May 6, 2019

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

Thank you for holding your upcoming May 8, 2019 Oversight Hearing on the U.S. Army Corps of Engineers' (Corps) Civil Works Program. States have a historic and unique relationship with the Corps and serve a vital role in the implementation of several Corps programs, due to states' inherent and sovereign authority over water resources, as well as their statutory role as co-regulators under the federal Clean Water Act (CWA). Western Governors have responsibly exercised their authority for comprehensive water management and protection within their states and have worked cooperatively with the Corps and other federal agencies in connection with that responsibility.

To inform the Committee's consideration of this important topic, I request that the Committee include the following attachments in the permanent record of the hearing:

- WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship;
- WGA Policy Resolution 2018-08, Water Resource Management in the West;
- WGA Policy Resolution 2018-12, Water Quality in the West;
- February 20, 2019 letter from the Western Governors' Association, National Conference of State Legislatures, Association of Clean Water Administrators, Association of State Wetland Managers, Council of State Governments – West, and the Western States Water Council to the U.S. Environmental Protection Agency and the Corps, presenting to the agencies recommendations that would improve permitting processes under Section 401 of the CWA while preserving states' authority to manage and protect water resources;
- August 9, 2018 letter from the Western Governors' Association, Association of Clean Water Administrators, Association of State Wetland Managers, Association of Fish and Wildlife Agencies, Conference of Western Attorneys General, Council of State Governments, Council of State Governments – West, National Association of Counties – Western Interstate Region, Western Interstate Energy Board, and Western States Water Council, to Congressional leadership, expressing their collective concerns regarding various proposals to alter the state water quality certification process under Section 401 of the CWA;
- June 13, 2018 written testimony of Western Governors' Association Policy Advisor, Ward J. Scott, to the Committee on Environment and Public Works, Subcommittee on Superfund,

Waste Management, and Regulatory Oversight for its June 13, 2018 hearing, Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights;

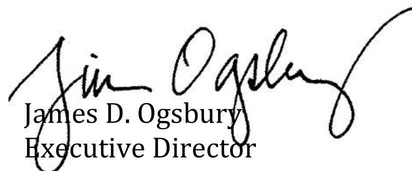
- June 6, 2018 letter from Western Governors to the Hon. R.D. James, Assistant Secretary for the Army for Civil Works, regarding the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (RIN 0710-AA72, Docket ID: COE-2016-0016);

- October 17, 2017 comments from WGA to the U.S. Army Corps of Engineers in response to a Request for Comment as part of its Review of Existing Rules in accordance with Executive Order 13777, Enforcing the Regulatory Reform Agenda; and

- February 27, 2017 comments from WGA to the Corps in response to the Corps' proposed rule, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (RIN 0710-AA72, Docket ID: COE-2016-0016).

Thank you for your consideration of this request.

Sincerely,



James D. Ogsbury
Executive Director

Attachments

WESTERN
GOVERNORS'
ASSOCIATION

Western Governors' Association
Policy Resolution 2017-01

Building a Stronger State-Federal Relationship

A. PREAMBLE

The Governors of the West are proud of their unique role in governing and serving the citizens of this great nation. They recognize that the position they occupy – the chief elected official of a sovereign state – imposes upon them enormous responsibility and confers upon them tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.

It was, after all, the states that confederated to form a more perfect union by creating a national government of limited and defined powers. The grant of specific responsibilities for irreducibly common interests – such as national defense and interstate commerce – was brilliantly designed to make the whole stronger than the sum of its parts.

The genius of American democracy is predicated on the separation of powers among branches of government (*viz*. the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. This principle is memorialized in the Tenth Amendment, which states in its entirety, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This reservation of power to the states respects the differences between regions and peoples. It recognizes a right to self-determination at a local level. It rejects the notion that one size fits all, and it provides for a rich tapestry of local cultures, economies and environments.

Because of the Constitutional recognition of state sovereignty, the states have been appropriately regarded as laboratories of democracy. States regularly engage in a kind of cooperative competition in the marketplace of ideas. Western Governors are leaders in innovative governance who employ their influence and executive authority to promote initiatives for improvement of their states' economies, environments and quality of life.

Despite the foregoing, the balance of power has, over the years, shifted toward the federal government and away from the states. The growth in the size, cost and scope of the federal government attests to this new reality. Increasingly prescriptive regulations infringe on state authority, tie the hands of states and local governments, dampen innovation and impair on-the-ground problem-solving. Failures of the federal government to consult with states reflect a lesser appreciation for local knowledge, preferences and competencies.

The inauguration of a new Administration presents a historic opportunity to realign the state-federal relationship. Western Governors are excited to work in true partnership with the federal government. By operating as authentic collaborators on the development and execution of policy, the states and federal government can demonstrably improve their service to the public. Western Governors are optimistic that the new Administration will be eager to unleash the power and creativity of states for the common advantage of our country. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united. Such an outcome will redound to the credit of the Administration and inure to the benefit of the American people.

B. BACKGROUND

1. The relationship between state government authority and federal government authority is complex and multi-dimensional. There are various contexts in which the authorities of these respective levels of U.S. government manifest and intersect. For example:

    a) **Exclusive Federal Authority –** There are powers that are specifically enumerated by the U.S. Constitution as exclusively within the purview of the federal government.[1]

    b) **State Primacy –** States derive independent rights and responsibilities under the U.S. Constitution. All powers not specifically delegated to the federal government are reserved for the states; in this instance, the legal authority of states overrides that of that federal government.[2]

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[1] The structure of the government established under the U.S. Constitution is premised upon a system of checks and balances: Article VI (Supremacy Clause); Article I, Section 8 (Congressional); Article II, Section 1 (Executive Branch); Article III, Section 2 (Judicial Branch). State law can be preempted two ways. If Congress evidences an intent to fully occupy a given "field," then state law falling within the field is preempted. If Congress has not fully displaced state regulation over the matter, then state law is preempted to the extent it *actually* conflicts with federal law.

[2] Amendment 10 of the U.S. Constitution: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved tothe States, respectively, or to the people.*"

Governors have responsibilities for the condition of land, air, forest, wildlife and water resources, as well as energy and minerals development, within their state's borders.

c) **Shared State-Federal Authority –** In some cases, state and/or federal authority can apply, given a particular fact pattern.[3] Federal preemption of state law is a concern under this scenario. According to the Council on State Governments, the federal government enacted only 29 statutes that pre-empted state law before 1900. Since 1900, however, there have been more than 500 instances of federal preemption of state law.

d) **State Authority "Delegated" from Federal Agencies by Federal Statute –** The U.S. Congress has, by statute, provided for the delegation to states of authority over certain federal program responsibilities. Many statutory regimes – federal environmental programs, for example – contemplate establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards.

   According to the Environmental Council of the States (ECOS), states have chosen to accept responsibility for 96 percent of the primary federal environmental programs that are available for delegation to states. States currently execute the vast majority of natural resource regulatory tasks, including 96 percent of the enforcement and compliance actions and collection of more than 94 percent of the environmental quality data currently held by the U.S. Environmental Protection Agency (EPA).

e) **Other –** Where the federal government has a statutory, historical or "moral" obligation to states.[4]

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[3] The federal government has authority to regulate federal property under Article IV of the Constitution. That authority, however, is limited. General regulatory authority (including regulation of wildlife and land use) is held by the states, unless Congress passes a specific law that conflicts with a state's exercise of authority. This is discussed in detail in U.S. Supreme Court case, *Kleppe v. New Mexico*.

[4] These historic agreements include, but are not limited to: Payments in Lieu of Taxes; shared revenues authorized by the Secure Rural Schools Act; Oregon and California Railroad Revested Lands payments; shared mineral royalties at the historic level of 50% and renewable energy leasing revenues from development on U.S. Forest Service lands, Bureau of Land Management lands and waters off the coasts of the western states; Abandoned Mine Lands grants to states consistent with 2006 Amendments to the Surface Mining Control and Reclamation Act; legally binding agreements and timetables with states to clean up radioactive waste that was generated in connection with nuclear weapons production and that remains on lands managed by the Department of Energy in the West.

2. Over time, the strength of the federal-state partnership in resource management has diminished. Federal agencies are increasingly challenging state decisions, imposing additional federal regulation or oversight and requiring documentation that can be unnecessary and duplicative. In many cases, these federal actions encroach on state legal prerogatives, especially in natural resource management. In addition, these federal actions neglect state expertise and diminish the statutorily-defined role of states in exercising their authority to manage delegated environmental protection programs.

3. The current fiscal environment exacerbates tensions between states and federal agencies. For example, states have a particular interest in improving the active management of federal forest lands. The so-called "fire borrowing" practice employed by the U.S. Forest Service and the Department of the Interior to fund wildfire suppression activities is negatively affecting restoration and wildfire mitigation work in western forests. Changes are needed, as the current funding situation has allowed severe wildfires to burn through crippling amounts of the very funds that should instead be used to prevent and reduce wildfire impacts, costs, and safety risks to firefighters and the public. This also has impacts on local fire protection districts, which often bear the brunt of costs associated with first response to wildfire, and state budgets that are also burdened by the costs of wildfire response. Fire borrowing represents an unacceptable set of outcomes for taxpayers and at-risk communities, and does not reflect responsible stewardship of federal land. In addition, states increasingly are required to expend their limited resources to operate regulatory programs over which they have less and less control. A 2015 report by the White House Office of Management and Budget on the costs of federal regulation and the impact of unfunded mandates notes that federal mandates cost states, cities and the general public between $57 and $85 billion every year.

4. States are willing and prepared to more effectively partner with the federal government on the management of natural resources within their borders.

5. The U.S. Advisory Commission on Intergovernmental Relations – established in 1959 and dissolved in 1996 – was the federal government's major platform for addressing broad intergovernmental issues beyond narrow considerations of individual programs and activities.

6. The current Executive Order on Federalism (E.O. 13132) was issued by then-President William Clinton in 1999. That E.O. has not been revisited since and it may be time to consider a new E.O.

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

a) It is time for thoughtful federal-state-local government review of the federal Executive Order on Federalism to identify areas in the policy that can be clarified and improved to increase cooperation and efficiency.

b) Governors support reestablishment of the U.S. Advisory Commission on Intergovernmental Relations. It is imperative that the President show his commitment to the Constitutional separation of powers by establishing a platform at the highest level to address federalism concerns.

