WESTERN STATES WATER COUNCIL
www.westernstateswater.org
Policy Position #2026-05

State Primacy and Cooperative Federalism for Western State Water Quality Programs

Policy Summary

Western states are characterized by their arid conditions and limited water resources. Accordingly, they have longstanding and comprehensive legal systems for protecting these limited supplies, including processes to address water quality, that provide the foundational certainty for continued growth and prosperity. The future economic and environmental health of the West depends on the availability of adequate quantities of water of suitable quality.

Western states implement numerous state laws and federally-delegated programs, including the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA), to protect water quality to ensure that western water supplies are suitable for their uses. Many states have their own statutory and constitutional authorities to protect water beyond the limits of federal statutes. Given the significant legal, ecologic, hydrologic, and socioeconomic differences across regions, flexibility and strong state-federal partnerships are vital to effective implementation of both state and federal laws. The framework of cooperative federalism serves as the foundation for environmental governance, recognizing the shared responsibilities between states and EPA while preserving primary state authority over water allocation and pollution control. The WSWC strongly advocates for adhering to these cooperative principles to ensure effective implementation of these programs, to maintain an appropriate balance of state and federal authority, and to foster collaborative relationships between federal agencies and western states.

WSWC Urges Congress and the Administration to:

1. **Respect the principles of cooperative federalism and apply those principles to build effective partnerships between EPA and western states.** Western states implement the majority of CWA and SDWA programs to protect water quality within their states.
2. **Recognize that cooperative federalism is particularly important to address the diverse needs of western states.** Western states emphasize the need for federal-state relationships that result in implementation of CWA and SDWA programs that effectively protect human health and the environment according to the needs of each western state.
3. **Recognize that states are co-regulators for water quality programs, not stakeholders.** Meaningful, timely, and substantive consultation and communication with western states are critical for effective program implementation. When developing federal rules, policy, and guidance for CWA and

*The **Western States Water Council (WSWC)** is a government entity representing western state water agencies with members appointed by their respective governors. The WSWC's 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.*

SDWA programs, EPA must engage early and often with the states that implement these programs and best understand their implications. Federal agencies should engage governors, state water agencies, and their appointed representatives early in the development of legislation, regulations, guidance, and other federal actions that have federalism implications for western water quality.

4. **Support state decisions for delegated programs.** States are co-regulators with EPA in the effort to protect water quality, and possess additional local knowledge, tools tailored to meet unique local needs, and authority over the protection of waters in their respective states. State decisions are generally practical and reasonable efforts to achieve intended outcomes, and oversight should be objective and outcome-oriented.

Core Message

Cooperative federalism is critical to successful water quality protection, particularly to address the diverse needs of western states Both state and federal agencies should remain committed to applying the principles of cooperative federalism to best protect public health and the environment.

What WSWC Is Asking For

WSWC requests that EPA build on existing principles of cooperative federalism by:

1. Supporting states' efforts to seek primacy of federal programs when they choose to do so and making it a priority to help states through that process.

2. Acknowledging and requesting the input of EPA Region 6, 7, 8, 9, and 10 offices, as regional offices work closely with states in their region and can help navigate challenges faced by western states in implementing their programs.

3. Recognizing the importance of WestFAST in implementing and promoting cooperative federalism to best protect water quality in western states.

4. Providing meaningful opportunities for states to address concerns raised by EPA, or meaningful opportunities to resolve disputes with other state, federal, or tribal agencies before EPA makes final decisions that will override a state decision.

5. Improving predictability in permitting and other regulatory processes.

6. Improving EPA's timelines and engagement with states when reviewing state actions.

Closing Statement

The federal government has at times introduced federal legislation or proposed regulatory actions that are inconsistent with sound principles of cooperative federalism. Federal agencies have, at times, dismissed these principles by engaging in rulemaking processes and procedures without collaborating with relevant state water agencies, and making decisions that unnecessarily hinder western states' effective implementation of federal programs. WSWC supports efforts to improve communication and collaboration at all levels of government.

Nothing in this position is intended to alter or affect the authority of western states over water allocation and administration within their borders, the implementation of delegated or primacy programs under federal law, or the interpretation or application of any interstate compact, court decree, international treaty, tribal settlement agreement, or state water law.

