



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

May 21, 2018

Mr. David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Docket ID No. EPA-HW-OQ-2018-0063; Clean Water Act Coverage of “Discharges of Pollutants”
via a Direct Hydrologic Connection to Surface Water

Dear Mr. Ross:

The Western States Water Council (WSWC) is a government entity created by the governors of the western states to advise them on water policy issues. WSWC has previously submitted letters to EPA concerning state and federal jurisdiction over water quality, noting the unique characteristics of water bodies in the arid regions of the West. Groundwater holds a position of particular importance to the western states, and the U.S. Congress¹ and U.S. Supreme Court² have long deferred to the states in the management and protection of groundwater.

Conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states. The states recognize the importance of effective groundwater management and are in the best position to protect groundwater quality through laws and regulations specific to their individual circumstances. The Clean Water Act was not intended and should not be applied to the protection and management of groundwater resources contravening state water laws, policies, and programs. Any efforts to exert federal control over groundwater in ways that interfere with state law are contrary to longstanding federal policy and explicit recognition of state primacy, and threaten effective groundwater management and protection.

The EPA should work cooperatively with the governors and appropriate state agencies to address state and federal needs. Protecting and managing groundwater and surface water requires cooperation among all levels of government. States have demonstrated the ability and authority to address federal needs regarding groundwater within existing legal frameworks, including memoranda of understanding, stipulations, and other methods as necessary. Any federal groundwater strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding.

¹ See, e.g., Clean Water Act §101(b) and (g); Desert Land Act of 1877.

² See, e.g., *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935)

While the Council has not specifically addressed the issue of groundwater as a conduit for pollutants, states have broad authorities that may be used as needed to regulate discharges to groundwater. The EPA is encouraged to meet with individual states and work together to identify solutions to water quality needs.

We urge the EPA to follow the Western Governor's Association's "Principles to Clarify and Strengthen the State-Federal Relationship,"³ endorsed by the Council, and to engage the states in substantive, meaningful consultation during the development of any rule. Further, please see the attached WSWC positions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jerry Rigby". The signature is fluid and cursive, with the first name "Jerry" being more prominent than the last name "Rigby".

Jerry Rigby, Chair
Western States Water Council

Attachments

³ See http://westgov.org/images/editor/Combined_State_Federal_Relationship_-_FINAL.pdf



**POSITION
of the
WESTERN STATES WATER COUNCIL
on
STATE PRIMACY OVER GROUNDWATER**

**Tulsa, Oklahoma
April 17, 2015**

WHEREAS, groundwater is a critically important natural resource that is vital to the economy and environment of the arid West;

WHEREAS, the Desert Land Act of 1877 and the United States Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) recognize States have exclusive authority over the allocation and administration of rights to the use of the groundwater within their borders and States and their political subdivisions are primarily responsible for the protection, control and management of the resource;

WHEREAS, the Congress has created and the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed nor federal appeals court explicitly recognized any federal property or other rights related to groundwater; and

WHEREAS, the regulatory reach of federal statutes and regulations, including but not limited to the Clean Water Act, Endangered Species Act, Multiple-Use Sustained-Yield Act, National Environmental Policy Act, Organic Administration Act (USFS), Reclamation Act of 1902, Safe Drinking Water Act, Wild and Scenic Rivers Act, Wilderness Act and the Comprehensive Environmental Response, Compensation, and Liability Act, were never intended to infringe upon state ownership or control over groundwater; and

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

WHEREAS, working cooperatively with their federal partners, states have shown that they have the ability and authority to address federal needs regarding groundwater within existing legal frameworks, including but not limited to memoranda of understanding, water rights compacts, stipulations, and other methods; and

WHEREAS, the conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states; and

WHEREAS, federal efforts to exert control over or ownership interests related to groundwater or otherwise infringe upon or supersede state groundwater management are contrary to federal law and threaten effective groundwater management and protection; and

WHEREAS, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact.

NOW THEREFORE BE IT RESOLVED, states have exclusive authority over the allocation and administration of rights to the use of the groundwater located within their borders and are primarily responsible for allocating, protecting, managing and otherwise controlling the resource; and

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would establish a federal ownership interest in groundwater not otherwise recognized or allowed under state law, or diminish the primary and exclusive authority of States over groundwater; and

BE IT FURTHER RESOLVED, that federal agencies should work cooperatively with appropriate state agencies and officials to address federal needs involving groundwater through state laws and authorities.



**POSITION
of the
WESTERN STATES WATER COUNCIL
on
PROTECTING GROUND WATER QUALITY
Albuquerque, New Mexico
October 20, 2017
(revised and reaffirmed)**

WHEREAS, ground water is a critically important natural resource, especially in the mostly arid West; and

WHEREAS, ground water management – the protection of its quality and its orderly, rational allocation and withdrawal for beneficial use – requires cooperation among all levels of government; and

WHEREAS, states recognize the importance and role of comprehensive ground water planning in overall water management; and

WHEREAS, the federal government has a longstanding policy of deferring to the states to develop and implement ground water management and protection programs; and

WHEREAS, most western states have legal systems to allocate ground water rights and further have the responsibility for ground water quality protection; and

WHEREAS, the regulatory reach of the Clean Water Act was not intended and should not be applied to the management and protection of ground water resources contravening state water law, policies and programs; and

WHEREAS, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact;

NOW THEREFORE BE IT RESOLVED that any federal ground water quality strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.

Originally adopted March 14, 1997

Revised and Reaffirmed:

Mar 14, 2000, Mar 21, 2003, Mar 29, 2006, Oct 17, 2008, Oct 7, 2011, and Oct 10, 2014

(See also Nos. 215, 230, 249, 274, 309, 337, and 377)