2. Avoiding Preemption of States

a) In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. Accordingly, federal departments and agencies should, to the extent permitted by law, construe, in regulations and otherwise, a federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm evidence compelling the conclusion that Congress intended preemption of state law, consistent with established judicial precedent.

b) When Congress, acting under authority granted to it by the Constitution, does preempt state environmental laws, federal legislation should:

   i. Accommodate state actions taken before its enactment;

   ii. Permit states that have developed stricter standards to continue to enforce them;

   iii. Permit states that have developed substantially similar standards to continue to adhere to them without change and, where applicable, without consideration to land ownership.

3. Defining Meaningful State-Federal Consultation

a) Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful* and *substantiv*e

input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.

b) Consistent with C(2) and C(3)(a), federal agencies should consult with states in a meaningful way, and on a timely basis.

   i. **Predicate Involvement:** Federal agencies should take into account state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action. States merit greater representation on all relevant committees and panels (such as the EPA Science Advisory Board and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.

   ii. **Pre-Publication / Federal Decision-making Stage**: Federal agencies should engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e., before such proposals are sent to the White House Office of Management and Budget).

   iii. **Post-Publication / Pre-Finalization Stage**: As they receive additional information from state agencies and non-governmental entities, Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

4. State Authority "Delegated" from Federal Agencies Pursuant to Federal Statute

Where states are delegated authority by federal agencies pursuant to legislation:

a) Federal agencies should treat states as co-regulators, taking into account state views, expertise and science in the development of any federal action impacting state authority.

b) Federal agencies should grant states the maximum administrative discretion possible. Any federal oversight of such state should not unnecessarily intrude on state and local discretion. Where states take proactive actions, those efforts should be recognized and credited in the federal regulatory process.

c) When a state is meeting the minimum requirements of a delegated program, the role of a federal department or agency should be limited to the provision of funding, technical assistance and research support. States should be free to develop implementation and enforcement approaches within their respective jurisdictions without intervention by the federal government.

d) New federal rules and regulations should, to the extent possible, be consistent with existing rules and regulations. The issuing agency should identify elements and requirements common to both the proposed and existing regulations and provide states an opportunity to develop plans addressing the requirements of both in a coordinated fashion. This will achieve economies of scale, saving both time and money.

e) When a federal department or agency proposes to take adjudicatory actions that impact authority delegated to states, notice should be provided to affected Governors' offices, and co-regulating states should have the opportunity to participate in the proceedings. Where legally permissible, that right should extend to federal agencies' settlement negotiations impacting state environmental and natural resource management prerogatives. Where their roles and responsibilities are impacted, states should be meaningfully consulted during settlement negotiations, including negotiations aimed at avoiding, rather than resolving, litigation (such as negotiations following a notice of intent to sue under the Endangered Species Act, but prior to a formal complaint being filed to initiate legal action).

f) States' expertise should be recognized by federal agencies and robustly represented on boards and in other mechanisms upon which agencies rely for development of science to support regulatory action.

5. **Other Opportunities for Positive Engagement by the Federal Government with Western States**

a) **Federalism Reviews** – Federal agencies are required by federal Executive Order 13132 to consider and quantify consequences of federal actions on states. In practice, the current process falls short of its stated goals. Governors call on the President to revisit the executive order to, among other things:

i. Specifically involve Western Governors on issues (e.g., public lands, water and species issues) that disproportionately impact the West;

ii. Work with Governors to develop specific criteria and consultation processes: 1) for the initiation of federalism assessments and 2) that guide the performance of every federal Department and agency federalism assessment;

iii. Require federal Departments and agencies to meet the criteria developed under C(5)(a)(ii), rather than simply require the consideration of federalism implications;

iv. Provide states, through Governors, an opportunity to comment on federalism assessments before any covered federal action is submitted to the Office of Management and Budget for approval.

b) **Federal and State Land-Use Planning** – Governors possess primary decision-making authority for management of state resources. Accordingly, it is essential that they have an opportunity to review new, revised and amended federal land management plans for consistency with existing state plans. Governors and their staffs have specific knowledge and experience that can help federal agencies craft effective and beneficial plans. A substantive role in federal agencies' planning processes is vital for Western Governors:

i. Federal landscape-level planning presents new issues for Governors to consider as they attempt to ensure consistency between state and federal requirements. Agencies should provide Governors sufficient time to ensure a full and complete state review. This is particularly true when agency plans affect multiple planning areas or resources;

ii. Agencies should seek to align the review of multiple plans affecting the same resource. This is particularly true for threatened or endangered species that have vast western ranges;

iii. When reviewing proposed federal land management plans for consistency with state plans, Governors should be afforded the discretion to determine which state plans are pertinent to the review, including state-endorsed land use plans such as State Wildlife Action Plans, conservation district plans, county plans and multi-state agreements;

iv. Governors must retain a right to appeal any rejection of recommendations resulting from a Governor's consistency review.

c) **Honoring Historic Agreements** – The federal government should honor its historic agreements with states and counties in the West to compensate them for state and local impacts associated with federal land use and nontaxable lands within their borders that are federally-owned.

d) **Responsible Federal Land Management** – The federal government should be a responsible landowner and neighbor and should work diligently to improve the health of federally-owned lands in the West. Lack of funding and conflicting policies have resulted in large wildfires and the spread of invasive species from federally owned forests and grasslands, negatively impacting adjacent state and privately-owned lands, as well as state-managed natural resources (soils, air and water).

e) **Recognizing State Contributions to Federal Land Management** – The U.S. Congress and appropriate federal departments and agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states' borders through the contribution of state expertise, manpower and financial resources.

f) **Avoiding Unfunded Mandates** – The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states. The federal government increasingly requires states to carry out policy initiatives without providing the funding necessary to pay for implementation. State governments cannot function as full partners if the federal government requires them to devote their limited resources to compliance with unfunded federal mandates.

g) **Other Considerations in Designing an Effective State-Federal Relationship** – Other important considerations in the design of a stronger state-federal relationship include:

i. The U.S. Congress and federal departments and agencies should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal action should not encroach on this authority.

ii. Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.

iii. States should be given flexibility to transfer a limited amount of funds from one grant program to another, and to administer related grants in a coordinated manner.

iv. Federal funds should provide maximum state flexibility without specific set-asides.

v. States should be given broad flexibility in establishing federally-mandated advisory groups, including the ability to combine advisory groups for related programs.

vi. Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.

vii. Federal government monitoring should be outcome-oriented.

viii. Federal reporting requirements should be minimized.

ix. The federal government should not dictate state or local government organization.

D. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.

2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.

Policy Resolution 2018-08

Water Resource Management in the West

A. BACKGROUND

1. Water is a crucial resource for communities, industries, habitats, farms, and western states. Clean, reliable water supplies are essential to maintain and improve quality of life. The scarce nature of water in much of the West makes it particularly important to our states.

2. States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.

3. Many communities in the West anticipate challenges in meeting future water demands. Supplies are nearly fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on those limited water resources. Sustainability of our natural resources, specifically water, is imperative to the foundations upon which the West was developed. Growth and development can only continue upon our recognition of continued state stewardship of our unique resources and corresponding responsibilities.

4. Strong state, regional and national economies require reliable deliveries of good-quality water, which in turn depend on adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West. Repairs to aging infrastructure are costly and often subject to postponement.

5. Western Governors recognize the essential role of partnership with federal agencies in western water management and hope to continue the tradition of collaboration between the states and federal agencies.

6. Tribal governments and western states also share common water resource management challenges. The Western Governors Association and Western States Water Council have had a long and productive partnership with tribes, working to resolve water rights claims.

B. GOVERNORS' POLICY STATEMENT

1. **State Primacy in Water Management:** As the preeminent authority on water management within their boundaries, states have the right to develop, use, control and distribute the surface water and groundwater located within their boundaries, subject to international treaties and interstate agreements and judicial decrees.

   a. **Federal Recognition of State Authority:** The federal government has long recognized the right to use water as determined under the laws of the various states; Western

Governors value their partnerships with federal agencies as they operate under this established legal framework.

While the Western Governors acknowledge the important role of federal laws such as the Clean Water Act (CWA), the Endangered Species Act (ESA), and the Safe Drinking Water Act (SDWA), nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources.

Authorization of water resources development legislation, proposed federal surplus water rulemakings, and/or storage reallocation studies should recognize natural flows and defer to the states' legal right to allocate, develop, use, control, and distribute their waters, including but not limited to state storage and use requirements.

b. **Managing State Waters for Environmental Purposes:** States and federal agencies should coordinate efforts to avoid, to the extent possible, the listing of water-dependent species under the ESA. When ESA listings cannot be avoided, parties should promote the use of existing state tools, such as state conservation plans and in-stream flow protections, to conserve and recover species.

2. **Infrastructure Needs:** Aging infrastructure for existing water and wastewater facilities and the need for additional water projects cannot be ignored. Infrastructure investments are essential to our nation's continued economic prosperity and environmental protection, and they assist states in meeting federally-mandated standards.

a. **Federal Support for Infrastructure Investment:** Congress should provide adequate support for the CWA and SDWA State Revolving Funds. Further, Congress should fully utilize the receipts accruing to the Reclamation Fund for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs, including the construction of Congressionally-authorized Bureau of Reclamation rural water projects and facilities that are part of a Congressionally-authorized Indian water rights settlement.

Congress should authorize water resources development legislation on a regular schedule and appropriate funding so all projects and studies authorized in such legislation can be completed in a timely manner.

Congress also should consider facilitating greater investment in water infrastructure, utilizing such tools as loan guarantees, revolving funds, infrastructure banks and water trust funds.

Capital budgeting and asset management principles should be used to determine funding priorities based on long-term sustainability and not annual incremental spending choices. It should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.

b. **Alternatives to Direct Federal Investment:** Federal and state policymakers should also consider other tools to promote investment in water infrastructure and reduce financing costs, including: public-private partnerships, bond insurance, risk pooling, and credit enhancements.

Congress should remove the state volume caps for private activity bonds used for water and wastewater projects, provide guaranteed tax-exempt status for bonds issued by state or local agencies to finance water infrastructure, provide loan guarantees, and otherwise support and encourage alternatives to direct federal investment of limited general funds.

c. **Hydropower:** Congress and the Administration should authorize and implement appropriate hydropower projects and programs through efficient permitting processes that enhance renewable electric generation capacity and promote economic development, while ensuring protection of important environmental resources and indigenous people's rights.

d. **Infrastructure Planning and Permitting:** Infrastructure planning and permitting guidelines, rules and regulations should be coordinated, streamlined and sufficiently flexible to: (1) allow for timely decision-making in the design, financing and construction of needed infrastructure; (2) account for regional differences; (3) balance economic and environmental considerations; and (4) minimize the cost of compliance.

