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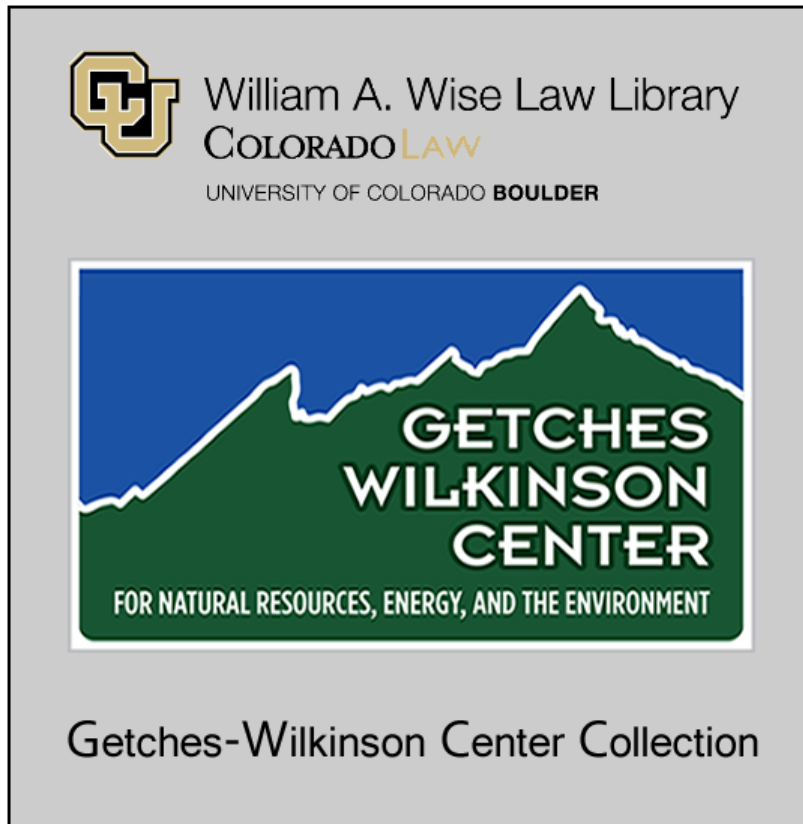


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**PRIORITIES OF THE STATES FOR
CLEAN WATER ACT REAUTHORIZATION**

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Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
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PRIORITIES OF THE STATES FOR CLEAN WATER ACT REAUTHORIZATION

By J. David Holm

INTRODUCTION

The following priorities for Clean Water Act reauthorization were considered by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) at its mid-winter meeting on February 18 and 19, 1999 in Alexandria Virginia and again during the May Board Meeting of ASIWPCA in McLean Virginia on May 25 and 26, 1999. These priorities are stated as recommendations for consideration by congressional lawmakers. State and Interstate Water Pollution Control Administrators agree that the following new directions should be pursued in any reauthorization of the Clean Water Act:

SECTION 106 FUNDING

- Baseline 106 Program: *Maintain* the historic allocation procedures for 106 funding at the FY 98 funding level.
- Increased 106 Program: *Authorize* an increase of approximately \$200 million in appropriations over the FY 98 funding level under section 106, in order to provide explicit support for the following: water quality monitoring; development of appropriate water body classifications and standards, including site-specific standards as necessary to address impairments due to sedimentation, nutrient enrichment, and other types of pollution which may prevent the attainment of the goals set forth in section 101(a)(2), as well as, protection of drinking water supplies; use attainability analysis; development of TMDLs; water quality indicators reporting; and, compliance assistance, particularly for minor facilities including small municipalities and businesses such as animal feeding operations.

- Allocation of Increased 106 Funding: *Establish* criteria for allocating incremental increases in the overall appropriations of funding under section 106 of the CWA using FY 98 as the baseline year. The criteria should include consistently derived elements of the following factors: surface water area; ground water use, water quality impairment, point sources, non-point sources and population of urbanized areas. No factor should be weighted greater than 25% of the total.

