November 14, 2014

Honorble Gina McCarthy                      Honorble Jo-Ellen Darcy
Administrator                                 Assistant Secretary of the Army
U.S. Environmental Protection Agency         (Civil Works)
1200 Pennsylvania Avenue, NW (1101A)         108 Army Pentagon
Washington, D.C. 20460                      Washington, D.C. 20310

Re: Docket ID No. EPA-HQ-OW-2011-0880 – Definition of “Waters of the United States” Under the Clean Water Act

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Western Governors’ Association (WGA) submits the following comments on the proposed rule regarding the jurisdiction of the Clean Water Act (CWA), as published in the Federal Register by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps).¹

STATEMENT OF INTEREST:

The WGA represents the Governors of 19 Western states and 3 U.S.-flag islands. The association 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.

Clean water is essential to strong economies and quality of life, and states are best positioned to manage their water resources. The Western Governors recognize the importance of state primacy over water in their 2014 Policy Resolution, Water Quality in the West.

States have significant authority and responsibility regarding water management. It is imperative that any policies developed by EPA and the Corps affecting water resources be crafted in a manner consistent with state laws governing water allocation and water quality. States are the primary authority for allocating, administering, protecting and developing water resources and are primarily responsible for water supply planning within their boundaries. Further, many states also administer both point and non-point source water quality programs under delegated federal authority through the CWA.

¹ 79 Fed. Reg. 22187, April 21, 2014
WESTERN GOVERNORS’ ANALYSIS AND RECOMMENDATIONS:

The Western Governors thank the agencies for extending the comment period on the proposed rule by an additional 25 days. We note, however, that we have twice requested a 180-day extension of the comment period. Those requests for additional review time were submitted to allow states the opportunity for sufficient analysis of the proposed rule’s potential implications for water management within their boundaries. Further, states deserve time for full evaluation of the Science Advisory Board’s (SAB) report on the connectivity of streams and wetlands to downstream waters, which was released just weeks before the comment deadline.

As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of state waters. While we appreciate the outreach from EPA and the Corps since the release of the proposed rule, we note that the agencies did not engage the states in substantive consultation prior to the release. Extending the comment period would allow for meaningful consultation between your agencies and the states. This is particularly imperative because the SAB panel for the review of the EPA water body connectivity report includes no state representatives at all. That report was therefore developed without the regulatory expertise, scientific resources and on-the-ground knowledge possessed by state professionals.

Substantive Concerns

The Western States Water Council (WSWC) has submitted detailed comments providing Western states’ shared technical analysis of the proposed rule. The Western Governors support that analysis and ask that the WSWC comment letter be incorporated by reference in our comments.

The Governors would like to highlight several key concerns:

- **Limits on Federal Regulatory Discretion**: The Western Governors appreciate the proposed rule’s objective to clarify the meaning of “Waters of the United States” in the CWA. Any changes within the proposed rule must stay within the limits set by

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2 Western Governors’ Association letters to Administrator Gina McCarthy and Assistant Secretary Jo-Ellen Darcy dated May 30, 2014 and August 27, 2014.
3 EPA Science Advisory Board (SAB) membership listed online as of October 17, 2014.
4 Western States Water Council letter to Administrator Gina McCarthy and Assistant Secretary Jo-Ellen Darcy dated October 15, 2014.
Congress and the Supreme Court,\(^5\) recognizing the authority of states to manage water within their boundaries.

- **Connectivity:** The Governors appreciate that the SAB’s connectivity study was released prior to the close of the proposed rule’s comment period. We note with concern, however, that the Board has indicated its support for utilizing connectivity of water as a scientific basis for even broader federal agency jurisdiction under the CWA than what is now suggested under the proposed rule.\(^6\) We urge you to remember that legal authority and precedent are at the core of the question of the agencies’ jurisdiction under the Act. Both hydrology and laws vary from state to state. The best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with — and intimately understand — the issue at hand.

- **Economic Impacts:** The Western Governors are also concerned about the potential for the proposed jurisdictional rule to impact state economies. Some analyses indicate that the agencies may have underestimated the economic impact of the proposed rule.\(^7\) Water is crucial to Western economies; because of this, we ask that you critically and completely examine the potential for the proposed rule to impact state and local economies.

