



**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
CLEAN WATER ACT § 404(c)**

**Sulphur, Oklahoma  
October 21, 2022**

**WHEREAS**, the Western States Water Council’s (WSWC) mission is “to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future;” and

**WHEREAS**, the Clean Water Act (CWA) does expressly “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....” CWA § 101(b); and

**WHEREAS**, there is a continuing need for greater collaboration between and among federal agencies, state agencies, local governments, and public/private organizations and businesses; and

**WHEREAS**, CWA § 401 grants States the right to issue certifications articulating project conditions necessary to ensure compliance with State water quality standards;

**WHEREAS**, CWA § 404 establishes a permitting program for the disposal of dredge or fill material administered by the U.S. Army Corps of Engineers (USACE), unless delegated to a State or Tribe; and

**WHEREAS**, CWA § 404(c) grants the Environmental Protection Agency (EPA) Administrator the power “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and...deny or restrict the use of any defined area...as a disposal site, whenever he determines...that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas;” and

**WHEREAS**, in 1992, as directed by CWA Section 404(q), EPA and USACE executed a Memorandum of Agreement (“1992 MOA”) that bound the two agencies to specific procedures for resolving potential disagreements, including “elevation of specific individual permit cases...that involve aquatic resources of national importance;” and

**WHEREAS**, EPA’s actions in the § 404 permitting process have recently been inconsistent with established protocols, creating challenges for States’ engagement and public and private investment in projects requiring § 404 permits.

**NOW THEREFORE BE IT RESOLVED**, that the WSWC supports the promulgation of regulation and guidance: (a) improving predictability in § 404 permitting, specifically the (c) and (q) processes; (b) improving communication between federal agencies and states; and (c) requiring EPA to adhere to established § 404 permitting processes and protocols.

**BE IT FURTHER RESOLVED**, that the WSWC urges regulation and guidance expressly limiting exercise of EPA’s § 404(c) power to the time period between USACE’s indication of its intent to issue a permit, and USACE’s final issuance of that permit.

**BE IT FURTHER RESOLVED**, that the WSWC urges EPA to:

- (1) communicate with the state's environmental agency in which the § 404 permit is to be issued prior to exercise of its § 404(c) power and provide the State with a meaningful opportunity to address EPA's concerns;
- (2) see the CWA § 404(q) process through to completion, prior to any proposed § 404(c) veto;
- (3) abstain from issuing a § 404(c) veto unless and until the affected State's time period for issuing a § 401 certification has expired;
- (4) update the existing 1992 MOA to reflect a procedure that the EPA and the Corps are committed to following;
- (5) document the rationale for any § 404(c) veto, including:
  - (a) verification that impacted waters are Waters of the United States;
  - (b) findings from any Final Environmental Impact Statement pertaining to the proposed project;
  - (c) impacts to municipal water supplies, shellfish beds, fishery areas, wildlife, and recreational areas; and
  - (d) resolved issues emanating from discussions between the USACE and EPA; and
- (6) abstain from issuing a § 404(c) veto until after discussion with the state's environmental agency on the rationale behind the 404(c) veto.

**BE IT FURTHER RESOLVED**, that the WSWC pledges to work with the Administration to reduce the uncertainties and inconsistencies in EPA's § 404(c) power, as it has been exercised to date.