**WATER QUALITY COMMITTEE**

**WORK PLAN**

**July 1, 2014 to June 30, 2015**

**1. HYDRAULIC FRACTURING**

**Work-to-Date:** The Environmental Protection Agency (EPA) is preparing a study on the relationship between hydraulic fracturing and drinking water, a final draft of which is expected in 2014. In May 2013, the Bureau of Land Management (BLM) also issued a proposed rule for hydraulic fracturing on public lands, which includes a variance process that would allow states to propose their own standards if they can prove that their regulations meet or exceed the requirements in BLM’s rule. In addition, EPA, the Department of Energy (DOE), and the Department of the Interior (DOI) agreed in April 2012 to develop a “Multi-Agency Unconventional Oil and Gas Research Program” to support policy decision by relevant state and federal agencies. The effort is intended to help support the White House’s March 2011 “Blueprint for a Secure Energy Future.”

The Western Governors’ Association ((WGA) Resolution #2014-4) and WSWC Position #353 state that: (1) federal efforts involving hydraulic fracturing should leverage state knowledge, experience, policies, and regulations; (2) such efforts should be limited, based upon sound science, and driven by states; and (3) that both organizations oppose any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing.

**2014-2015:** The Committee will work with the Water Resources and Legal Committees to support the WGA and WSWC positions, and will continue to monitor and update the WSWC on developments involving hydraulic fracturing, including but not limited to EPA’s study, BLM’s proposed rule, and the EPA/DOE/DOI research program.

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

**Time Frame:** 2014

**2. WATER QUALITY/QUANTITY NEXUS**

**Work-to-Date:** Paragraph (B)(3) of WGA Resolution #2014-03 states: “Western Governors believe solutions to water resource challenges require an integrated approach within states and with federal, tribal and local partners. Water resource planning should occur within a framework that preserves states’ authority to manage water through policies which recognize state law and the financial, environmental and social values of the water resource to citizens of the western states today and in the future.” (emphasis added)

**2014-2015:** In conjunction with the Water Resources and Legal Committees, the Committee will hold an invitation only workshop to bring together state experts and other relevant stakeholders to discuss the interaction between water quality and quantity. The purpose of the workshop will be to produce findings and policy options for the WSWC to consider as it supports WGA Resolution #2014-03 by providing further insight on: (1) how state water quantity and quality regulations interact with each other; (2) how states can protect water quality within the existing framework of the prior appropriation doctrine; and (3) the proper relationship between federal environmental protections and the states’ primary and exclusive authority over the allocation of water resources. Under the WSWC’s direction, WSWC staff will prepare a summary of the meeting.

**Time Frame:** 2015

**3. CLEAN WATER ACT ISSUES**

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

**a. CWA Jurisdiction\***

**Work-to-Date:** In 2011, the EPA and the U.S. Army Corps of Engineers released draft guidance intended to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001),and *Rapanos v. United States*,  [547 U.S. 715](http://en.wikipedia.org/wiki/Case_citation) (2006).

In September 2013, the EPA and Corps withdrew the draft guidance. At the same time, the agencies announced that they had submitted a draft rule to clarify CWA jurisdiction to the Office of Management and Budget (OMB) for interagency review. In addition, EPA announced that its Science Advisory Board is developing a report on the connection between different bodies of water. EPA released the report for public comment in September 2013, and has indicated that the final connectivity report will inform the final rule.

In 2013, the WSWC wrote EPA and the Corps a series of five letters based on WSWC Position #330.5 to: (1) express concern about the agencies’ process in developing the rule; (2) urge them to engage in greater consultation with the states and to comply with the state consultation criteria of Executive Order 13132; and (3) to comment on the draft connectivity report.

In addition, the WSWC created a CWA Rulemaking Workgroup to gather information on the WSWC member states’ perspectives regarding the rulemaking and to identify further areas of consensus among the western states regarding the rulemaking. In March 2014, the workgroup developed a letter that the WSWC sent to EPA and the Corps on March 10, setting forth a list of additional consensus comments on the rulemaking, including a list of waters and features that should be excluded from the rule’s definition of “waters of the U.S.” The letter also asked the agencies not to publish a proposed rule for public comment until the connectivity report is final. The Western Governors’ Association (WGA) sent a subsequent letter on March 25, 2014, that cited the WSWC’s March 10 letter and urged the agencies to consult with the states individually and through the WGA before taking further action on the rulemaking.

On April 21, 2014, EPA and the Corps published a proposed rule in the Federal Register with an initial 90-day public comment period that was later extended to October 20, 2014, following requests from the WGA and other organizations for an extension.

