



WESTERN GOVERNORS' ASSOCIATION

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June 19, 2017

Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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Washington, D.C. 20460

Honorable Douglas W. Lamont, P.E.
Senior Official Performing the Duties
of the Assistant Secretary of the
Army for Civil Works
U.S. Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator Pruitt and Acting Assistant Secretary Lamont:

The Western Governors' Association (WGA) submits the following comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) in response to the agencies' March 6, 2017, Federal Register announcement ([82 FR 12532](#)) and request for comments from states, in connection with your renewed efforts to promulgate an administrative rule defining "Waters of the United States" as that term applies to the jurisdictional scope of the federal Clean Water Act (CWA).

STATEMENT OF INTEREST

WGA represents the Governors of 19 western states and 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. Western Governors recognize that clean water is essential to strong economies and quality of life, and that states are best positioned to manage their water resources.

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. CWA Section 101(g) expressly states that, "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."¹ It is imperative that any policies developed by EPA and the Corps affecting water resources be consistent with, and respective of, state laws governing water management, allocation, planning, and protection.

¹ 33 U.S.C. § 1251(g).

State water laws have developed over the course of decades to reflect local customs and necessities. Accordingly, these laws – and the regulatory frameworks within which they operate – are significantly diverse. Deference to state primacy in water management and allocation decisions is a well-established principle of federal case law and 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 and continue to maintain such authority under their own legal structures.²

As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management, allocation, or protection of water resources. Western Governors [were quite concerned](#) about the lack of substantive consultation with states during the promulgation of the 2015 Clean Water Rule. Governors are encouraged by the recent efforts of both EPA and the Corps to conduct early outreach in this renewed rulemaking process. Importantly, these efforts have involved direct outreach to individual states through their Governors. WGA strongly urges the agencies to pursue continued consultation with Governors throughout the substantive development of any new rule under the CWA.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS

WGA will defer to individual western states to submit to EPA and the Corps their own substantive comments addressing “Waters of the United States.” WGA, however, would like to highlight the following procedural matters as this rulemaking moves forward:

- **Limits on Federal Regulatory Discretion.** Western Governors appreciate the agencies’ objective to clarify the meaning of “Waters of the United States.” All content of the proposed rule must be bounded by the limits established by Congress and the U.S. Supreme Court, and must expressly and effectively recognize the primary authority of states to manage and allocate water resources within their boundaries.
- **Consultation with States.** As stated in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, Western Governors believe that 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.” Similarly, in WGA Policy Resolution [2017-04](#), *Water Quality in the West*, Western Governors, “urge EPA and the

² 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* (SWANCC), 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

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.”

Both EPA and the Corps conducted early outreach to WGA and Western Governors in connection with this renewed rulemaking effort. Western Governors encourage the agencies to continue this approach and use this rulemaking as an opportunity to establish working relationships with individual Governors’ offices. Substantive consultation with states 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 prior to its becoming final.

- **Inclusion and Utilization of State Science.** Federal agencies should take into account state data and expertise in development and analysis of science upon which any new “Waters of the United States” rule is predicated. Additionally, states merit greater representation on all relevant committees and panels, including EPA’s Science Advisory Board, and should be asked to advise the agencies on scientific, technological, social, and economic issues relating to Waters of the United States and the CWA.
- **Economic Impacts.** Western Governors are also concerned about the potential impacts of any new CWA rule on states’ economies. Some analyses indicate that the agencies may have underestimated the economic impact of the 2015 Clean Water Rule. Water is crucial to western economies; because of this, we ask that you critically and completely examine the potential for any proposed rule to affect state and local economies.

CONCLUSION

Clean water is essential to strong economies and quality of life, and states are best positioned to plan and manage the use and protection of their water resources. States possess primary jurisdiction over water resource allocation decisions and are responsible for balancing state water resource needs within CWA objectives. New agency regulations, rulemaking, and guidance affecting water management or protection should recognize and respect this historic and well-established authority.

Western Governors support early, meaningful, and substantive involvement with EPA and the Corps throughout the development, prioritization, and implementation of federal environmental statutes, policies, and rules. Federal agencies should engage with Governors and their designees in the earliest stages of rule development rather than after their publication

Honorable E. Scott Pruitt
Honorable Douglas W. Lamont, P.E.
June 19, 2016
Page 4

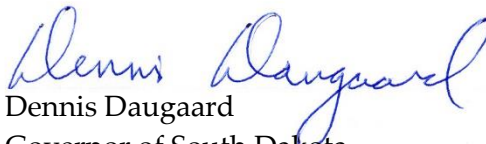
for public comment. This is especially important with respect to rules that have significant federalism implications and material impacts on state authority, such as those involving water resource management and water quality.

Western Governors recognize the essential role of partnerships between the states and federal agencies and the tradition of cooperative federalism in protecting our nation's waters. WGA recognizes the EPA and the Corps for your positive efforts in beginning a dialogue with Western Governors in this renewed rulemaking process. We request that you pursue future state consultation with diligence and carefully consider the comments submitted in this letter, as well as those submitted by individual states, recognizing states' authority and unique role in the implementation of the CWA for the protection of their water resources.

Sincerely,



Steve Bullock
Governor of Montana
Chair, WGA



Dennis Daugaard
Governor of South Dakota
Vice Chair, WGA