Position No. 481
Revised and Readopted
(*see former Positions No. 472 – 9/16/2021; No. 427 –10/26/2018; No. 410 – 6/29/2017; and No. 369 – 7/18/2014)*

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Arlington, Virginia
April 6, 2022

WHEREAS, the Clean Water Act (CWA) is built upon the principle of cooperative federalism in which Congress intended the states, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps) to implement the CWA as partners, delegating co-regulator authority to the states;

WHEREAS, the CWA's cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and western states have made great strides in protecting water quality and coordinating water quality and water quantity decisions; and

WHEREAS, it is imperative that EPA and the Corps actively seek meaningful state consultation, engagement, and participation in the review and development of any new proposed or final rule to define Waters of the United States; and

WHEREAS, States are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks; and

WHEREAS, States have both state statutory and constitutional authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders, and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

WHEREAS, CWA Section 101(g) further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act;" and

WHEREAS, the Supreme Court has interpreted the jurisdictional scope of the CWA in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715, 723 (2006); and has granted certiorari in *Sacket v. EPA* (#21-424); and

WHEREAS, perennial streams with a relatively permanent surface water connection to navigable waters are presumptively considered to be under federal CWA jurisdiction consistent with *Rapanos*; and

WHEREAS, Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction; and

WHEREAS, Justice Scalia's plurality opinion in *Rapanos* held that the phrase "waters of the United States" includes only relatively permanent, standing, or continuously flowing bodies of water; and

WHEREAS, a one-size-fits-all national approach to federal regulations, guidance, and programs pertaining to the CWA does not recognize specific conditions and needs in the West, where water and precipitation can be scarce and a variety of unique waterbodies exist, including small ephemeral washes and arroyos, snow dependent intermittent streams, effluent dependent and dominated streams, prairie potholes, playa lakes, and terminal lakes, as well as numerous man-made reservoirs, impoundments, and water and stormwater conveyance structures; and

WHEREAS, physical, biological, and chemical differences between waters, and hydrologic differences, both spatially and temporally, as well as considerable differences in legal doctrines that govern water in western states, mean that any federal effort to clarify CWA jurisdiction will inevitably impact each state differently, thus underscoring the need to thoroughly involve states in developing and implementing any rule so as to clearly respect and avoid conflict with state authority over the regulation of water quality and the allocation of waters and water rights within their respective borders; and

WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government; and

WHEREAS, as co-regulators, states are separate and apart from the general public, and have a unique role with the federal government in the development and implementation of any rule to clarify or redefine CWA jurisdiction; and

WHEREAS, information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the Corps to develop and implement federal CWA jurisdiction efforts in authentic partnership with the states; and

WHEREAS, uncertainty and differences of opinion have and continue to exist regarding CWA jurisdiction among states, and challenge EPA and the Corps to develop and implement any new rule in cooperation with the states, based on principles of cooperative federalism, and together to provide greater certainty and a clearer definition of the limits of federal jurisdiction; and

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WHEREAS, substantial and recurring changes to regulatory definitions, policies, and programs between federal administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits.

NOW, THEREFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction and define Waters of the United States:

1. Creates an enduring and broadly supported definition

2. Acknowledges and addresses the needs, priorities, and concerns of states as co-regulators.

3. Includes robust, meaningful, and representative state participation and consultation in the development and implementation of any rule, acknowledging the inherent federalism implications.

4. Gives full force and effect to Congress' intent to maintain a reasonable balance of state and federal authority and the purposes of CWA Sections 101(b) and 101(g).

5. Complies with the limits set by Congress as interpreted by the Supreme Court, and appropriately incorporates those limits.

6. Specifically identifies waters and features outside the scope of the CWA jurisdiction including but not limited to groundwater and historically recognized agricultural exemptions.

7. Acknowledges that states have authority to protect all "waters of the state," and that excluding waters from federal jurisdiction does not always mean that they will be exempt from state regulation and protection.

8. Continues to provide access to appropriate technical and financial assistance to the states to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations.

9. Provides a clearly delineated process for resolving differences of opinion over federal and non-federal jurisdiction, and jurisdiction between different States and tribes (treated as states).

10. Provides for mapping of jurisdictional waters as a joint federal/state/tribal effort employing the best available data and tools, with appropriate provisions and processes for map maintenance.

11. Includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling states to take such actions as may be necessary to address any gaps in state law, regulation and protection, and to ensure sufficient time for tools to be developed by federal agencies, in collaboration with states, that facilitate implementation of the new rule.

12. Recognizes the need to balance definitional clarity with flexibility in implementation to address the unique landscapes, flow regimes, and legal frameworks in various regions of the Nation and appropriately weighs all factors of science, law, and effective policy to draw jurisdictional conclusions that are appropriate, and that do not impinge on the rights of States.

13. Considers a regional approach to the definitions of terms for foundational and any categorical waters in the rule including terms such as "relatively permanent" and "significant nexus" and defines regions building upon existing classification systems based on hydrology, geology, and climate.

14. Provides, in the rule development process, a representative number of states, as co-regulators, with diverse perspectives and regions to engage actively in an integrated way with the EPA and Corps staff to provide direct and effective feedback on the implementability of a proposed rule which requires ample time for development of new regulatory language.