The WSWC adopted a resolution regarding CWA rulemaking efforts on July 18, 2014, during its summer meetings in Helena, Montana. The resolution replaces WSWC Position #330.5 and is based on the WSWC’s letter regarding the rulemaking as well as letters and testimony from the WGA.

**2014-2015:** The Committee will continue to work with the Water Resources and Legal Committees through the Workgroup to follow and comment on the development of a jurisdictional rule and other federal actions regarding CWA jurisdiction in accordance with the WSWC’s positions.

**Time Frame:** Ongoing

CWA Rulemaking Workgroup: Michelle Hale (AK), Mike Fulton (AZ), Trisha Oeth (CO), Barry Burnell (ID), Tom Stiles (KS), Jon Patch (ND), Bill Schuh (ND), J.D. Strong (OK), Todd Chenoweth (TX), Walt Baker (UT), Laura Driscoll (WA), Stephen Bernath (WA), and Bill DiRienzo (WY).

\*See Item 2 of the Legal Committee Workplan

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

**Work-to-Date:** WSWC Position #364 urges the Administration and Congress to provide greater flexibility and fewer restrictions on state SRF management and stable and continuing appropriations to the SRF capitalization grants at funding levels that are adequate to help states address their water infrastructure needs. WGA resolution 2014-04 also supports the SRFs as “important tools” and requests greater flexibility and fewer restrictions on state SRF management.

In January 2014, Congress passed an omnibus appropriations bill (H.R. 3547) to fund the federal government through FY 2014. Appropriations for the Clean Water SRF total $1.45B, a $73M increase, while the Drinking Water SRF will receive $907M, a $46M increase. H.R. 3547 also enacted or retained a number of limitations on the use of SRF funds, including but not limited to: (1) “Buy American” provisions for iron and steel; (2) requirements that between 20% and 30% of SRF funds be used for principal forgiveness, negative interest loans, or grants subject to additional provisions; and (3) requirements that states use at least 10% of their SRF funds for green infrastructure, water or energy efficiency improvements, or other “environmentally innovative” activities.

For FY 2015, the President’s budget request seeks around $1B for the Clean Water SRF, a cut of about $431M from current levels. The request also seeks $757M for the Drinking Water SRF, a reduction of $150M.

**2014-2015:** The Committee will support the WGA and WSWC positions. In particular, WSWC staff will continue to update the Committee on developments within Congress and the Administration that have the potential to impact the SRFs. As needed, Committee members and WSWC staff will also meet with the Administration and Congress to further the objectives of the WGA and WSWC positions.

**Time Frame:** Ongoing

**c. EPA’s Water Transfers Rule**

**Work-to-Date:** Paragraph B(2)(c) of WGA Resolution #2014-04 and WSWC Position #316 generally support EPA’s Water Transfers Rule (940 C.F.R. § 122.3(i)), which clarifies that water transfers from one “navigable” water to another are exempt from National Pollutant Discharge Elimination System (NPDES) permitting under Section 402 of the CWA. The rule states that transfers do not require NPDES permits if they do not add pollutants and if there is no intervening municipal, industrial, or commercial use between the diversion and the discharge of the transferred water.

On March 28, 2014, the U.S. District Court for the Southern District Court of New York (SDNY) vacated the rule in *Catskills Mountain Chapter of Trout Unlimited v. EPA (Catskills II)*, 2014 U.S. Dist. LEXIS 42545 (S.D.N.Y., March 2014). Among other things, the court reasoned that many of the types of conveyances contemplated by the rule would not be considered navigable waters under the jurisdictional standards set forth in the U.S. Supreme Court’s *Rapanos* decision. The SDNY court further opined that language in the CWA regarding state rights and state primacy over water allocation support an interpretation that allows for a federal role in water allocation.

Litigation regarding the rule is also pending in the 9th Circuit Court of Appeals in *ONRC Action v. Bureau of Reclamation*. The case stems from claims an environmental group filed against the Bureau of Reclamation, arguing that the agency should obtain an NPDES permit to operate a drain in the federal Klamath Project that transfers water between the Klamath River and Lower Klamath Lake near the border between Oregon and California. A federal district court disagreed with this assertion, reasoning that the CWA is ambiguous and that the rule is entitled to deference. This case marks the first time the 9th Circuit will review the validity of EPA’s rule, although it did issue a decision in 2003 before EPA promulgated the rule that rejected the “unitary waters” theory upon which the rule is based.