MONITORING AND REPORTING

- Guidance: *Require* the National Water Quality Monitoring Council to develop guidance identifying a comprehensive national water quality monitoring program which uses State water quality agency monitoring functions as the primary data collection and compilation mechanism. Such guidance should be aimed at the following: identifying the types of data and monitoring approaches that will most efficiently support the major water quality management decisions for which increased section 106 funding is targeted; unifying the requirements for monitoring and assessment whether for purposes of section 106, 305(b), 303(c)2(B), 303(d) or 319(a); encouraging state and federal agencies to avoid fragmented monitoring approaches by cooperatively designing comprehensive monitoring strategies aimed at accomplishing multiple objectives.
- Funding for State Monitoring Programs: *Increase* the annual level of federal 106 funding significantly to support state monitoring programs. *Require* states to increase their matching level in direct proportion to the level of effort established under section 106(d). *Authorize* the use of any increased level of federal 106 funding for pass through with the required state matching to be provided by agencies and entities beyond the state water pollution control agency which are capable of carrying out monitoring and assessment activities in accordance with approved quality control and assurance protocols and committed to conducting specific water quality monitoring work directly contributing to a

state's strategic monitoring plan.

- Adequate State Monitoring Programs: *Require* each state to submit a comprehensive water quality monitoring strategy for review by EPA which provides for adequate representative chemical, physical and biological sampling of all the state's waters within a five year recurrence interval. The monitoring aspects of the plan should be consistent with national guidance but scaled such that the minimum level of effort for each state regardless of the actual source(s) of funding, will be *equivalent* to the sum of the following: (1) 20% of the total state and federal 106 funding in FY 98; and (2) 50% of any increased federal funding pursuant to section 106 along with the state's matching contribution. Up to 50% of the remainder of any increased federal 106 funding and state match should be available for assessment functions including, but not limited to, development of standards and TMDLs.
- Monitoring Costs Included in Projects: *Mandate* that all Federally supported projects related to water quality protection or enhancement and non-point source abatement, allocate adequate funding for water quality monitoring and assessment, consistent with overall project purposes.
- Reporting: *Require* submissions of monitoring data as described in section 305(b) on April 1st of each year based on the totality of monitoring conducted during the preceding year ending on October 1st, in accordance with the states approved comprehensive water quality monitoring strategies. *Revise* the biennial requirement for 305(b) reports to a 5 year reporting requirement beginning in FY 2000. *Mandate* the EPA to make the information available to the public through electronic means on or before October 1 of each year. *Obligate* EPA to ensure data comparability among States to allow better documentation of water improvements on a national basis and the use of consistent water quality indicators.

CRITERIA AND STANDARDS

- Review of Water Quality Standards: *Revise* the triennial review requirement for water quality standards to a 5 year review requirement where standards for approximately 20% of the each state's watersheds and drainage basins would be reviewed each year, beginning in FY 2000.
- Fish Contamination: *Mandate* all federal agencies to use a consistent approach in establishing risk based guidance and regulations to ensure that all national programs that regulate similar health risks (e.g., assure "fish are safe to eat") provide similar levels of protection for human health and wildlife. This unified approach should address: 1) the number and type of samples necessary for determination of consumability, 2) appropriate analytical methods, and 3) appropriate methods for states to use in determining action levels versus the action/tolerance levels established by the U.S. Food and Drug Administration for contaminants in food involved in interstate commerce.
- Nutrient Criteria: *Require* the establishment of site-specific or regionally-derived nutrient standards for water bodies that are currently impaired due to nutrient enrichment or very likely to become impaired unless specific control strategies or management practices geared to attain such standards are implemented. The need for nutrient standards to protect threatened water bodies or restore impaired water bodies should be a required consideration during each review of water quality standards.
- Biocriteria: *Reaffirm* that the "designated use" concept is the appropriate mechanism to achieve the "fishable/swimmable" water quality goals set forth in section 101(a)(2) of the Act. The water quality standards policy should not be revised to require uses to be based on protecting "balanced indigenous populations". Protection of native species is the

primary concern of the Endangered Species Act which requires that decisions made pursuant to the Clean Water Act not jeopardize threatened or endangered species. *Reaffirm* that biological assessment must be an integral part of each state's water quality management program and that such information must be used in establishing use classifications, chemical numeric and narrative standards, conducting aquatic life use attainability analyses and in determining whether waters are impaired. While such uses of biological assessment information imply the need for biological criteria they do not and should not require states to establish enforceable biological standards.