**Conclusion**

Agencies should engage with the states in the earliest stages of rule development rather than after their publication for public comment. This is especially important with respect to rules that have significant federalism implications and potentially dramatic impacts on state authority, such as those in the areas of water resource management and water quality. As stated in their 2014 Policy Resolution, *Respecting State Authority and Expertise*, the Western

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Governors support early, meaningful and substantial state involvement in the development, prioritization and implementation of federal environmental statutes, policies and rules.

With respect to the current rulemaking process, we request that you carefully consider the comments submitted by the WSWC and individual states, recognizing that, in many cases, the states have authority to administer the CWA.

Thank you for your consideration.

Regards,

Brian Sandoval
Governor, State of Nevada
Chairman, WGA

John Kitzhaber, M.D.
Governor, State of Oregon
Vice Chairman, WGA
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). The U.S. Congress has provided for, by statute, the authority for states 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, 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 of the CWA 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 the 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 generally 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 maintain 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 are concerned about efforts to treat forest roads as point sources under the NPDES program and 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.

1. **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.

2. **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)**

3. **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.
4. **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.

5. **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.

6. **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.

7. **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**

8. **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.
9. **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.

10. **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 states to identify priority areas and focus on programs that provide the largest public health and environmental benefits.

11. **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 State Revolving Funds through EPA, are necessary to augment state resources.

**Water Quality Monitoring and Data Collection**

12. **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.

**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’ Association  
Policy Resolution 2014-09  

*Respecting State Authority and Expertise*

### A. BACKGROUND

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

2. States derive a number of independent rights and responsibilities under the U.S. Constitution. The 10th Amendment details the division of power between the federal government and states. “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.”

3. Further, the U.S. Congress has, by statute, provided for the delegation to states of authority over certain federal program responsibilities. Many federal environmental programs are statutorily authorized to be delegated to states that wish to undertake those responsibilities.

4. 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 in America, 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.

5. 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 unnecessary and often duplicative documentation. In many cases, these federal actions encroach on state prerogatives, especially in natural resource management. These federal actions neglect state expertise and diminish the statutorily-defined role of states in exercising their authority to manage delegated environmental protection programs.

6. The current fiscal environment exacerbates the tensions between states and federal agencies. Increasingly, states are required to expend their limited resources to operate regulatory programs over which they have less and less strategic control.
B. GOVERNORS’ POLICY STATEMENT

1. Except as mandated by Congress, the management of resources through the establishment of environmental standards and natural resource planning goals, as well as the means of achieving those standards and goals, should be left to the states.

2. Western Governors support early, meaningful and substantial state involvement in the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budget proposals, budget processes and strategic planning. The U.S. Congress and appropriate federal agencies should provide expanded opportunities for such involvement, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders.

3. When a state is meeting the minimum requirements of a delegated program, the role of federal agencies should be limited to the provision of funding, technical assistance and research support. States should be free to develop implementation and enforcement approaches that make sense within their jurisdictions, without intervention by the federal government.

4. Prior to any intervention in state-run programs, federal agencies should consult with states in a meaningful way, and on a timely basis.
   
   a. Predicate Involvement: Federal agencies should take into account state data and expertise in development and analysis of underlying science which serves as the legal basis for federal regulatory action. Accordingly, states merit greater representation on all relevant EPA Science Advisory Board (SAB) Committees and other panels advising the agency on scientific, technological, social and economic issues that inform its regulatory process.

   b. 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 for finalization).

   c. Post-Publication / Pre-Finalization Stage: As they receive additional information from state agencies and non-governmental entities, Governors and other state officials should have the ability to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.
d. **Rule / Policy Implementation**: Significant deference – as provided for by Congress in various enacting statutes (including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, among others) -- should be granted to states in formulation of state plans designed to implement delegated programs.

5. Western Governors have identified several specific areas where state environmental and natural resource management prerogatives are diminished by federal agencies’ settlement of litigation without consultation with states. Where their roles and responsibilities are impacted states should, at a minimum, be consulted during settlement negotiations.

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.

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.