3. **Western States Require Innovative and Integrated Water Management:** 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 preserve state authority to manage water through policies which recognize state law and financial, environmental and social values of water to citizens of western states today and in the future.

a. **Water Transfers:** Western Governors recognize the potential benefits of market-based water transfers, meaning voluntary sales or leases of water rights. The Governors support water transfers that avoid or mitigate damages to agricultural economies and communities while preventing injury to other water rights, water quality, and the environment.

b. **Energy Development:** Western Governors recognize that energy development and electricity generation may create new water demands. Western Governors recommend increased coordination across the energy and water management communities, and support ongoing work to assess the interconnection of energy and water through the Regional Transmission Expansion Planning Project for the Western Interconnection and similar efforts.

c. **Conservation and Efficiency:** Because of diminished water resources and declining and inconsistent snowpack, Western Governors encourage adoption of strategies to sustain water resources and extend existing water supplies further through water conservation, water reuse and recycling, desalination and reclamation of brackish

waters, and reductions in *per capita* water use. The Governors encourage the use of and research into promising water-saving strategies.

d. **Local Watershed Planning:** Western Governors encourage federal agencies and Congress to provide resources such as technical support to states and local watershed groups. States may empower these watershed groups to address local water issues associated with water quality, growth and land management to complement state water needs.

e. **Intergovernmental Collaboration and Conflict Resolution:** Western Governors support the negotiated settlement of interstate water disputes, Indian and Hawaiian water rights claims, and other federal water needs and claims, the settlement of which are in the best interest of western states.

f. **State-Federal Coordination:** Western Governors recognize the important role of federal agencies in water resource management in the western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities, particularly through the Western States Water Council, and support the continuation of these key state-federal partnerships.

4. **Western States Need Reliable Water Resource Information:** Basic information on the status, trends and projections of water resource availability is essential to sound water management.

a. **Basic Water Data:** Western Governors support the U.S. Geological Survey's Groundwater and Streamflow Information Program, the Natural Resources Conservation Service's Snow Survey and Water Supply Forecasting Program, the National Oceanic and Atmospheric Administration's weather and hydrology-related data collection, monitoring, and drought information programs, and the National Aeronautics and Space Administration's National Land Imaging (Landsat) Program with its thermal infrared sensor. Western Governors support federal efforts to coordinate water data gathering and information programs across multiple agencies.

b. **Extreme Weather Events Planning**: Western Governors recognize the significant potential impacts of extreme weather events and variability in water supplies. Western Governors urge Congress and the Administration to work closely with states and other resource managers to improve predictive and adaptive capabilities for extreme weather variability and related impacts. We specifically urge the federal government to place a priority on improving the sub-seasonal and seasonal precipitation forecasting capabilities that could support water management decision-making.

c. **Water Data Exchange:** The Western Governors' Association and the Western States Water Council have worked together to create the Water Data Exchange, an online portal that will enable states to share their water data with each other, federal agencies, and the public via a common platform. The Governors encourage the use of state water data in planning for both the public and private sectors.

5. **Drought Preparedness and Response:** As exceptional levels of drought persist across the West, Governors are leading on drought preparedness and response through the Western Governors' Drought Forum. The Drought Forum provides a

framework for leaders from states, businesses, non-profits, communities, research organizations and federal agencies to share best practices and identify policy options for drought management. The Governors have identified several areas in need of additional attention from Drought Forum partners, including:

a. **Data and Analysis:** Basic data on snowpack, streamflow and soil moisture is essential to understanding drought. Though a great deal of information already exists, enhanced drought data collection and real-time analysis at a higher resolution is essential. Governors support state and federal efforts to maintain adequate collection of drought and water data, enhance data networks where appropriate, and facilitate better use of existing information.

   The Governors appreciate the collaborative efforts on drought provided through NOAA's National Weather Service River Forecast Centers and Weather Forecast Offices, and the Office of Atmospheric Research's labs and programs, such as the National Integrated Drought Information System (NIDIS).

b. **Produced, Reused, and Brackish Water:** Technology exists to use produced, reused, recycled and brackish water -sources traditionally considered to be marginal or wastewater. Adoption of this technology has been limited by inadequate data, regulatory obstacles, financial barriers, public attitudes and logistical uncertainties. Governors support regulatory streamlining and policy options to encourage use of produced, brackish, and reused water where appropriate.

c. **Forest Health and Soil Stewardship:** Better land management practices for forests and farmland may help improve availability and soil moisture retention. Wildfires can cause sediment runoff in water systems, leading to problems for reservoir management and water quality. Governors support policies and practices that encourage healthy and resilient forests and soils in order to make the most of existing water supplies.

d. **Water Use Efficiency and Conservation:** Public awareness of drought has directed increasing attention to water conservation strategies, both in-home and on-farm. Governors encourage municipal, industrial and agricultural water conservation strategies as drought management strategy.

e. **Infrastructure and Investment:** Water infrastructure to store and convey water is crucial to drought management, but maintenance and expansion of that infrastructure is often difficult to fund. Governors support efforts to make the most of existing infrastructure, while seeking creative solutions to add more infrastructure with limited resources.

f. **Working within Institutional Frameworks to Manage Drought**: Legal frameworks and regulatory regimes can sometimes limit the ability of state, local and federal agencies to respond quickly to drought conditions. Governors believe that innovative, flexible policy solutions, such as streamlined processing of temporary water transfers, should be considered when managing drought.

Policy Resolution 2018-12

Water Quality in the West

A. BACKGROUND

1. Clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.

2. States have federally-recognized authority to manage and allocate water within their boundaries. The Clean Water Act (CWA) Section 101(g) expressly says that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."

3. States and the Environmental Protection Agency (EPA) work together as co-regulators under the CWA and the Safe Drinking Water Act (SDWA). Congress has delegated to states, by statute, the authority to obtain approval to implement certain federal program responsibilities. When a state has been approved to implement a program and the state is meeting minimum program requirements, the role of federal agencies like EPA should be funding, technical assistance, and research support. States should be free to develop, implement, and enforce those requirements using an approach that makes sense in their specific jurisdiction, subject to the minimum requirements of the federal acts.

4. The CWA was last reauthorized in 1987; attempts to reauthorize the Act since then have failed. Current federal regulations, guidance, and programs pertaining to the CWA do not always recognize the specific conditions and needs of most of the West, where water is scarce and even wastewater becomes a valuable resource to both humans and the environment. The West includes a variety of waters; small ephemeral washes, large perennial rivers, effluent-dependent streams, and wild and scenic rivers. In addition to natural rivers, streams and lakes, there are numerous man-made reservoirs, waterways and water conveyance structures. States need more flexibility to determine how to best manage these varying resources.

B. GOVERNORS' POLICY STATEMENT

Clean Water Act (CWA)

1. **State Authority and Implementation of CWA:** States have jurisdiction over water resource allocation decisions and are responsible for how to balance state water resource needs within CWA objectives. New regulations, rulemaking, and guidance should recognize this state authority.

    a) **CWA Jurisdiction:** Western Governors urge EPA and the Corps to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

b) **Total Maximum Daily Loads (TMDLs)/Adaptive Management:** States should have the flexibility to adopt water quality standards and set total maximum daily loads (TMDLs) that are tailored to the specific characteristics of Western water bodies, including variances for unique state and local conditions.

c) **Anti-degradation:** CWA Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA oversight. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new anti-degradation policies or implementation requirements, EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.

d) **Groundwater:** States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders and are primarily responsible for allocating, protecting, managing, and otherwise controlling the resource. The regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources. The federal government should not develop a groundwater quality strategy; instead, it must recognize and respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities.

2. **Permitting:** Actions taken by EPA in its CWA permitting processes should not impinge upon state authority over water management or the states' responsibility to implement CWA provisions.

a) **State Water Quality Certification:** Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. Section 401 is operating as it should, and states' mandatory conditioning authority should be retained without amendment.

b) **General Permits:** Reauthorization of the CWA must reconcile the continuing administrative need for general permits with their site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance that better support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.

c) **Water Transfers:** Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors support EPA's current Water Transfers Rule, which exempts water transfers between waters of the United States from NPDES permitting requirements.

d) **Pesticides:** Western Governors generally support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public

health related pesticide applications to waters of the U.S. and will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies.

3. **Nonpoint Source Pollution:** Nonpoint source pollution requires state watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state, and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy that maintains the non-regulatory and voluntary nature of the program. In general, the use of point source solutions to control nonpoint source pollution is also ill-advised.

   a) **Forest Roads**: Stormwater runoff from forest roads has been managed as a nonpoint source of pollution under EPA regulation and state law since enactment of the CWA. Western Governors support solutions that are consistent with the long-established treatment of forest roads as nonpoint sources, provided that forest roads are treated equally across ownership within each state.

   b) **Nutrient Pollution**: Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the nation, and continued cooperation between states and EPA is needed. However, nutrients produced by non-point sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

      States should be allowed sufficient flexibility to utilize their own incentives and authorities to establish standards and control strategies to address nutrient pollution, rather than being forced to abide by one-size-fits-all federal numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches.

4. **CWA Reauthorization:** The Western Governors support reauthorization of the CWA, provided that it recognizes the unique hydrology and legal framework in Western states. Further, any CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources.

5. **Good Samaritan Legislation:** Congress should enact a program to protect volunteering remediating parties who conduct authorized remediation of abandoned hardrock mines from becoming legally responsible under the CWA and/or the Comprehensive Environmental Response, Compensation, and Liability Act for any continuing discharges after completion of a remediation project, provided that the remediating party – or "Good Samaritan" – does not otherwise have liability for that abandoned mine or inactive mine site.

6. **Stormwater (Wet Weather) Pollution:** In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. The Western Governors emphasize the importance of state primacy in water management, including management of ephemeral streams. State water agencies are well-equipped to provide tailored approaches that reflect the unique management needs of ephemeral streams.

7. **State-Tribal Coordination:** Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective and consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA.

Safe Drinking Water Act (SDWA)

8. **Federal Assistance in Meeting SDWA Standards:** Western Governors believe that the SDWA and its standards for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for the nation. It is essential that the federal government, through EPA, provide adequate support to the states and water systems to meet federal requirements. Assistance is particularly needed for small and rural systems, which often lack the resources needed to comply with federal treatment standards.

9. **Drinking Water Standards:** Contaminants such as arsenic, chromium, perchlorate, and fluoride often occur naturally in the West. Western Governors support EPA technical assistance and research to improve both the efficiency and affordability of treatment technologies for these contaminants. In any drinking water standards that the EPA may revise or propose for these and other contaminants, including disinfection byproducts, EPA should consider the disproportionate impact that such standards may have on Western states and give special consideration to feasible technology based on the resources and needs of smaller water systems.