- Antidegradation: *Require* states to develop and implement antidegradation programs consistent with the existing federal policy but which provide sufficient specificity to disclose how the program addresses such issues as: designating or defining water bodies for purposes of the program; managing information related to antidegradation decisions, and definitions of key concepts and terms for the program. EPA's review and approval of state programs should be based on the program's consistency with the existing federal policy.

Total Maximum Daily Loads

- Priority of Impaired Waters: *Provide* that the geographic management areas (i.e., watersheds and water body segments) identified under 303(d) be used to drive pollution control priorities and strategies including permit issuance priorities, non-point source control efforts, water quality monitoring and assessment, TMDL development, and other water quality management decisions including, but not limited to establishing SRF loan priorities.
- Management of Point and Non-point Sources Impacting Impaired Waters: *Set forth* that the present regulatory approach for dealing with point source pollution must

continue in concert with appropriate combinations of cost effective regulatory and voluntary approaches (with suitable assurances) for addressing non-point sources involving multiple stakeholders in watershed-based efforts.

- TMDLs and Watershed Restoration Plans for Impaired Waters: *Clarify* the requirement upon states to establish TMDLs for constituents for which the concepts of concentration and mass loading are relevant. *Recognize* that, for some pollutants, loading may be less important to the “health and integrity” of a water body on a daily basis than on a seasonal, annual or even longer term average basis. *Require* states and if possible, locally-based and balanced groups of watershed stakeholders, to develop watershed restoration plans which provide, at a minimum: an assessment of the impairments to water bodies attributable in whole or in significant part, to non-point sources; a control strategy which is consistent with the goals for restoration of the water body; and an implementation plan which delineates specified roles and responsibilities, pertinent regulatory authorities and other assurances.
- Load Allocations for Impaired Waters: *Recognize* that it is very difficult to identify specific pollutant load contributions coming from discrete areas generating non-point source runoff. Therefore, it is rarely possible to assign meaningful individual load allocations to specific non-point source problem areas. Accordingly, the goals for “best management practices” are often stated in terms of percent reductions in non-point source contributions which are relative versus absolute and may not readily translate directly to predictable water body improvements. *Require* individual non-point source problem areas causing or contributing to water body impairments to be controlled to the maximum extent practicable through best management practices in accordance with a state approved water body restoration plan and the state’s approved Nonpoint Source Management Plan. *Authorize* such plans to be set forth in a phased manner with measurable milestones. *Set forth* that, if point source contributions are subtracted, the resultant water quality in the

water body following the implementation of such best management practices at each milestone will become the interim load allocation for non-point sources. Interim and ultimate waste load allocations for point sources must be established to achieve water quality standards in view of such interim and ultimate load allocations established for non-point sources.

- Authorities and Assurances for Non-point Source Control: *Require* states to develop or identify sufficient authorities to impose requirements which will result in the implementation of “best management practices,” as described in their approved management plans, for the types of non-point sources causing or contributing to the failure to attain water quality standards in any water body (but in a manner consistent with section 101(g)). *Authorize* the use of non-regulatory approaches to control non-point sources in impaired waters where other types of assurances, such as intergovernmental agreements, contractual commitments and obligations, easements, or financial sureties, are provided in state approved or adopted watershed (or water body) restoration plans.
- Local authorities for Non-point Source Control: *Encourage* state water pollution control agencies to work with other local, state and federal agencies to develop regulatory authorities and non-point source control mechanisms at the most appropriate governmental level. *Authorize* the use of 319 funding to support the efforts of appropriate and qualified agencies to ensure required best management practices are properly selected and implemented for each site causing or contributing to water body impairments.
- “Best Management Practices” for Impaired Waters: *Require* best management practices for water bodies that are impaired from non-point sources of pollutants to be designed, constructed and maintained to prevent or control the sources which lead to the impairment or nonattainment of classified uses and will result in the attainment of water quality standards to the maximum extent practicable.