The Committee and WSWC staff have carried out a number of efforts to support EPA’s Water Transfers Rule, including meeting with Administration and Congressional officials to advocate the WSWC’s position and updating the WSWC and others stakeholders on recent developments. Most recently, on May 12, 2014, the WSWC and the Western Governors’ Association wrote a joint letter to EPA on May 12, 2014, urging EPA to appeal the SDNY decision. EPA subsequently filed notice that it will appeal the decision.

**2014-2015:** The Committee and WSWC staff will: (1) continue to support the WGA and WSWC positions; (2) monitor any and all activities impacting EPA’s rule, including but not limited to the SDNY and 9th Circuit litigation and possible efforts by EPA to reconsider the rule; and (3) inform the WSWC of ongoing developments.

**Time Frame:** Ongoing

**d. Nutrients**

**Work-to-Date:** EPA’s Office of Water is working to carry out a National Nutrient Strategy to accelerate state adoption of numeric water quality standards while building the scientific and technical infrastructure for developing new criteria to address nitrogen and phosphorus pollution.

On March 16, 2011, EPA Acting Assistant Administrator for Water Nancy Stoner issued a memo to EPA’s Regional Administrators to synthesize key principles regarding the agency’s technical assistance and collaboration with states. The memo urged the regions to place new emphasis on working with states to achieve near-term reductions in nutrient loadings. Most notably, the memo provided a “Recommended Elements of a State Nutrients Framework” to serve as a tool to “…guide ongoing collaboration between EPA regions and states in their joint effort to make progress on reducing nitrogen and phosphorus pollution.” It also asked each region to use the framework as a basis for discussions with interested and willing states, the goal of which would be to tailor the framework to particular state circumstances.

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

Paragraph B(3)(b) of WGA Resolution #2014-04 states that “…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.” The WGA’s resolution further states that states should have “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.” According to the WGA’s resolution, successful tools currently in use by states include best management practices, nutrient trading, and controlling other water quality parameters, among other “innovative” approaches.

**2014-2015:** The Committee and WSWC staff will monitor EPA’s nutrient efforts and inform the WSWC of ongoing developments. It will also ensure that the WSWC’s efforts do not duplicate those of the Association of Clean Water Administrators.

**Time Frame:** Ongoing

**e. Pesticide Permits and National Pollutant Discharge Elimination System (NPDES) Permits**

**Work-to-Date:** The Sixth Circuit Court of Appeals’ 2009 ruling in *National Cotton Council v. Environmental Protection Agency* vacated an EPA rule that exempted pesticide applications made in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The decision has national implications because it consolidated rule challenges filed in eleven circuits, and because the U.S. Supreme Court declined to review the decision.

WSWC Position #328 urges Congress to amend the CWA and FIFRA to clarify that FIFRA-compliant pesticide applications do not require NPDES permits. Paragraph B(2)(d) of WGA Resolution #2014-04 also states that the Western Governors support FIFRA’s primary role in regulating pesticide applications to water, and will seek state-based solutions that compliment rather than duplicate FIFRA.

WSWC members and staff have supported these positions through multiple visits with Congressional officials. WSWC staff also completed a summary of state information and examples of how dual CWA-FIFRA regulation will impact western states. Most recently, legislation (S. 175 and S.802/H.R. 935) has been introduced in the 113th Congress that would overturn the Sixth Circuit’s decision and prevent EPA and states from requiring NPDES permits for pesticide applications.

**2014-2015:** The Committee will continue to: (1) monitor and inform the WSWC about developments involving this issue; and (2) work with key Congressional members and their staff consistent with the WGA and WSWC positions to support legislation that would clarify that FIFRA-compliant pesticide applications do not require NPDES permits.

**Time Frame:** Ongoing

 **f. Abandoned Hardrock Mine Remediation**

**Work-to-Date:** The WGA and WSWC have long supported legislation to amend the Clean Water Act (CWA) to protect authorized third parties, or “Good Samaritans,” who voluntarily clean up abandoned hardrock mines, from inheriting perpetual liability for the site under the CWA (WGA Policy Resolution #13-05).

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

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

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

**2014-2015:** The Committee will coordinate with the WGA and encourage efforts to clean up abandoned hardrock mines, including but not limited to enactment of Good Samaritan legislation and efforts to support utilization of EPA’s 2012 memorandum. As part of this effort, the Committee will work with key Congressional members/staff, Administration officials, and other stakeholders to develop and support efforts to clean up abandoned hardrock mines in accordance with the WGA’s policies.

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

**Time Frame:** Ongoing