10. **Risk Assessments:** Analysis of the costs of treatment for drinking water contaminants should carefully determine the total costs of capital improvements, operation, and maintenance when determining feasible technology that can be applied by small systems. These costs should be balanced against the anticipated human health benefits before implementing or revising drinking water standards.

11. **Emerging Contaminants/Pharmaceuticals:** The possible health and environmental impacts of emerging contaminants and pharmaceuticals are of concern to Western Governors. Although states have existing authorities to address possible risks associated with emerging contaminants and pharmaceuticals, there is a need for more reliable science showing impacts on human health as more information regarding these contaminants becomes available.

12. **Hydraulic Fracturing:** States currently employ a range of effective programmatic elements and regulations to ensure that hydraulic fracturing does not impair water quality, including but not limited to requirements pertaining to well permitting, well construction, the handling of exploration and production waste fluids, the closure of wells, and the abandonment of well sites.

    Federal efforts to study the potential impacts of hydraulic fracturing on water quality should leverage state knowledge, expertise, policies, and regulations. Such efforts should also be limited in scope, based upon sound science, and driven by the states. Western Governors oppose efforts that would diminish the primary and exclusive authority of states over the allocation of water resources necessary for hydraulic fracturing.

Compliance with Federal Water Quality and Drinking Water Requirements

13. **State Revolving Funds:** Western Governors support EPA's Clean Water State Revolving Fund (SRF) and Drinking Water SRF as important tools that help states and local communities address related water infrastructure needs and comply with federal water quality and drinking water requirements. Western Governors also urge Congress and the Administration to ensure that the SRF Programs provide greater flexibility and fewer restrictions on state SRF management.

14. **Restoring and Maintaining Lakes and Healthy Watersheds:** Historically, the Section 314 Clean Lakes Program and the Section 319 Nonpoint Source Management Program provided states with critical tools to restore and maintain water quality in lakes and watersheds. Western Governors urge the Administration and Congress to support these programs. Such support should not come at the expense of other federal watershed protection programs.

15. **EPA Support and Technical Assistance:** The federal government, through EPA, should provide states and local entities with adequate support and technical assistance to help them comply with federal water quality and drinking water requirements. EPA should also collaborate with and allow states to identify and establish priority areas, timelines, and focus on programs that provide the largest public health and environmental benefits.

16. **EPA Grant Funding for Primary Service - Rural Water Programs:** Some rural communities still lack basic water and sanitary services needed to assure safe, secure sources of water for drinking and other domestic needs. Adequate federal support, including but not limited to the Rural Utilities Service programs of the Department of Agriculture and SRFs through EPA, are necessary to augment state resources.

Water Quality Monitoring and Data Collection

17. **Water Data Needs:** Western water management is highly dependent upon the availability of data regarding both the quality and quantity of surface and ground waters. EPA should provide support to the states in developing innovative monitoring and assessment methods, including making use of biological assessments, sensors and remote sensing, as well as demonstrating the value to the states of the national probabilistic aquatic resource surveys.

B. <u>GOVERNORS' MANAGEMENT DIRECTIVE</u>

1. The Governors direct WGA staff to work with Congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.

2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.

g. **Communication and Collaboration:** Communication among state officials, federal agency representatives, water providers, agricultural users and citizens is a crucial component of effective drought response. The Western Governors' Drought Forum will continue to provide a framework for sharing best practices through its online resource library, informational webinars, and strategy-sharing meetings for the duration of this resolution.

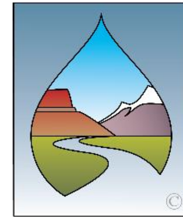
C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.

2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.

West
THE COUNCIL OF STATE GOVERNMENTS



WESTERN STATES
WATER COUNCIL

February 20, 2019

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable R.D. James
Assistant Secretary for the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314

Dear Acting Administrator Wheeler and Assistant Secretary James:

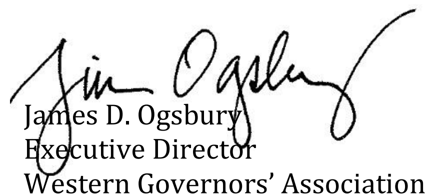
We are aware of reports of efforts within your agencies to develop rules, guidance, or policies that would modify state water certification processes under Section 401 of the federal Clean Water Act (CWA). Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress.

Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and – regardless of whether promulgated through Administrative Procedure Act rulemaking or otherwise – federal action should be informed by early, meaningful, substantive, and ongoing consultation with state officials.

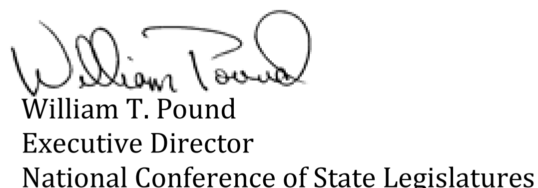
We stand ready to be helpful in that regard. Accordingly, attached please find a list of potential process reforms that would reduce the instances of certification delays or denials, while preserving the balance of state and federal powers in the implementation of the CWA. We have also attached, for your review, prior letters to the White House, Environmental Protection Agency, and Congressional leadership addressing this important issue.

These proposed reforms represent a good starting point for discussions to improve federal permitting processes while protecting state authority. We expect that, with respect to this and other issues, Administration officials will engage states in a productive and substantive manner befitting of a genuine system of cooperative federalism. Moreover, we look forward to discussing these potential reforms with you at your earliest possible convenience.

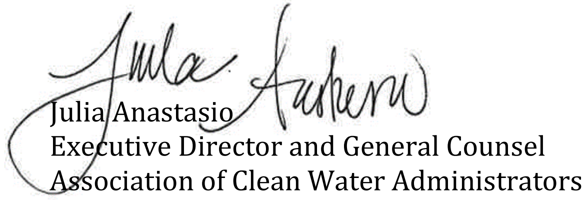
Sincerely,



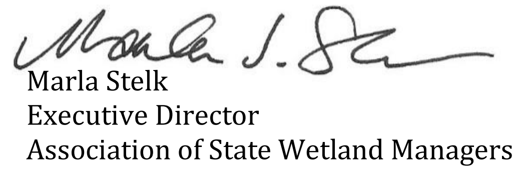
James D. Ogsbury
Executive Director
Western Governors' Association



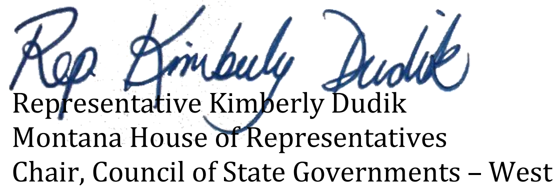
William T. Pound
Executive Director
National Conference of State Legislatures



Julia Anastasio
Executive Director and General Counsel
Association of Clean Water Administrators



Marla Stelk
Executive Director
Association of State Wetland Managers



Representative Kimberly Dudik
Montana House of Representatives
Chair, Council of State Governments – West

Tony Willardson
Executive Director
Western States Water Council

Clean Water Act Section 401: Process Improvements and the Preservation of State Authority

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In response to calls for improvement of the state water quality certification program under Clean Water Act (CWA) Section 401, associations of state officials have developed the following list of potential process improvements to ensure the efficient and effective administration of this vital state authority.

These recommendations are intended to provide federal regulatory bodies positive suggestions for measures that could strengthen the efficiency and efficacy of CWA Section 401 programs by clarifying responsibilities of parties regarding consultation and better defining information required by project proponents in the application process.

These measures are intended to help promote better, more efficient permitting processes in a manner that is consistent with our clear and unambiguous position that state authority must be preserved under any federal action affecting the CWA Section 401 program. The recommendations also address several aspects of cooperative federalism and offer significant opportunities to strengthen the state-federal relationship.

Preservation of Cooperative Federalism

1. Ensure strict adherence to the stated intent of Congress to, "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, and to consult with the [EPA] Administrator in the exercise of his authority," under the CWA.[1]

2. Ensure that any changes to CWA Section 401 or associated regulations, rules, policies, handbooks or guidance do not impair, diminish, or subordinate states' well-established authority to manage and protect water resources.

3. Ensure that any changes to the regulations, rules, policies, handbooks or guidance governing the implementation of CWA Section 401 adhere to precedents of reviewing state and federal courts, particularly to the opinions of the U.S. Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*[2] and *S.D. Warren Co. v. Maine Board of Environmental Protection*.[3]

4. Recognize the authority of states under the CWA and their role as partners with the federal government and co-regulators under the Act by consulting with state officials regarding aspects of the Section 401 program that warrant review and potential reform. Federal agencies should solicit early, meaningful, substantive, and ongoing input from states in the

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[1] 33 U.S.C. § 1251(b).
[2] *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994).
[3] *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 385 (2006), in which the Court emphasizes that, "State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution."

development of regulatory policies intended to clarify states' authority under CWA Section 401 and improve processes in water quality certification.

5. In addition to engaging in early, meaningful, substantive and ongoing consultation with state officials, provide genuine avenues for the solicitation of input from stakeholders and the general public in adherence to CWA Section 101(e).[4]

Timelines for State Review / Waiver of State Authority

1. Recognize that states have up to one year to act on requests for water quality certifications under the CWA Section 401; consult and work with state officials if shorter timelines may be necessary and appropriate.

2. Ensure that any state laws and regulations relating to the processing of requests for water quality certification - including those that require certain information to be submitted with applications for water quality certification - are incorporated into, and given deference by, any federal rules, regulations, policies, guidance, etc.

3. In order to preserve state flexibility, continue to work with states to define "receipt of request for certification"[5] to require applicants for CWA Section 401 certification to submit baseline data and information to states before the commencement of any statutory or regulatory timeline for review. Applications should include, at a minimum, the same information that is required to be submitted to the federal licensing agency to act on associated applications.

4. Adopt policies expressly stating that timelines for state action under CWA Section 401 do not begin until an applicant has submitted a substantially complete application to request the issuance of a water quality certification. Encourage states to adopt – by statute, regulation, or guidance – standards for information that must be submitted for an application to be deemed "substantially complete."

5. Define processes, timelines, and expectations of project applicants for submitting and supplementing information to states (and applicable federal agencies) in relation to any request for CWA Section 401 certification.

Increased Early Coordination and Communication Between Applicants and State/Federal Officials

1. Institute a pre-consultation process involving applicants, states, and federal licensing agencies before the commencement of any prescribed timelines required by a CWA Section 401 review. Such a process should be used to define the parameters of a proposed project and its potential effects on water quality, scope of state review, points of contact, information required to render an application complete and ready for state review (*i.e.*, the commencement of any prescribed timelines for state review), and expectations for supplementing information related to a proposed project.

