Western Governors' Association
Policy Resolution 11-15

Water Quality in the West

A. BACKGROUND

1. Clean water is essential to the Nation's economy and the quality of life of its citizens. In the arid West, water is a scarce and precious resource that must be managed with sensitivity to all social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.

2. Much progress has been made toward the goal of controlling water pollution and protecting drinking water supplies as required by the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA). Western states have made significant strides in coordinating water quality and water quantity decision-making and have developed legislative and planning strategies for promoting the goals of these acts.

3. The CWA was last reauthorized in 1987, and attempts to reauthorize the act since then have failed. The CWA is in need of revision to provide states and the Environmental Protection Agency (EPA) with proper tools to address current water quality challenges.

4. Current federal regulations, guidance and programs pertaining to the CWA do not always recognize the specific conditions and needs of the arid West, where water is scarce and even wastewater becomes a valuable resource to both humans and the environment. States need more flexibility to determine how to best manage water resources, especially in situations where states have determined that it is appropriate to set uses and standards for ephemeral streams, effluent dominated low-flow waterways, and man-made water conveyances.

5. States and the EPA work together as co-regulators under the CWA and SDWA. To maintain an appropriate federal/state partnership, state officials must have a meaningful voice in policy development by the EPA with respect to the CWA and the SDWA, particularly in the early stages of such development before irreversible momentum precludes effective state participation and consideration of alternative methods for controlling water pollution.

6. States are facing increasing budget constraints and are reaching a critical mass with respect to their ability to maintain existing programs and comply with new EPA and court-imposed water quality and drinking water mandates. To the extent federal law has established nationwide water quality and drinking water requirements, the federal government has an obligation to provide states with the necessary financial and technical assistance to comply with such requirements.

B. GOVERNORS' POLICY STATEMENT

Clean Water Act (CWA)

Western Governors support reauthorization of the CWA consistent with the following recommendations.

1. **State Water Allocation:** In the implementation of CWA provisions, the states retain jurisdiction over water resource allocation decisions, and are primarily responsible for how to most appropriately balance state water resource needs within CWA objectives.

2. **Western Waters:** The arid West includes a variety of waters, including small ephemeral washes; large perennial rivers; effluent-dependent streams; and wild, scenic rivers. In addition to natural rivers, streams and lakes, there are numerous man-made reservoirs, waterways and water conveyance structures. The federal government must provide flexibility to allow states to adopt water quality standards that are appropriately tailored to the unique characteristics of Western water bodies.

3. **Stormwater (Wet Weather) Pollution:** In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. States must have the ability to require greater management of stormwater pollution on those water bodies that may require it, and to utilize tailored approaches that reflect the different risks posed by discharges to ephemeral streams.

4. **Water Reuse:** The CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources.

5. **Nonpoint Source Pollution:** Nonpoint source pollution requires watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy. In general, the use of point source solutions to control nonpoint source pollution is also ill advised.

6. **Forest Roads**: Stormwater runoff from forest roads has been managed as a nonpoint source under EPA regulation and state law since enactment of the Clean Water Act. The Ninth Circuit Court of Appeals' decision in NEDC v. Brown overturned this 35-year old interpretation and ruled that stormwater runoff associated with forest roads must be treated as a point sources authorized through permits issued under the National Pollution Discharge Elimination System (NPDES). Western Governors are concerned about the potential impacts of treating forest roads as point sources under the NPDES program and will seek solutions that are consistent with the long-established treatment of forest roads as nonpoint sources.

7. **General Permits:** Reauthorization of the CWA must reconcile the continuing administrative need for general permits with the site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance that better support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.

8. **State-Tribal Coordination:** Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA.

9. **Animal Feeding Operations (AFOs)/Concentrated Animal Feeding Operation (CAFOs):** Western Governors support implementation of a comprehensive AFO/CAFO strategy.

    i. All CAFOs should develop manure management plans that are consistent with sound agronomic practices and water quality protection.

    ii. Farm Bill funding for AFOs/CAFOs in the states should be targeted to environmental priority concerns, especially impaired waters.

    iii. Environmental results can be maximized by focusing on state-identified water quality priorities and coordinated federal, state and local agency assistance and regulated activities. Voluntary incentives are preferable to regulatory mandates, but both voluntary and regulatory mechanisms are valid approaches to solve water quality problems associated with CAFOs, as are state-led innovations, such as Environmental Management Systems.

