” through a “point source” into a “water of the United States” without first obtaining a National Pollutant Discharge Elimination System (NPDES) permit. The permit includes limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure that the discharge does not violate state water quality standards.

EPA in 40 CFR Part 122.3(i) expressly excluded water transfers from regulation under the NPDES permitting program, and defined a water transfer as an activity that conveys or connects waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. The rule relies on EPA's CWA interpretation and does not limit any ability of a State to use any available authority, including authority regarding nonpoint sources of pollution, to protect the water quality of the receiving water body in a water transfer.

Water transfers and water quality are essential to the social, economic and environmental well-being of the Western States. The United States Court of Appeals, in the cases of *Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009), and *New York State et al. v. Environmental Protection Agency*, 846 F.3d 492 (2nd Cir. 2017), upheld EPA's Water Transfer Rule, holding it to be a reasonable construction of the CWA and therefore entitled to deference by the Federal Courts and on which decisions the United States Supreme Court subsequently denied Petitions for Writ of Certiorari.

The WSWC supports EPA's amendment to its CWA regulations in 40 CFR 122.3(i) and supports the codification of 40 CFR 122.3(i) into statute by Congress. The WSWC has long declared its position that the transport of water through constructed conveyances to supply water for various uses without the "addition" of a pollutant should not trigger federal NPDES permitting requirements, simply because the transported water contains different chemical concentrations and physical constituents. The WSWC supports the ability of each Western State to use available authorities to place appropriate conditions on water transfers to protect water quality. With few exceptions, States have been delegated full or partial federal authority to administer the NPDES program and issue permits. Moreover, regardless of the extent of federal jurisdiction over waters of the United States, States have authority to protect their waters of the State, including any waters that may not fall under CWA delegated NPDES permitting authority.

Waters of the United States (WOTUS)

The CWA is built upon the principle of cooperative federalism in which Congress intended the States, the EPA, and the U.S. Army Corps of Engineers (USACE) implement the CWA as partners, delegating co-regulator authority to the States. This cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and Western States have made great strides in protecting water quality and coordinating water quality and water quantity decisions. It is imperative that EPA and USACE actively seek meaningful state consultation, engagement, and participation in the review and development of any new proposed or final rule to define WOTUS. States are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks.

States have both state statutory and constitutional authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders, and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA. Again, CWA Section 101(b) supports the States' critical role in protecting water quality as Congress explicitly declared that it did "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." The Supreme Court has limited the jurisdictional scope of the CWA in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715, 723 (2006); and *Sackett v. EPA* (#21-424).

Perennial streams with a relatively permanent surface water connection to navigable waters are presumptively considered to be under federal CWA jurisdiction consistent with *Rapanos* and Justice Scalia's plurality opinion. In *Sackett*, the Court affirmed the phrase "waters of the United States" includes only relatively permanent, standing, or continuously flowing bodies of water.

A one-size-fits-all national approach to federal regulations, guidance, and programs pertaining to the CWA does not recognize specific conditions and needs in the West, where water and precipitation can be scarce and a variety of unique waterbodies exist, including small ephemeral washes and arroyos, snow dependent intermittent streams, effluent dependent and dominated streams, prairie potholes, playa lakes, and terminal lakes, as well as numerous man-made reservoirs, impoundments, and water and stormwater conveyance structures. Further, there are physical, biological, and chemical differences between waters, and hydrologic differences, both spatially and temporally, as well as considerable differences in legal doctrines that govern water in Western States, which mean that federal effort to clarify CWA jurisdiction will inevitably impact each State differently, thus underscoring the need to thoroughly involve States in developing and implementing any rule so as to clearly respect and avoid conflict with state authority over the regulation of water quality and the allocation of waters and water rights within their respective borders

Any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact States and alter the distribution of power and responsibilities among the States and the federal government. As co-regulators, States are separate and apart from the general public, and have a unique role with the federal government in the development and implementation of any rule to clarify or redefine CWA jurisdiction. Information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the USACE to develop and implement federal CWA jurisdiction efforts in authentic partnership with the States. Uncertainty and differences of opinion have and continue to exist regarding CWA jurisdiction among States, and challenge EPA and the Corps to develop and implement any new rule in cooperation with the States, based on principles of cooperative federalism, and together to provide greater certainty and a clearer definition of the limits of federal jurisdiction.

As noted above, substantial and recurring changes to regulatory definitions, policies, and programs between federal Administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits. Congress and this Administration should ensure that any federal effort to clarify or define CWA jurisdiction and define Waters of the United States:

1. Creates an enduring and broadly supported definition.
2. Acknowledges and addresses the needs, priorities, and concerns of states as co-regulators.
3. Includes robust, meaningful, and representative state participation and consultation in the development and implementation of any rule, acknowledging the inherent federalism implications.
4. Gives full force and effect to Congress' intent to maintain a reasonable balance of state and federal authority and the purposes of CWA Sections 101(b) and 101(g).

5. Complies with the limits set by Congress as interpreted by the Supreme Court, and appropriately incorporates those limits.
6. Specifically identifies waters and features outside the scope of the CWA jurisdiction including but not limited to groundwater and historically recognized agricultural exemptions.
7. Acknowledges that States have authority to protect all “waters of the state,” and that excluding waters from federal jurisdiction does not always mean that they will be exempt from state regulation and protection.
8. Continues to provide access to appropriate technical and financial assistance to the states to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations.
9. Provides a clearly delineated process for resolving differences of opinion over federal and non-federal jurisdiction, and jurisdiction between different States and Tribes (treated as states).
10. Provides for mapping of jurisdictional waters as a joint federal/state/tribal effort employing the best available data and tools, with appropriate provisions and processes for map maintenance.
11. Includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling states to take such actions as may be necessary to address any gaps in state law, regulation and protection, and to ensure sufficient time for tools to be developed by federal agencies, in collaboration with states, that facilitate implementation of the new rule.
12. Recognizes the need to balance definitional clarity with flexibility in implementation to address the unique landscapes, flow regimes, and legal frameworks in various regions of the Nation and appropriately weighs all factors of science, law, and effective policy to draw jurisdictional conclusions that are appropriate, and that do not impinge on the rights of States.
13. Considers a regional approach to the definitions of terms for foundational and any categorical waters in the rule and defines regions building upon existing classification systems based on hydrology, geology, and climate.
14. Provides, in the rule development process, a representative number of states, as co-regulators, with diverse perspectives and regions to engage actively in an integrated way with the EPA and Corps staff to provide direct and effective feedback on the implementability of a proposed rule which requires ample time for development of new regulatory language.

EPA Veto Authority (CWA 404(c))

EPA’s actions in the Section 404 permitting process have not always been consistent with established protocols, creating challenges for States’ engagement and public and private investment in projects requiring Section 404 permits.

CWA Section 404(c) grants the 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.”

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.”

WSWC supports the promulgation of regulations and guidance: (1) improving predictability in Section 404 permitting, specifically the 404(c) and 404(q) processes; (2) improving communication between federal agencies and States, particularly providing States with a meaningful opportunity to address EPA concerns prior to the exercise of its veto power; and (3) requiring EPA to adhere to established Section 404 permitting processes and protocols, and to update those protocols as appropriate to reflect current procedures.

WSWC also supports documentation of the rationale for any Section 404(c) veto, including: (1) verification that impacted waters are Waters of the United States; (2) findings from any Final Environmental Impact Statement pertaining to the proposed project; (3) impacts to municipal water supplies, shellfish beds, fishery areas, wildlife, and recreational areas; and (4) resolved issues emanating from discussions between the USACE and EPA.

Thank you for the opportunity to submit our written testimony.