***Related position:** See WSWC Policy Position #2026-04, Western Water, State Authority, and Cooperative Federalism, addressing cooperative federalism in western water allocation, water rights, and administration.*

Supporting Documentation

Why This Matters

Cooperative federalism is a foundational principle of environmental governance in the United States. EPA and states share a collective mission of protecting human health and the environment.

Cooperative federalism was a constitutionally based tenet when the CWA and SDWA were established in the United States in the 1970s, and nationally, states have assumed more than 95% of delegable federal environmental authorities. For example, the CWA envisioned state and federal partners working together with shared responsibilities. Section 101(b) explicitly preserves the primary responsibility of states to address pollution within their borders, and section 101(g) acknowledges the critical importance of balancing water quality protection in a way that does not interfere with state authority to allocate water. Section 101(g) further directs federal agencies to cooperate with state agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

States are best positioned to protect and manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology and legal frameworks. The federal government should acknowledge states as valued partners with the experience to help inform any legislative or regulatory changes to accomplish mutual objectives. Rather than attempt to dictate water policy, the federal government should engage states early in meaningful consultation, seek to understand state priorities, and contribute its fair share of funding to support implementation of state water planning and management, thus avoiding, or at least minimizing, the need for federal regulatory mandates.

The federal government should explicitly recognize and support ongoing state, tribal, and local watershed management efforts through appropriate technical and financial assistance. Strong

Federal Deference to Western State Water Law

Clean Water Act (1972): Sections 101(b) and 101(g) recognize state authority to protect water quality and allocate water quantities. 101(g) further directs federal agencies to cooperate with state agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Safe Drinking Water Act (1974): Section 3 commits the federal government to maintaining and improving its partnerships with the states in implementing the SDWA, and section 4 acknowledges both the central role of states in SDWA implementation, and the need of states for increased financial resources and appropriate flexibility for implementation.

Executive Order 13132 (1999): Requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications…"

***P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994):** The Supreme Court upheld a state's delegated authority to impose minimum stream flow conditions under the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the First Iowa interpretation of the Federal Power Act.

state-federal relationships will result in more effective implementation of programs that protect human health and the environment according to the needs of each state.

The WSWC supports regulations that strengthen the deference to state water laws and do not diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, groundwater, and the protection of water quality and designated uses. Notably, the CWA was not intended to and should not be applied to the management and protection of groundwater resources contravening state water law, policies and programs.

The ecologic, hydrologic, geophysical, and socioeconomic differences within western states and between western and eastern states make the flexibility and partnerships intended by cooperative federalism of utmost importance to western states in their implementation of CWA and SDWA programs. Adhering to cooperative federalism principles in the federal-state relationship will help maintain an effective balance of state and federal authority in western states' implementation of CWA and SDWA programs. The WSWC continues to unequivocally advocate for the principles of cooperative federalism and for applying those principles to build strong and effective relationships between EPA and western states.

Finally, while cooperative federalism is important for all CWA and SDWA programs, WSWC particularly urges EPA to reinvigorate the principles of cooperative federalism in the following programmatic areas, given challenges that some western states are experiencing or have experienced in the past.

- **Section 404(c) Veto Authority:** WSWC recognizes there is a continuing need for greater collaboration between and among federal agencies, state agencies, local governments, and public/private organizations and businesses in the issuance of CWA § 404 permits and § 401 certifications. Within the existing regulatory framework, it is imperative that the EPA exercises its § 404(c) veto authority judiciously and consistent with applicable laws and regulations, the 1992 Memorandum of Agreement between EPA and USACE (as directed by CWA § 404(q)), and the principles of cooperative federalism. Past inconsistent EPA actions regarding § 404(c) veto authority and permitting protocols have created uncertainty and challenges for state engagement and public and private investment. WSWC urges EPA to adhere to established protocols and expressly limit its § 404(c) veto power to the period between the U.S. Army Corps of Engineers' intent to issue a permit and its final issuance. EPA must meaningfully consult with affected state environmental agencies prior to taking action under 404(c). If EPA considers promulgating regulations and guidance to improve predictability and communication in the 404(c) veto process, WSWC urges EPA to meaningfully engage with state environmental agencies during that rulemaking.
- **Review of State Water Quality Standards:** The Western States Water Council (WSWC) urges the Environmental Protection Agency (EPA) to improve the consistency and timeliness of its water quality standards reviews. Under Clean Water Act (CWA) Section 303(c)(2)(A) and 40 CFR § 131, water quality standards consist of designated uses, criteria to protect those uses, and antidegradation policies. CWA Section 304(a) requires the EPA to publish recommended national water quality criteria. While 40 CFR § 131.20 directs states to review these recommendations and explain any decision not to adopt them, states retain broad discretion to adopt Section 304(a) criteria, modify them for site-specific conditions, or establish narrative

