

**DRAFT**  
**WATER QUALITY COMMITTEE**  
**WORK PLAN**  
**July 1, 2019 to June 30, 2020**

**1. WATER QUALITY/QUANTITY NEXUS**

**Work-to-Date:** Paragraph (B)(3) of WGA Resolution #2015-08 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 provide 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 occur within a framework that preserves states’ authority to manage water through policies which recognize state law and the financial, environmental and social values of the water resource to citizens of the western states today and in the future.” (emphasis added)

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 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.

**2019-2020:** The Committee supports WGA Resolution #2015-08, and will follow up on the next steps recommended in the 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; and (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, (3) provide updated information from states on current water quality-water quantity issues at Council meetings.

**Time Frame:** Ongoing

WQ2 Nexus Workgroup: Kent Woodmansey (SD), Tom Stiles (KS), David Schade (AK)

**2. CLEAN WATER ACT ISSUES**

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

a. **CWA Jurisdiction\***

**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 WOTUS Rule, finalized on June 29, 2015 (80 FR 37054). Many of our member states filed lawsuits challenging the WOTUS Rule in federal court. In 2018, the U.S. Supreme Court held that challenges to the WOTUS Rule belonged in the federal District Courts, overturning a 6<sup>th</sup> Circuit decision to consolidate the cases. *National Association of Manufacturers v. Department of Defense* (#16-299)

On February 28, 2017, the Trump Administration issued an Executive Order, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, directing the EPA and Corps to review the WOTUS Rule for consistency with the stated policy of keeping the navigable waters free of pollution while also promoting economic growth, reducing regulatory uncertainty, and respecting the roles of Congress and the States. The EO specifically directs the agencies to interpret “navigable waters” consistent with the opinion of Justice Scalia in the *Rapanos* case. On March 6, 2017, the agencies published a *Notice of Intention to Review and Rescind or Revise the Clean Water Rule* in the Federal Register, 82 FR 12532.

On May 8, Scott Pruitt, the Environmental Protection Agency (EPA) Administrator, and Douglas Lamont, Senior Official for the U.S. Army Corps of Engineers (Corps), sent a letter to governors seeking input from the states on a new definition of “waters of the United States” protected under the Clean Water Act (CWA), including how each state “might respond to a reduced scope of federal jurisdiction under the [CWA].” The letter notes that consulting with state and local government officials--or their representative national organizations--before proposing regulations with federalism implications is a priority for this Administration. “We hope to keep the states at the forefront of our mission[,] and your input during the federalism process will enable us to do that effectively.”

As a first step, the agencies are “re-codifying the regulation that was in place prior to the issuance of the Clean Water Rule,” which is what the agencies are currently implementing under the 6th Circuit’s nationwide stay of the rule. WSWC submitted comments on this proposed rule, 82 FR 34899.

The second step for the agencies is to propose a new definition of protected waters that is consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). The agencies note that the federalism consultation began with an initial meeting on April 19, 2017 with state and local government associations. “In addition to discussions our respective staffs will have with associations and individual state environmental agencies, we are reaching out to you directly to ensure we received the benefit of your particular state’s experiences and expertise. The agencies are soliciting written comments from state and local governments until June 19, 2017.” The WSWC

submitted a letter outlining the states' federalism concerns and requesting continued dialogue and collaboration throughout the development of a new WOTUS rule.

The agencies continued various levels of outreach through the end of 2017 and into the beginning of 2018, including a State Co-Regulators Meeting on March 8-9 to discuss policy direction, definitions of key terms, and the impact of WOTUS changes on states and their water quality authorities and programs. The WSWC Executive Director and representatives from the States of Arizona, Oregon, and Wyoming attended this meeting. ~~Following that will be a public notice and comment rulemaking, anticipated during the summer of 2018.~~

[On February 14, 2019, the agencies published the proposed rule for a Revised Definition of Waters of the United States \(84 FR 4154\), with a comment deadline of April 15, 2019.](#)

**Work-to-Date:** In 2013, the WSWC wrote EPA and the Corps a series of five letters requesting greater state consultation in the development of the rule. In March 2014, the WSWC sent another letter to EPA and the Corps, setting forth a list of additional consensus comments on the rulemaking. The Western Governors' Association (WGA) sent a subsequent letter on March 25, 2014, that cited the WSWC's letter and urged the agencies to consult with the states individually and through the WGA before taking further action on the rulemaking.