10. **Water Transfers:** Water supply management in the West requires elaborate systems for moving waters across natural drainage divides. Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Section 101(g) of the CWA 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." Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors generally support EPA's current water transfers rule, which exempts water transfers from NPDES permitting requirements.

11. **Total Maximum Daily Loads (TMDLs)/Adaptive Management:** EPA should work cooperatively with the states to develop and implement a TMDL program that provides flexibility to accommodate state and local conditions. Fully implementing TMDLs will

require a full suite of tools available to the states, including modification of permits, restoration programs, non-point source best management practices, as well as other innovative approaches. States should develop the necessary models, processes and principles to assume a leadership role to resolve TMDL issues, and cooperate to address issues that transcend their boundaries. Given the significant costs associated with TMDL implementation, it may also be prudent in some situations to utilize adaptive management techniques. This may include the use of interim performance measures, the effectiveness of which can be monitored and evaluated before fully implementing TMDLs.

12. **State Water Quality Certification:** Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. This certification authority is a vital tool for Western states as they continue to work closely with federal and private partners to restore fish populations under the Endangered Species Act and, in the face of consent decrees, to develop TMDLs for pollutant discharges into state waters in order to bring them into compliance with federal water quality standards. Section 401 of the CWA is operating as it should and states' mandatory conditioning authority should be retained without amendment.

13. **Pesticides:** The Sixth Circuit Court of Appeals' decision in *National Cotton Council v. EPA* ruled that the statutory text of the CWA requires National Pollutant Discharge Elimination System (NPDES) permits for pesticide applications. The decision has national implications and will require EPA and states with authorized NPDES programs to permit nationwide approximately 365,000 pesticide applicators who perform 5.6 million applications annually. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) protects water quality from pesticide applications. States can also use their own authorities to address water quality concerns related to pesticide applications, and such authorities should not be abrogated by federal legislation. Western Governors support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public health related pesticide applications to waters of the U.S., and they will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies. .

14. **Good Samaritan Legislation:** Congress should enact a program to protect volunteering remediating parties who conduct authorized remediation of abandoned hardrock mines from becoming legally responsible under the Clean Water Act and/or the Comprehensive Environmental Response, Compensation, and Liability Act for any continuing discharges after completion of a project, provided that the remediating party – or "Good Samaritan" – does not otherwise have liability for that abandoned mine or inactive mine site.

15. **Nutrient Pollution:** Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the Nation, and continued cooperation between states and EPA is needed. As EPA works with states to address nutrient pollution, it should consider:

    - Addressing excessive nutrients through the NPDES program can be difficult for a number of reasons, including the fact that adverse impacts vary from water body to

water body and nutrients are often times produced by non-point sources that fall outside of NPDES jurisdiction. Thus, nutrients cannot be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

- Numeric criteria require significant investments of time and money to develop, and may not always be effective because the link between nutrient concentrations and adverse impacts varies considerably, and levels of nutrients that cause impairments in one stream may not cause impairments in another.

- State strategies are often more functional, inexpensive, and effective in achieving nutrient reductions than numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches. Effective nutrient reduction strategies should not focus exclusively on numeric criteria, but should also provide states with sufficient flexibility to utilize their own incentives and authorities under the CWA to establish standards and control strategies to address nutrient pollution.

16. **Antidegradation:** Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA approval, including the establishment of antidegradation policies and the methods they will use to implement such policies. States have a variety of ways of providing implementation instruction to regulated entities, such as continuous planning process documents, NPDES regulations, and stand alone guidance documents. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new antidegradation policies or implementation requirements. EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.

Safe Drinking Water Act (SDWA)

Western Governors believe that the SDWA and its standards for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for the Nation. It is essential for the federal government through EPA to provide technical and financial assistance to the states and water systems to meet federal requirements. Assistance is particularly needed for small and rural systems, which often lack the financial resources needed to comply with federal treatment standards.