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[4] 33 U.S.C. § 1251(e), "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."
[5] 33 U.S.C. § 1341(d).

2. Ensure, where appropriate, that material information about water quality certification is included in other environmental review processes (e.g., the National Environmental Policy Act [NEPA], the Endangered Species Act [ESA], etc.).

3. Ensure consistency in the implementation of CWA Section 401 review among federal departments and agencies, and among districts and offices within federal departments and agencies.

4. Ensure that federal agencies include state-imposed certification conditions within federal licenses and permits and that such conditions are being enforced.

Scope of State Review

1. Emphasize the relationships between water quantity, water management, and water quality, and recognize that state water quality certification extends beyond the chemical composition of waters of the United States.

2. Ensure that any regulation, policy, or guidance that defines "other appropriate requirements of state law" is developed through effective consultation with states and adheres to the principles expressed in applicable state and federal case law.

3. Recognize the consistent interpretations of state and federal courts, including the U.S. Supreme Court, that state authority to review and act upon requests for water quality certification under CWA Section 401 is to be construed broadly and that the scope of states' certification authority extends to the proposed activity as a whole.[6]

Data and Staffing

1. To avoid duplicative analysis, ensure that states have access to application information relating to a proposed project's review under other federal statutes (e.g., NEPA, ESA, etc.) to use, when appropriate, in their water quality certification review under CWA Section 401.

2. Ensure extensive consultation and communication between states and the federal government in the process of developing any regulations, rules, policies, guidance or handbooks governing the implementation of CWA Section 401 and associated state authority.

3. Encourage, facilitate and support the development by states of their own best practices for implementation of CWA Section 401 state water quality certification programs, and encourage federal participation in such development.

4. Support the adequate funding and staffing of state and federal agencies charged with implementing CWA Section 401.

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[6] *See, e.g., PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994).

January 31, 2019

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Trump:

Western Governors are aware of reports that the White House is considering issuance of an executive order to address energy infrastructure development and that the order may include provisions affecting the implementation of the state water quality certification program under Section 401 of the federal Clean Water Act (CWA). We urge you to direct federal agencies to reject any changes to agency rules, guidance, or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Further, any executive order (or corresponding federal action) aimed at improving or streamlining the state water quality certification program under CWA Section 401 should be informed by early, meaningful, substantive, and ongoing consultation with state officials who have vast experience and expertise in the program's implementation.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes the primacy of state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses congressional intent to:

> …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, and to consult with the Administrator in the exercise of his authority under this chapter.

This declaration demonstrates the understanding of Congress that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

State authority to certify and condition federal permits of discharges into waters of the United States under Section 401 is vital to the CWA's system of cooperative federalism. This authority helps ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed the issue of state authority and concluded that, "[s]tate certifications under [CWA Section] 401 are 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).

Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively and equitably. We question the need for any federal action to amend or clarify federal policy or regulations governing the implementation of Section 401, as instances of delays or denials

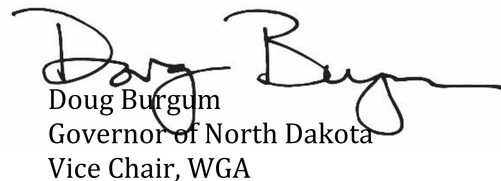
of state water quality certifications are extremely limited. Moreover, the CWA provides ample avenues for challenging state certification determinations.

Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any executive order addressing the implementation of CWA Section 401 should be developed in genuine consultation with states to ensure that the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

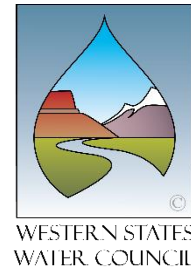
Western Governors are committed to establishing a framework to incorporate the early, meaningful and substantive input of states in the development of federal regulatory policies that have federalism implications. By operating as authentic collaborators in the development and execution of policy, the states and federal government can demonstrably improve their service to the public. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united.

Sincerely,

David Ige
Governor of Hawai'i
Chair, WGA



Doug Burgum
Governor of North Dakota
Vice Chair, WGA



December 3, 2018

The Honorable David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Assistant Administrator Ross:

We understand the Environmental Protection Agency's (EPA) Office of Water is considering regulatory action related to the interpretation of state statutory authority under Clean Water Act (CWA) Section 401. We urge you to reject any changes to agency rules, guidance, and/or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries. Any regulatory action related to states' CWA Section 401 authority raises significant federalism concerns, and therefore, we request that EPA engage in meaningful and substantive consultation with state officials before the commencement of such action.

With the adoption of the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state authority over the allocation, administration, protection, and development of water resources. Section 101 of the CWA clearly expresses Congress's intent to:

> …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, and to consult with the Administrator in the exercise of his authority under this chapter.

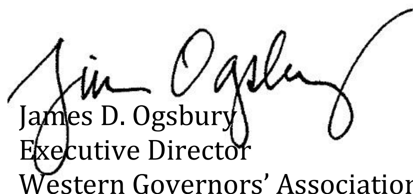
This declaration demonstrates Congress's understanding that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

A vital component of the CWA's system of cooperative federalism is states' authority to certify and condition federal permits of discharges into waters of the United States under Section 401, an authority which has helped to ensure that activities associated with federally-permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that "[s]tate certifications under [CWA Section] 401 are 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).

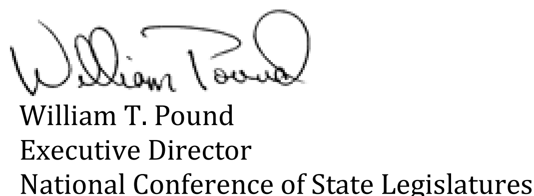
Since the enactment of the CWA, states have exercised their authority under Section 401 efficiently, effectively, and equitably. We question the need for any agency action aimed at amending or clarifying EPA's policy or regulations governing the implementation of Section 401. Instances of delays or denials of state water quality certifications are extremely limited. Where parties wish to contend that a state has exceeded its authority under Section 401, the CWA provides avenues for challenging state certification determinations.

Curtailing or reducing state authority under CWA Section 401, or the vital role of states in maintaining water quality within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any regulatory change to the Section 401 permitting process must not come at the expense of state authority and should be developed through genuine consultation with states. EPA must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. EPA should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

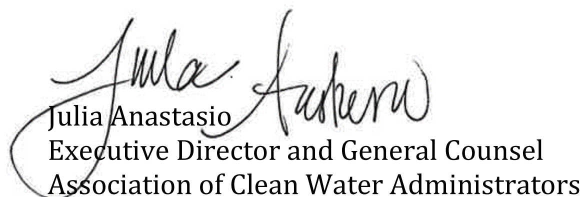
Sincerely,



James D. Ogsbury
Executive Director
Western Governors' Association



William T. Pound
Executive Director
National Conference of State Legislatures



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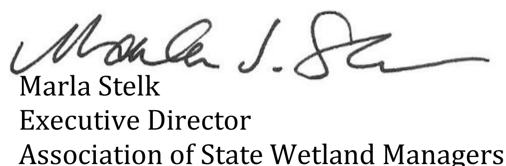
Ed Carter
President
Association of Fish and Wildlife Agencies



Marla Stelk
Executive Director
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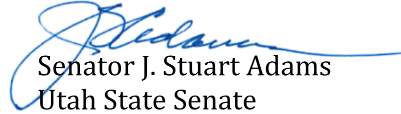

Senator J. Stuart Adams
Utah State Senate
Chair, Council of State Governments - West

Dr. Laura Nelson
Chair
Western Interstate Energy Board

Tony Willardson
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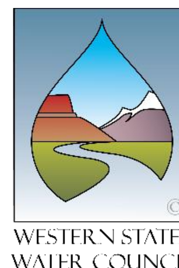

August 9, 2018

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

The Honorable Mitch McConnell
Majority Leader
United States Senate
S-230 U.S. Capitol
Washington, D.C. 20510

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

The Honorable Charles Schumer
Minority Leader
United States Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer, and Representatives Ryan and Pelosi:

We write to express our concerns about various proposals to alter the state certification process under Section 401 of the federal Clean Water Act (CWA). Because each state is unique, we need the flexibility and authority to address our individual water needs. We urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries.

States have primary legal authority over the allocation, administration, protection and development of their water resources. Responsible growth and development, as well as proper environmental management, depend upon the recognition and preservation of state stewardship.

We recognize the importance of partnerships between states and the federal government. To implement the CWA, Congress purposefully designated states as co-regulators under a system of cooperative federalism that recognizes state interests and authority. Congress recognizes the legal position of states in the CWA; Section 101 clearly expresses Congress's intent to:

> 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, and to

> consult with the Administrator in the exercise of his authority under this chapter…Federal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources.

A balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility. The CWA correctly recognizes that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity among states.

A vital component of the CWA's system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401. This authority has helped ensure that activities associated with federally permitted discharges will not impair state water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that, "[s]tate certifications under [Section] 401 are 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).

Curtailing or reducing state authority or the vital role of states in maintaining water quality within their boundaries would inflict serious harm to the division of state and federal authorities established under the Constitution and recognized by Congress in the CWA. Any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not be achieved at the expense of authority delegated to states under the CWA or any other federal law. Any such effort must also recognize, and defer to, states' sovereign authority over the management and allocation of their water resources. We implore you to ensure that the CWA continues to effectively protect water quality while maintaining the proper balance between state and federal authorities.