The WSWC adopted Position #369 regarding CWA rulemaking efforts on July 18, 2014, during its summer meetings in Helena, Montana. The resolution served as the basis of a comment letter the WSWC sent to EPA and the Corps on October 15, 2014. That letter called for the creation of a state-federal workgroup to refine and revise the rule and set forth a number of requested changes. This Position was revised and readopted as #410 during WSWC summer meetings in Rohnert Park, California in 2017. [In anticipation of the new proposed rule, the position was revised and readopted as #427 during WSWC fall meetings in Coeur d'Alene, Idaho in 2018. The State of Washington abstained from the vote.](#)

WSWC has submitted comments and letters as noted above, and has continued to engage with EPA and the Corps at each opportunity

**2019-2020:** The Committee will continue to work with the Water Resources and Legal Committees through the Workgroup to follow and comment on the further development and/or implementation of the jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC's positions.

**Time Frame:** Ongoing

CWA Rulemaking Workgroup: (AK), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jennifer Verleger (ND), Julie Cunningham (OK), Todd Chenoweth (TX), Laura Driscoll (WA), and Kevin Frederick (WY).

\*See Item 2 of the Legal Committee Workplan

**b. State Revolving Funds (SRFs) and Infrastructure Financing**

**Background:** 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.

On ~~April 10~~July 19, 2017, the Water Infrastructure Finance and Innovation Act (WIFIA) program ~~closed its~~selected 12 projects for the first ~~selection~~round ~~for of~~ credit assistance, up to \$2B in loans. EPA received 43 letters of interest from entities seeking loans to fund water infrastructure projects located all around the country. In this round, EPA will make available the up to \$17 million of budget authority appropriated to provide approximately \$1 billion in credit assistance. Prospective borrowers requested more than \$6 billion in credit assistance to support over \$12 billion in total infrastructure investment ~~press release. On November 1, 2018, EPA selected 39 projects for the second round of WIFIA loans up to \$5B.~~

During the summer 2018 meetings in Newport, Oregon, the Committee heard reports from Kansas and Washington on the process they went through to apply for their WIFIA loans during the first round, and the water projects that will be built with these low-interest loans.

WSWC Position #404 urges the Administration and Congress to provide greater flexibility and fewer restrictions on state SRF management and stable and continuing appropriations to the SRF capitalization grants at funding levels that are adequate to help states address their water infrastructure needs. WGA resolution 2017-04, Water Quality in the West, also supports the SRFs as “important tools” and requests greater flexibility and fewer restrictions on state SRF management.

**2019-2020:** The Committee will support the WGA and WSWC positions. In particular, WSWC staff will continue to update the Committee on developments within Congress and the Administration that have the potential to impact the SRFs. As needed, Committee members and WSWC staff will also meet with the Administration and Congress to further the objectives of the WGA and WSWC positions. Some topics for discussion include state experiences with Buy American and Davis-Bacon, whether there are otherwise eligible entities, and how many, that are walking away from SRFs because of these restrictions, the right of first refusal of the SRF prior to funding projects by WIFIA, and first round funded WIFIA projects in member states.

**Time Frame:** Ongoing

**c. EPA’s Water Transfers Rule**

**Background:** On January 18, 2017, the 2<sup>nd</sup> 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.

Paragraph B(2)(c) of WGA Resolution #2017-04 and WSWC Position #424 generally support EPA's Water Transfers Rule (40 C.F.R. § 122.3(i)), 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.

Efforts are underway to codify the Water Transfers Rule, seeking support from WGA, WSWC, and other state organizations.

**2019-2020:** The Committee and WSWC staff will: (1) continue to support the WGA and WSWC positions; (2) monitor any and all activities impacting EPA's rule, including but not limited to the Second Circuit 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

**d. Nutrients**

**Background:** EPA's Office of Water released the Nancy Stoner memo *Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions* on March 16, 2011, and 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.