17. **Drinking Water Standards:** In the West, contaminants such as arsenic, chromium, perchlorate and fluoride, often occur naturally. Western Governors support EPA technical assistance and research to improve both the efficiency and affordability of treatment technologies for the above contaminants. In any drinking water standards that the EPA may revise or propose for these and other contaminants, including disinfection byproducts, EPA should consider the disproportionate impact that such standards may have on Western states and give special consideration to feasible technology based on the resources and needs of smaller water systems. Analysis of the costs of treatment should also carefully determine the total costs of capital improvements, operation, and

maintenance when determining feasible technology that can be applied by small systems. States should be given the flexibility and discretion in allocating limited funds for water and sewer infrastructure.

18. **Risk Assessments:** Analysis of the costs of treatment for drinking water contaminants should carefully determine the total costs of capital improvements, operation and maintenance when determining feasible technology that can be applied by small systems. These costs should be balanced against the anticipated human health benefits before implementing or revising drinking water standards.

19. **Microcontaminants/Pharmaceuticals:** Concerns about the possible health impacts of microcontaminants and pharmaceuticals are of concern to Western states. Many states are aware of the risks posed by these contaminants but are waiting for the formation of a national consensus or policy on the potential risks involved before developing concrete measures and rules. EPA can assist states by providing additional technical research into the health effects associated with microcontaminants and pharmaceuticals.

Federal Funding and State Resources

20. **State Revolving Funds:** The EPA's Clean Water State Revolving Fund (SRF) and Drinking Water SRF provide states with capitalization grants that are leveraged with state contributions to provide financial assistance for the planning, design, construction and rehabilitation of drinking water and wastewater-related infrastructure. The Administration and Congress should work together to ensure that stable and continuing federal appropriations, increased by a construction inflation index, are made to the SRFs at funding levels adequate to help states address related water infrastructure needs. The SRF Programs should also provide for greater flexibility and fewer restrictions on state SRF management.

21. **Restoring and Maintaining Lakes and Healthy Watersheds:** Historically, the Section 314 Clean Lakes Program and the Section 319 Nonpoint Source Management Program provided states with critical tools to restore and maintain water quality in lakes and watersheds. In addition to Farm Bill funding, these programs provided valuable tools that empowered states to meet CWA goals by supporting demonstration projects for the abatement of nonpoint source pollution. Western Governors support a renewed emphasis on providing additional funding for these programs, and urge that any funding provided should not come at the expense of other federal watershed protection programs.

22. **EPA Financial and Technical Assistance:** The federal government through EPA should provide states and local entities with sufficient federal funding and technical assistance to help them comply with federal water quality and drinking water requirements. EPA should also collaborate with states to identify priority areas and focus on program areas that provide the largest public health and environmental benefits.

Water Quality Monitoring and Data Collection

23. **Water Data Needs:** Western water management is highly dependent upon the availability of data and information regarding both the quality and quantity of surface and ground waters. Federal support for monitoring, data management and data sharing are critical for the states to maintain a viable monitoring program, especially in times when states face budget shortfalls.

24. **Federal Data Funding:** The federal government needs to adequately finance and support the collection of water data in the nation's streams, lakes and aquifers. EPA should also provide support to the states in developing innovative monitoring and assessment methods, including making use of biological assessments, sensors and remote sensing, as well as demonstrating the value to the states of the national probabilistic aquatic resource surveys.

25. **EPA Grant Funding for Primary Service:** In some rural areas people and communities still lack basic water and sanitary services needed to assure safe, secure sources of water for drinking and other domestic needs. Continued federal assistance in the form of grants to augment state resources are necessary to meet these needs.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. This resolution is to be posted on the Western Governors' Association Web site to be referred to and distributed as appropriate.

2. Western Governors direct the Western Governors' Association and the Western States Water Council to monitor any relevant legislation and implementation of the CWA and SDWA, and to work with Congress, federal agencies, and the appropriate public policy organizations in support of the Governors' policies.

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