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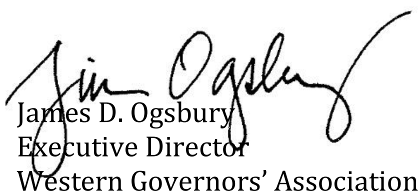

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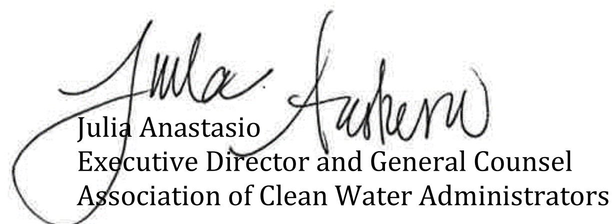

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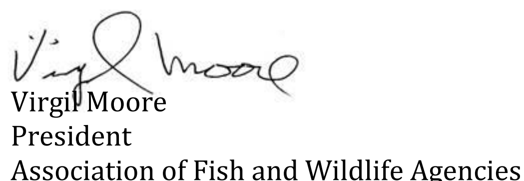

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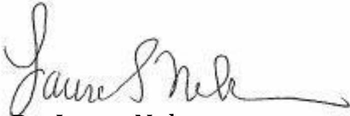
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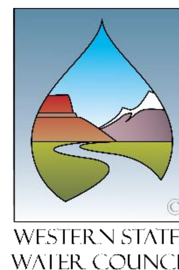

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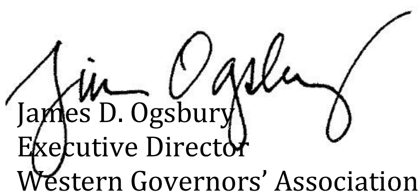

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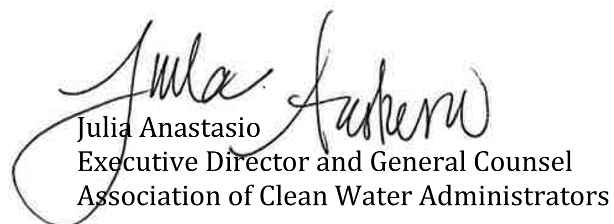
Western Governors' Association



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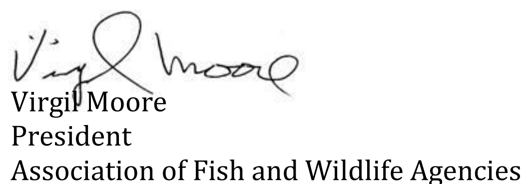

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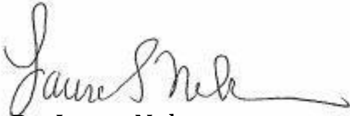
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Western Interstate Energy Board

Tony Willardson
Executive Director
Western States Water Council

Written Testimony of Ward J. Scott, Policy Advisor
Western Governors' Association

Submitted to the United States Senate
Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
June 13, 2018

Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights

Chair Rounds, Ranking Member Booker, and Members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Western Governors' Association (WGA). My name is Ward Scott and I am a Policy Advisor with the Association, where my work focuses on western water policy and state-federal relations.

WGA represents the Governors of 19 western states and three U.S. territories and is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and water resource management and of working collaboratively with the administrative agencies of the federal government.

My testimony will focus on the Western Governors' concerns with the U.S. Army Corps of Engineers (Corps) proposed rule, "Use of [Corps] Reservoir Projects for Domestic Municipal & Industrial Water Supply" (Proposed Rule).[1] Western Governors have consistently expressed their opposition to the Proposed Rule and to any agency rule or policy that would – or has the potential to – interfere with, subordinate, or in any way diminish states' well-established legal authority over water resources within their boundaries.

Western Governors' concerns regarding the Proposed Rule focus on three primary elements. First, the Proposed Rule may have preemptive effects on states' sovereign authority over water resources and corresponding state laws. Second, the Corps' overly-broad proposed definition of the term "surplus waters" includes natural, historic river flows, which should remain under state jurisdiction. Third, the Corps' has not adequately consulted with potentially-affected states, nor has it properly assessed potential federalism implications as required by Executive Order 13132, in its development of the Proposed Rule.[2]

Water is precious everywhere but especially in the West, where consistently arid conditions, diverse landscapes and ecosystems, and growing populations present unique challenges in the allocation and management of scarce water resources. State water laws have developed over the course of decades, and vary greatly to account for local hydrology, the interplay between Tribal, state, and federal legal rights, and complicated systems of water allocation. In the West, water must generally be appropriated under state-granted water rights and is often transferred long distances from its point of diversion to its point of use. Additionally, western water users often possess vested private property rights in water, which are granted and administered by the states. Western

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[1] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[2] WGA Comments, Feb. 27, 2017. Available at: http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf.

state water laws – and the regulatory frameworks within which they operate – are complex and diverse and must be accounted for in the development of any Corps rule or policy.

State Authority over Water Resource Management and Allocation

Western Governors have adopted policy (WGA Policy Resolution 2015-08, Water Resource Management in the West) that articulates a fundamental principle recognized by both Congress and the United States Supreme Court:

> States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.[3]

This well-established state authority is rooted in the U.S. Constitution's Tenth Amendment, which guarantees that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[4] States, upon their admission to the Union, established their sovereign authority over water resources under the Equal Footing Doctrine[5] and continue to maintain this broad authority, unless preempted by federal law.[6] Federal statutes addressing western water management have consistently expressed that states possess primary authority over their water resources and that it is the intent of Congress to preserve and respect such authority and corresponding state laws.[7]

No federal laws cited by the Corps that may be applicable to Proposed Rule expressly or impliedly preempt state's authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)[8] – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law.

Section 1 of the Flood Control Act of 1944 begins with the following: "[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control…"[9] Similarly, in the Water Supply Act of 1958, Congress declared its intent "to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies

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[3] WGA Policy Resolution 2015-08, Water Resource Management in the West. Available at: http://westgov.org/images/editor/RESO_Water_Resources_Final_Version_08.pdf
[4] U.S. Const. amend. X.
[5] *Pollard v. Hagan*, 44 U.S. 212 (1845).
[6] *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 (1842) ("[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."); *see also*, *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *PPL Montana v. Montana*, 565 U.S. 576 (2012).
[7] *See*, *e.g.*, the 1866 Mining Act (43 U.S.C. § 661); the 1877 Desert Land Act (43 U.S.C. §321); the 1920 Federal Power Act (16 U.S.C. §§ 802, 821); the Clean Water Act (33 U.S.C. § 1251(b) and (g)); the 1902 Reclamation Act (43 U.S.C. § 383); *Pollard v. Hagan*, 44 U.S. 212 (1845); *California v. United States*, 438 U.S. 645 (1978).
[8] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[9] 43 U.S.C. § 701-1.

in connection with the construction, maintenance, and operations of Federal navigation, flood control, irrigation, or municipal purpose projects."[10] Although the Corps cites various statements of Congressional intent to justify certain provisions of the Proposed Rule in its NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states' authority over their water resources.

The Corps' Proposed Rule

Through its Proposed Rule, the Corps seeks to establish policies governing the use of its reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system.[11] Although the Proposed Rule attempts to address "specific issues that have arisen most notably in the Corps' Northwestern and South Atlantic Divisions," the Corps has stated that it "is also intended to provide greater clarity, consistency, and efficiency in implementing [the Flood Control Act of 1944 and the Water Supply Act of 1958] nationwide."[12]

Western Governors have expressed their concerns regarding both the substance of the Proposed Rule and the process by which is was developed, both through WGA and individually[13] and remain concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by the Corps or incorporated into its decisionmaking processes. These concerns were heightened by the Corps' listing of the Proposed Rule in the Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions' as currently in its "Final Rule Stage" with a "Final Action" date estimated as January 2019.

Definition and Treatment of "Surplus Waters"

Through the Proposed Rule, the Corps seeks to address the use of its reservoir projects for domestic, municipal, and industrial water supply, and clarify its use of water supply contracts to authorize the withdrawal of "surplus waters" from Corps reservoirs. The Corps' administration of water supply contracts at its reservoirs should not have any negative effect on states' primary authority over the management and allocation of their water resources or state laws enacted for such purposes. The Proposed Rule, however, fails to distinguish between "surplus water," which is defined in relation to storage and authorized purposes, and "natural flows," which is defined as waters that would have been available for use in the absence of federal dams and reservoirs.

Section 6 of the Flood Control Act of 1944 authorizes the Corps to enter into agreements "for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir," provided such uses do not "adversely affect then-existing lawful uses of such water." The statute does not provide a definition for "surplus waters." Under the Proposed Rule, the Corps would define "surplus water" to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir.

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[10] 43 U.S.C. § 390b.
[11] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[12] 81 Fed. Reg. 91558-59.
[13] Western states submitting individual comments to the Corps include: The State of Idaho; the State of Nebraska; the State of North Dakota; the State of Oklahoma; and the State of South Dakota. Comments were also submitted by the Western States Water Council; North Dakota Water Commission; North Dakota Water Users Association; Association of California Water Agencies; and the Texas Commission on Environmental Quality.

The Corps does not claim that federal law preempts state authority over natural flows through the Flood Control Act of 1944, the Water Supply Act of 1958, or any other relevant statute. Nor have states transferred or ceded any rights to, or authority over, the allocation and management of natural flows to the Corps. In its NPRM, the Corps acknowledges that some portion of waters to be defined as "surplus" would exist without Corps' water storage: "The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage."[14]

The proposed definition of "surplus waters" is beyond the scope of the Corps' statutory authority and would usurp states' well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the Proposed Rule would conflict with Congress's clear intent to preserve state water law. Western Governors believe that any definition of "surplus waters" must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

Rulemaking Process

In addition to the substance of the Proposed Rule, Western Governors are concerned about the process by which it was developed. States should be afforded the opportunity to consult with federal agencies as part of the development of any federal rule, policy or decision which may have significant impacts on states' authority – both inherent and delegated. Nowhere is state consultation more important than in the context of water resource management.

Western Governors emphasize in WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship, that federal agencies should, "have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."[15] State consultation should be an ongoing process and should continue from the development stage of any proposed rule throughout its promulgation. As the agencies receive additional information, Governors and the state officials they designate should have the opportunity for ongoing engagement with the agencies to develop refinements to any rule.

Consistent with this policy, Executive Order 13132, Federalism, requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications."[16] These policies include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[17] In its NPRM, the Corps declares that it "do[es] not believe that the

[14] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[15] WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship. Available at: http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf.
[16] 64 Fed. Reg. 43255 (Aug. 10, 1999).
[17] *Id*.

proposed rule has Federalism implications."[18] WGA disagrees with this assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect "on the distribution of power and responsibilities among the various levels of government.").

Proper state consultation in an agency's decisionmaking process produces more durable, informed, and effective policy and allows for genuine partnerships to develop between federal and state officials. Providing states with an opportunity to submit written comments – which is already required under the Administrative Procedures Act - is not the same process as "consultation."[19] Federal courts have relied on an ordinary definition of "consultation" and have concluded that state consultation requires a meaningful opportunity for dialogue between state and federal officials, where federal decisionmakers "seek information or advice from" states or "have discussions or confer with [states], typically *before* undertaking a course of action."[20]

While WGA has submitted written comments under the normal procedures for public input, Western Governors have asserted that states should have been consulted throughout this rulemaking process. In addition to written comments submitted in response to the Corps' Notice of the Proposed Rule, WGA issued letters in August 2013 and again in October 2017 regarding the Corps' failure to adequately engage with states in the development of the Proposed Rule. It is our understanding that Corps officials have conducted little to no outreach to Governors' offices in response to their expressed concerns regarding the Proposed Rule. This failure to consult with states has resulted in a rule that largely ignores state concerns that have been consistently communicated to the Corps.