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 impacts to public health from nitrates in sources of drinking water and from 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
- EPA continuing to provide support and financial assistance.

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

**2019-2020:**

The Committee and WSWC staff will monitor any changes to EPA’s nutrient efforts under the current administration, including those related to Harmful Algae Blooms (HABs)/ EPA cyanotoxin criteria and inform members of ongoing developments. 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 members with the Committee.

The Association of Clean Water Administrators has a Nutrient Working Group developing a Nutrients Reduction Progress Tracker. The Committee’s efforts will complement those of the ACWA Working Group, but may include information from ACWA’s efforts of interest to Committee members.

**Time Frame:** Ongoing

**e. 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 §518, necessary for delegation of regulatory programs to the tribes. The first involved an interpretive rule regarding inherent authority of tribes, considering CWA §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, and the proposed rulemaking continued on EPA’s regulatory agenda in 2017.

**2019-2020:** The Committee will continue to monitor these rulemakings and their implementation and engage with EPA as appropriate.

**Time Frame:** Ongoing

**f. Abandoned Hardrock Mine Remediation**

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

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

**Work-to-Date:** The WGA and WSWC have long supported legislation to amend the Clean Water Act (CWA) to protect authorized third parties, or "Good Samaritans," who voluntarily clean up abandoned hardrock mines, from inheriting perpetual liability for the site under the CWA (WGA Policy Resolution #2016-07).

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

**2019-2020:** The Committee will coordinate with the WGA and encourage efforts to clean up abandoned hardrock mines, including but not limited to enactment of Good Samaritan legislation and efforts to support utilization of EPA's 2012 memorandum. As part of this effort, the Committee will work with key Congressional members/staff, Administration officials, and other stakeholders to develop and support efforts to clean up abandoned hardrock mines in accordance with the WGA's policies, including the possible development of a workgroup and/or workshop to bring together interested stakeholders to identify ways to facilitate abandoned hardrock mine remediation.

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

**Time Frame:** Ongoing

### 3. **HYDRAULIC FRACTURING**

**Background:** In June 2015, the Environmental Protection Agency (EPA) published a study on the relationship between hydraulic fracturing and drinking water, titled "Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources." In March 2015, the Bureau of Land Management (BLM) issued a final rule for hydraulic fracturing on public lands, which includes a variance process that would allow states to propose their own standards if they can prove that their regulations meet or exceed the requirements in BLM's rule. In addition, EPA, the Department of Energy (DOE), and the Department of the Interior (DOI)

agreed in April 2012 to develop a “Multi-Agency Unconventional Oil and Gas Research Program” to support policy decision by relevant state and federal agencies. The effort is intended to help support the White House’s March 2011 “Blueprint for a Secure Energy Future.”

In December 2016, EPA published its report, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States, available at <https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990>

[On December 28, 2017, BLM rescinded the 2015 hydraulic fracturing rule, noting that “all 32 of the 32 states with federal oil and gas leases have regulations that address hydraulic fracturing” and that “since the 2015 final rule was published, more companies are using state regulatory agencies and/or databases such as FracFocus to disclose the chemical content of hydraulic fracturing fluids.” Litigation pending in the U.S. District Court for the Northern District of California \(California v. Bureau of Land Mgmt., #18-521\) seeks to vacate the rescission and reinstate all of the 2015 rule’s provisions.](#)

The Western Governors’ Association (WGA) Resolution #2017-04 and WSWC Position #393 state that: (1) federal efforts involving hydraulic fracturing should leverage state knowledge, experience, policies, and regulations; (2) such efforts should be limited, based upon sound science, and driven by states; and (3) that both organizations oppose any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing.

**2019-2020:** The Committee will work with the Water Resources and Legal Committees to support the WGA and WSWC positions, and will continue to monitor and update the WSWC on developments involving hydraulic fracturing, including but not limited to EPA’s study, BLM’s rule, and the EPA/DOE/DOI research program.

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

**Time Frame:** 2016-2020, pending available staff time and resources.