criteria. Given this statutory latitude, WSWC requests that EPA grant strong deference to state determinations of scientifically sound standards. Additionally, CWA Section 303(c) requires the EPA to approve submitted standards within 60 days or disapprove them within 90 days. WSWC urges strict adherence to these statutory deadlines. To streamline the review process, WSWC supports early collaboration between states and the EPA. During pre-submission discussions, the EPA should clearly distinguish between mandatory regulatory deficiencies and non-binding recommendations.

- **Review and Approval of State 303(d)/305(b) Integrated Reports:** Sections 305(b) and 303(d) of the Clean Water Act (CWA) require states to submit a comprehensive biennial water quality report and list of impaired waters to the EPA by April 1st of even-numbered years. Under Section 305(b) and 40 CFR § 130.8, the report must assess overall water quality and report on the elimination of pollutants necessary for designated use support. Under Section 303(d) and 40 CFR § 130.7, states must identify waters failing to meet designated use standards, submit a prioritized list of impaired and threatened waters for EPA approval within 30 days, and establish Total Maximum Daily Loads (TMDLs) to calculate maximum allowable pollution levels for listed waters. States have considerable discretion in how they assess surface waters and identify impaired waters not supporting their designated uses, in accordance with approved water quality standards, assessment methods, and quality assurance/quality control requirements. As part of its oversight authority, EPA can add waterbodies or pollutants to a state's submitted list of impaired waters, overriding the state's initial assessment (a process referred to as overlisting). The WSWC urges the EPA to respect state assessment procedures and recognize that states manage and fund the restoration of impaired waters. Consequently, the EPA should resort to overlisting sparingly and only after engaging in thorough collaboration with the affected state.
- **Supporting State CWA Program Authority in Lands of Exclusive Federal Jurisdiction:** Under the 2023 Section 401 Rule, EPA asserted direct Section 401 certifying authority across 16 national parks and other areas classified as "lands of exclusive federal jurisdiction." This decision stripped several states of their long-standing authority to administer Section 401 certifications without prior consultation or post-promulgation outreach from the EPA. Similar shifts away from state authority have also affected Clean Water Act (CWA) Section 402 permitting and Section 303 water quality standards, ultimately diminishing environmental protections for the parks and undermining principles of cooperative federalism. To address these concerns, the WSWC urges the EPA and Congress to identify pathways for willing states to preserve their environmental program authority on lands of exclusive federal jurisdiction, including establishing concurrent jurisdiction with the Department of the Interior.

WestFAST

One way to improve communication between the federal agencies and the western states is ongoing engagement through the Western States Federal Agency Support Team (WestFAST). WestFAST is comprised of 16 federal agencies with water-related responsibilities in the West. It was created in 2008 pursuant to a recommendation of the Western Governors' Association and the WSWC to foster cooperation and collaboration between the federal agencies, the states, and the state agencies in addressing water resource needs. Ongoing communication between WestFAST and WSWC builds strong state-federal relationships that enables opportunities for collaboration.

Regulatory Etiquette

Agencies must follow Executive Order 13132 (Federalism) by establishing accountable processes and implementing appropriate procedures for meaningful and substantive consultation with states. This should include implementing a system of etiquette that:

A. Avoids the publication of public notices over federal holidays and extends comment periods when states identify a need for more time to provide meaningful feedback;
B. Promotes dialogue with state agencies rather than listening sessions;
C. Provides sufficient notice and context for nationwide briefings to enable state agencies to prepare to meaningfully engage in the conversation;
D. Identifies opportunities where in-person engagement is needed with states, beyond virtual communication; and
E. Includes field visits to western states and tribes to better understand regional and local issues, the various relationships among states and tribes, and how federal rulemaking can address or impact those issues.

Adopted unanimously by the Western States Water Council on October 22, 2026, in Las Cruces, New Mexico.