The Corps should develop rules and policies establishing comprehensive procedures for state consultation, requiring its officials to conduct pre-decisional – as well as ongoing – government-to-government engagement with states through their Governors' offices. Such measures should be implemented prior to any decision in which the Corps asserts jurisdiction over matters traditionally under state authority.

Conclusion

Western Governors have a history of responsible and comprehensive water management within their states and of working with federal agencies on water-related matters. The Proposed Rule has a substantial likelihood of interfering with, impairing, and/or subordinating states' well-established authority to manage and allocate the natural flows of rivers within their boundaries and to implement state water laws.

Any definition of "surplus water" must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. The Corps should not deny access to divert and appropriate such natural flows, nor should the Corps charge storage or access fees where users are making withdrawals of natural flows from Corps reservoirs. No federal statute purports to assert federal jurisdiction over these waters or to preempt state law.

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[18] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[19] *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011).
[20] *The New Oxford Dictionary 369* (2001).

The Corps should consult with states, on a government-to-government level, to better understand the impacts the Proposed Rule may have on states' authority over water resources and ways in which the Corps can partner with states to effectively manage its projects and resources.

This concludes my testimony. Thank you again for providing the opportunity to testify and for bringing attention to these important issues of states' rights and federal responsibilities. I will be happy to answer any questions you have.

WESTERN GOVERNORS' ASSOCIATION

DENNIS DAUGAARD
GOVERNOR OF SOUTH DAKOTA
CHAIR

DAVID IGE
GOVERNOR OF HAWAII
VICE CHAIR

JAMES D. OGSBURY
EXECUTIVE DIRECTOR

June 6, 2018

The Honorable R.D. James
Assistant Secretary for the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314

Dear Assistant Secretary James:

We are writing to express the continued concerns of Western Governors regarding the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (RIN 0710-AA72, Docket ID: COE-2016-0016). The proposed rule, which would affect Corps water reservoir projects located in western states, threatens to interfere with those states' primary authority to manage and allocate water resources within their boundaries. The Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions schedules "Final Action" on the proposed rule for January 2019 and "Final Action Effective" for March 2019. It remains unclear to Western Governors how the Corps plans to engage with, and respond to, states as it moves forward in its rulemaking process.

On December 16, 2016, the Corps issued a Notice of Proposed Rulemaking (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system. In response to the NPRM, the Western Governors' Association (WGA) submitted comments expressing concerns about both the substance of the proposed rule and the process by which it had been developed.

Specifically, the Governors' comments cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132, Federalism; (ii) the various potential preemptive effects of the proposed rule on state authority over water resources; (iii) the Corps' overly-broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority; and (iv) the denial of, or interference with, access to Corps projects for the lawful diversion and appropriation of water under state law. Several other western states also submitted comments to the Corps in response to its NPRM, largely reiterating and expanding upon the concerns expressed by WGA.[1]

[1] Western States that submitted comments to the Corps in response to the NPRM include: The State of Idaho; the State of Nebraska; the State of North Dakota; the State of Oklahoma; and the State of South Dakota. Comments were also submitted by the Western States Water Council; North Dakota Water Commission; North Dakota Water Users Association; Association of California Water Agencies; and the Texas Commission on Environmental Quality.

Western Governors' concerns regarding this issue were initially raised in an August 21, 2013 letter to then-Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy. We cited the Corps' failure to adequately engage with states in its then-pending rulemaking relating to surplus waters. Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues. Western Governors are concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by, or incorporated in, the Corps' decision-making processes in the development of the proposed rule.

States have an historic and unique relationship with the Corps and a vital role in the implementation of several Corps programs, due to states' inherent and sovereign authority over water resources, as well as their statutory role as co-regulators under the federal Clean Water Act. As stated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, federal agencies "should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."

In its 2016 NPRM, the Corps states that the proposed rule is "intended to enhance the Corps' ability to cooperate with state and local interests in the development of water supplies in connection with the operation of its reservoirs," and that it "endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities." As of this date, the Western Governors are unaware of any meaningful outreach on the part of the Corps to engage with states – or respond to their expressed concerns – as part of this rulemaking effort.

Western Governors have a history of responsibly exercising their authority for comprehensive water management within their states and of working cooperatively with various federal agencies in connection with that responsibility. We reiterate our concerns about the Corps' proposed rule, as described in its NPRM, for the following reasons:

- Western Governors continue to believe that the proposed rule does, in fact, have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132.

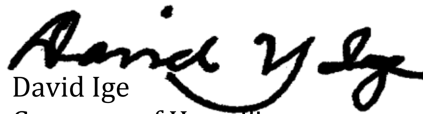
- As the primary authority over water management and allocation within their borders, states must not be required to relinquish or subordinate their sovereign authority over the natural flows of rivers impounded by the Corps or any other federal agencies.

- Legally, the Corps must define "surplus water" to expressly exclude natural flows (and any quantification of such flows) which would have occurred without the development of federal water projects. Natural flows must remain subject to states' authority to allocate water resources for beneficial uses.

- The Corps should not deny, or interfere with, access to divert and appropriate natural flows (*i.e.*, water which would have been available without the construction of Corps impoundments) in its reservoir projects. Similarly, the Corps should not charge storage fees to water users where such users are making withdrawals of natural flows within Corps reservoirs.

Western Governors strongly urge you to engage in meaningful, substantive, and ongoing consultation with states before moving forward with any efforts to develop the proposed rule and to respond to our consistently expressed concerns regarding this matter.

Sincerely,



Dennis Daugaard
Governor of South Dakota
Chair, WGA

David Ige
Governor of Hawai'i
Vice Chair, WGA

WESTERN GOVERNORS' ASSOCIATION

DENNIS DAUGAARD
GOVERNOR OF SOUTH DAKOTA
CHAIR

DAVID IGE
GOVERNOR OF HAWAII
VICE CHAIR

JAMES D. OGSBURY
EXECUTIVE DIRECTOR

October 17, 2017

U.S. Army Corps of Engineers
ATTN: CECW-CO-N
441 G Street, N.W.
Washington, D.C. 20314

Re: COE-2017-0004 – Review of Existing Rules

Dear Sir or Madam:

The U.S. Army Corps of Engineers has issued a Request for Comment as part of its Regulatory Reform Task Force, Review of Existing Rules in accordance with Executive Order 13777, Enforcing the Regulatory Reform Agenda.[1] Section 3(e) of Executive Order 13777 requires each agency's Regulatory Reform Task Force, in evaluating an agency's regulations, to "seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations."[2]

Statement of Interest

The Western Governors' Association (WGA) represents the governors of 19 western states and three Pacific territories, and is an instrument of the governors for bipartisan policy development, information exchange, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and resource management and of working collaboratively with federal administrative agencies. States have an historic and unique relationship with the Corps, largely due to states' inherent authority over water resources, as well as their statutorily-delegated authorities under the federal Clean Water Act (CWA).

WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, observes that the strength of the federal-state partnership in resource management has diminished in recent years.[3] In many cases, agency rules and regulations have encroached on state legal prerogatives, neglected state expertise, and diminished the statutorily-defined role of states in managing federal environmental protection programs. Western Governors appreciate the Corps' recognition of the need for a comprehensive review of agency policies and regulations and welcome the opportunity to provide the Corps with their insights and perspective.

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[1] Request for Comment, 82 Fed. Reg. 33470 (Jul. 20, 2017); Extension of Comment Period, 82 FR 43314 (Sep. 15, 2017).
[2] Exec. Order No. 13777 (Feb. 24, 2017), *published in* 82 Fed. Reg. 12285 (Mar. 1, 2017).
[3] Western Governors' Association Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*. Available at: http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf.

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WESTGOV.ORG

Proper Consultation with State Officials in the Rulemaking Process

As stated in WGA Policy Resolution 2017-01, federal agencies, "should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."[4] Similarly, in WGA Policy Resolution 2017-04, *Water Quality in the West*, Western Governors urge the Corps "to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation."[5]

The Corps has contemplated the concept of consultation in the context of its engagement with federally-recognized Indian tribes. In this particular context, the Corps has defined "consultation" as an:

> Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands. [6]

This consultation policy is based upon the principle that federally-recognized Indian tribes possess sovereign status and are to be afforded government-to-government, pre-decisional consultation in the development of any Corps' rule which may significantly affect tribal resources, rights, or lands. The Corps' tribal consultation policy also recognizes that "each of the 565 federally recognized American Indian and Alaska Native Tribes are distinct and separate governments, requiring a consultation process that may be completely unique to them."

States – possessing sovereign authorities under the U.S. Constitution, as well as delegated authorities under federal statute – should be afforded a similar opportunity for robust and complete consultation as part of any agency rulemaking which may have significant impacts on states' resources, rights, or lands. The Corps should develop rules and policies to establish comprehensive procedures for consultation with states, recognizing states' sovereignty and requiring agency officials to conduct pre-decisional government-to-government state consultation.

Respecting States' Primary Authority over Water Resources

Nowhere is effective state consultation more important than in the context of water resources. States possess primary authority for managing, allocating, administering, protecting, and developing their water resources and are primarily responsible for water supply planning within

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[4] *Id*.
[5] Western Governors' Assoc., Policy Resolution 2017-04, *Water Quality in the West*. Available at: http://westgov.org/images/editor/PR_2017-04_Water_Quality.pdf
[6] http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013_nap_brochure.pdf

their boundaries. State water laws have developed over the course of decades to reflect local customs and necessities. Accordingly, these state laws – and the regulatory frameworks within which they operate – are complex and diverse. Deference to states' primacy in water management and allocation decisions is a well-established principle of federal case law and is unambiguously repeated throughout federal statutory authority. The U.S. Supreme Court has consistently held that states established their sovereign authority over water resources upon their admission to the Union under the Equal Footing Doctrine of the Constitution and continue to rightfully exercise such authority under their own laws.[7] States' authority over water resources, and the legal structures under which such authority is executed, must receive effective and express deference where any Corps action threatens any type of federal preemption.

Two rules currently being developed by the Corps exemplify the need to clearly recognize and respect this important balance of powers:

- **Defining "Waters of the United States"**

  States should be consulted and engaged in any Corps rulemaking which defines "waters of the United States" or affects states' authority under the CWA, which expressly provides that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."[8] Western Governors previously expressed their concerns to the Corps regarding the lack of substantive state consultation during the promulgation of the 2015 Clean Water Rule.[9] Renewed rulemaking efforts addressing this critical subject have been encouraging, as the Corps and EPA have conducted early outreach with states. Importantly, these efforts have involved direct communications with individual states through their Governors. WGA strongly urges the Corps to pursue ongoing consultation with Governors throughout the substantive development of any new rule affecting the scope of the CWA.

- **"Surplus Water" Rule**

  On December 16, 2016, the Corps issued a Notice of Proposed Rulemaking (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of purported "surplus water" within that system.[10] In response to the NPRM, Western Governors submitted comments expressing their concerns regarding both the substance of the proposed rule and the process by which it had been developed. Specifically, the governors' cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132; (ii) the various potential preemptive effects of the proposed rule on states' primary and federally-delegated authorities over their water resources; and (iii) the Corps' overly-

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[7] *See*, *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142 (1935); *California v. United States*, 438 U.S. 645 (1978); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).
[8] 33 U.S.C. § 1251(g).
[9] Western Governors' Assoc. Letter, Nov. 14, 2015. Available at: http://westgov.org/images/editor/LTR_Waters_of_the_US_Comments_Final_1.pdf
[10] 81 Fed. Reg. 91556 (Dec. 16, 2016).

broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority.[11] Western Governors are concerned that the procedural, legal, and technical issues which arose under this rulemaking process remain unaddressed in Corps' rulemaking policies.

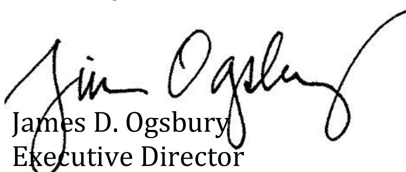
Conclusion

WGA appreciates the opportunity to provide this assessment of areas in which the communication and collaboration between the Corps and state governments can be reinforced and strengthened.

Western Governors are excited to work in true partnership with federal administrative agencies toward positive and productive outcomes. By operating as authentic collaborators on the development and execution of agency rules and policy, states and federal agencies can demonstrably improve their service to the public.

We look forward to working with the Corps in this effort and appreciate your attention to these important matters.

Sincerely,



James D. Ogsbury
Executive Director

[11]Western Governors' Assoc. Letter, Feb. 27, 2017. Available at: http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf.

WESTERN GOVERNORS' ASSOCIATION

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February 27, 2017

U.S. Army Corps of Engineers
ATTN: CECC-L
441 G Street, N.W.
Washington, D.C. 20314

Re: COE-2016-0016 – Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Dear Sir or Madam:

The U.S. Army Corps of Engineers (USACE) has issued a Notice of Proposed Rulemaking concerning policies governing the use of its reservoir projects within the Missouri River Basin, pursuant to Section 6 of the Flood Control Act of 1944, 33 U.S.C. § 708, and the Water Supply Act of 1958, 43 U.S.C. § 390b, (hereafter the "NPRM"). Specifically, USACE invites interested parties to comment on, "the proposed definition of 'surplus water,' for purposes of Section 6."[1]

Statement of Interest

WGA represents the governors of 19 western states, as well as three U.S.-flag islands, and is an instrument of the governors for bipartisan policy development, information exchange, and collective action on issues of critical importance to the western United States.

States are the primary legal authority for the allocation, management, protection, and development of water resources, and are responsible for water supply planning within their respective borders. The NPRM suggests regulations that would affect USACE water reservoir projects located within the boundaries of upper Missouri River Basin states, the Governors of which are members of WGA.

Western Governors' Analysis and Recommendations

WGA has previously expressed its concerns to USACE regarding any administrative actions intended to regulate so-called "surplus waters." On August 21, 2013, WGA issued a letter to the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), regarding USACE's failure to adequately engage with states in its pending rulemaking relating to surplus waters.[2] Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a

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[1] 81 FR 91556, Dec. 16, 2016.

[2] Available at: http://westgov.org/letters-testimony/342-water/503-letter-army-corps-of-engineers-surplus-water-rulemaking.

letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues.[3] Western Governors are concerned that the procedural, legal, and technical issues cited in both letters were not addressed by USACE in advance of the development and announcement of the NPRM.

Consultation Deficiencies

Western Governors have been explicit regarding what, in their estimation, constitutes proper "consultation" between federal agencies and states. As stated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, federal agencies should, "have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful,* and *substantive* input in the development of regulatory policies that have federalism implications." Consistent with gubernatorial policy, Executive Order 13132, "Federalism," requires federal agencies, including USACE, to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications."[4]

In the NPRM, USACE declares that it, "do[es] not believe that the proposed rule has Federalism implications."[5] For reasons described below, WGA disagrees with this assertion. The NPRM clearly qualifies for further review under Executive Order 13132, as its provisions would have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[6]

States' Legal Authority Over Water Resources

Having developed over the course of decades to reflect local customs and necessities, state water laws – and the regulatory frameworks within which they operate – are significantly diverse.[7] Federal case law and statutory authority provide a clear history of deference to state primacy in water management and allocation decisions. The U.S. Supreme Court has

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[3] Available at: http://www.westernstateswater.org/wp-content/uploads/2017/01/Darcy_USACE-Storage-Water-Letter_2013July.pdf
[4] 64 FR 43255, Aug. 10, 1999.
[5] 81 FR 91556, at 123, Dec. 16, 2016.
[6] 64 FR 43255, Aug. 10, 1999.
[7] *California v. United States*, 438 U.S. 645, 653 (1978).

consistently expressed that states established their sovereign authority over water resources upon their admission to the Union under the Equal Footing Doctrine[8] and continue to maintain such authority under their own legal structures.[9]

The Tenth Amendment of the U.S. Constitution ensures that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[10] States, subsequent to their admission into the Union under equal footing, have not relinquished their sovereign powers to allocate and manage water resources. Rather, states – particularly in the western U.S. – have a rich history of comprehensive water regulation devised under their respective laws.

Unlike states' plenary authority to regulate water and land-use generally, federal powers are limited to those which have been enumerated in the U.S. Constitution. No applicable federal laws purport to preempt, expressly or by implication, state water-management authority. Numerous federal statutes reiterate that states possess primary authority over water resources within their respective borders and that it is the intent of Congress to preserve and respect such authority.[11] The two federal statutes USACE intends to "clarify" through these rulemaking efforts expressly and unambiguously recognize state primacy. Section 1 of the Flood Control Act of 1944 begins with the following:

> "[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control…"[12]

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[8] *Pollard v. Hagan*, 44 U.S. 212 (1845).

[9] *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 ("[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."); *see also*, *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *PPL Montana v. Montana*, 565 U.S. 576 (2012).

[10] U.S. Const. amend. X.

[11] *See* Mining Act of 1866, 43 U.S.C. § 661; Desert Land Act of 1877, 43 U.S.C. § 321; Clean Water Act, 33 U.S.C. § 1251(b); Reclamation Act of 1902, 43 U.S.C. § 383-8 ("Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder…).

[12] 43 U.S.C. § 701-1.

Similarly, in the Water Supply Act of 1958, Congress declared its intent, "to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers…."[13] Although USACE cites congressional intent to justify certain provisions in the NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states' authority to manage and allocate their water resources.

The NPRM pronounces that, "the Corps endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities."[14] The text of the NPRM is rife with references to the importance of state authority over water resource management and USACE's intention to respect the same.[15] Western Governors, however, are concerned that certain provisions, as described within the NPRM, would substantially interfere with states' sovereign authority to manage and allocate water resources and that the proposal exceeds USACE's legal authority over state-managed water resources.

Definition of "Surplus Waters"

While the NPRM asks for comments on the proposed definition of "surplus waters," Western Governors assert that there is only one legally legitimate definition: any attempt to define "surplus water" must exclude natural, historic flows from any quantification of waters subject to any USACE regulation.

For reasons stated above, states have primary authority to manage and allocate water resources within their respective borders. USACE does not claim, nor do the facts reflect, that any state has relinquished such authority under the Flood Control Act of 1944, the Water Supply Act of 1958, or any other federal statute. While USACE may have viable claims to some level of discretion over waters that are impounded in USACE reservoirs which would not have existed but for the construction of USACE projects (*i.e.,* truly "surplus waters"), Missouri River Basin states have never ceded any rights to the natural flows that existed prior to USACE projects.

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[13] 43 U.S.C. § 701-1

[14] 81 FR 91556, Dec. 16, 2016.

[15] *See* 81 FR 91556, *supra* note 1 (e.*g*., "The proposed rule is not intended to upset the balance between federal purposes and State prerogatives, or to assert greater federal control over water…"; "The operations of Corps projects for those purposes are not expected to interfere with the prerogatives of the States to allocate waters within their borders for consumptive use.").

States' rights to these natural flows, as well as access to the waters within their borders, should not be denied through any agency rule or actions. Additionally, natural flows should be exempt from any monetary charges imposed for water storage within USACE reservoirs. Such waters would exist within the streambed in the absence of USACE reservoirs and, therefore, should not be subject to federal management or the imposition of fees.

USACE concedes that some portion of waters which have been defined as "surplus" in the NPRM would, in fact, exist without USACE water storage: "The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage."[16] It is, therefore, WGA's position that natural flows should be expressly and clearly exempted from any USACE rule which claims any degree of authority to manage and/or allocate "surplus water."

Conclusion

Western Governors have a history of responsible and comprehensive water management within their states and of working with various federal agencies in furtherance of that duty. Through this letter, the WGA expresses its concerns to USACE regarding the NPRM, in its current form, for the following reasons:

- Western Governors believe that the NPRM does, in fact, have "Federalism" implications which trigger the expanded procedural rulemaking requirements of Executive Order 13132.

- As the primary authority over water management and allocation within their borders, states must not be required to relinquish any of their rights to natural flows of rivers which have been impounded by USACE or any other federal agencies.

- Legally, USACE must define "surplus water" to expressly exclude natural flows (and any quantification of such flows) which would have occurred without the development of federal water projects. Natural flows must remain subject to states' authority to allocate water resources for beneficial uses.

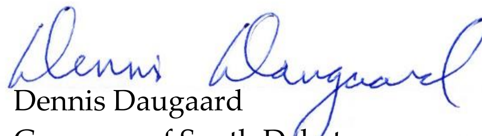
- USACE should not deny access to divert and appropriate natural flows (*i.e.*, water which would have been available without the construction of USACE impoundments) in its

[16] *Id.*

reservoir projects. Similarly, USACE should not charge storage fees to appropriators where such users are making withdrawals of natural flows within USACE reservoirs.

WGA strongly urges USACE to engage in meaningful and substantive consultation with Governors before moving forward with any rulemaking as described in the NPRM.

Sincerely,



Steve Bullock	Dennis Daugaard
Governor of Montana	Governor of South Dakota
Chair, WGA	Vice Chair, WGA