NON-POINT SOURCE MANAGEMENT

- Non-point Source Management Program: *Require* states to maintain a balanced approach in managing non-point sources that includes state-wide nonpoint source programs that provide for effective technology transfer, technical assistance and education on the impacts of activities which can cause or contribute to NPS pollution loads, but emphasize on-the-ground management of individual watersheds where waters are impaired or threatened. The major focus of the State program should be toward abating known water quality impairments resulting from nonpoint source pollution in accordance with approved or adopted watershed or water body restoration plans. (See TMDLs). Non-point source efforts and projects should also be aimed at preventing significant threats to water quality from present and future activities, and preserving high quality waters.
- Consolidated Assessment: *Require* the consolidation of NPS assessment programs with other water quality programs and reporting or assessment tools (e.g. 305(b) & 303(d)).
- The Challenge of Non-point Source Impacts: *Recognize* that the majority of our remaining water quality problems stem from non-point sources of pollutants (e.g., runoff from forests, rangelands, urban areas and farm lands), and that for these difficult water pollution problems to be solved, a renewed emphasis which stimulates watershed based approaches, pollution trading, TMDL's, and a mixture of voluntary commitments and regulatory programs must be established. *Recognize* that there are significant limitations in the feasibility of monitoring, assessing, predicting and controlling intermittent runoff events.
- Increased Funding for Non-point Source Control: *Authorize* annual appropriations of \$500 million under section 319 to be allocated to state water pollution control agencies,

and, as appropriate, passed through to federal land management agencies and the Natural Resource Conservation Service in accordance with the location and types of impaired and threatened water bodies reflected in the most current unified state water quality assessment and with its approved non-point source management plan. Such allocations to federal agencies should be used exclusively for selecting and tailoring “best” management practices and implementing them to manage and control non-point sources causing or substantially contributing to water body impairments. Because Section 319 management plans provide the framework and establish priorities under which a myriad of agencies at all levels of government can carry out activities to control NPS pollution, States should retain primary responsibility for NPS pollution programs, and the funding allocated to Federal agencies.

- Federal Consistency: All activities conducted by Federal agencies or supported in whole or in part by Federal funds must utilize management measures which have been certified by the State water quality agency to be consistent with updated state management plans.
- Physical Habitat: *Specify* that the existing management perspective on protection of surface waters must be broadened to address the importance of physical habitat as a determinant of species abundance and distribution. Non-point source management must include the restoration and conservation of riparian buffer zones adjacent to streams and wetlands to ensure: (1) maintenance of balanced populations of aquatic species; (2) protection of public water supplies including source water protection and groundwater; and where possible, (3) conservation of native bio-diversity, but in a manner consistent with section 101(g).
- Success in Non-point Source Management: *Recognize* that long term commitments of resources are required to successfully manage NPS pollution. Short term water quality benefits are difficult to attain, and the initial success of implementing best management

practices (BMPs) through the 319 program should be primarily measured by the foundation they establish for long term improvement. For example, the Rural Clean Water Program (RCWP) demonstrated that, in some cases, the full water quality benefits of certain agricultural BMPs were not realized for more than a decade. Control of NPS should be viewed as a long term task comparable to point source control, but requiring a much higher level of intergovernmental cooperation, coordination and partnerships.

401 Certification

- *Authorize* the development and issuance of general 401 certifications for routine activities authorized under federal licences. Such general certification should be based upon an environmental assessment and management plan which includes standard required management practices designed to protect water quality. These certification requests should be submitted by the federal agency.
- *Maintain* the authority of states to require individual certification of activities requiring federal licenses at their discretion.

PERMITS AND REGULATORY CONTROL MECHANISMS

- Technology Based Limitations: *Impose* an expeditious schedule upon EPA to update the most seriously outdated categorical effluent limitations and revise regulations as required in Section 304(b) of the Act. *Provide* the agency adequate funding and other resources to accomplish this work in a timely manner, particularly for developing effluent limitations for high priority industrial categories which have not yet been addressed. *Require* EPA to conduct a formal review of current best available technology economically achievable (BATEA) for wastewater treatment. *Revise* the factors currently set forth in 304(b) for

BATEA in order to specifically address pollution prevention and waste reduction measures.

- Toxic and Pretreatment Effluent Standards: *Mandate* that EPA update the existing categorical standards for pretreatment industrial categories to reflect current best available technology economically achievable (BATEA), as well as address pollution prevention and waste reduction measures.
- 10 year permits: *Authorize* the issuance of NPDES permits which are: currently based on technology based requirements; unlikely during the extended term of the permit to require water quality-based effluent limits; and, which have had good compliance records. Also *authorize* such extended permits for point sources in areas where TMDLs and watershed plans have been developed and implemented and where assurances are in place that water body standards are being attained or will be attained and maintained.
- Good Samaritan Provision: *Enact* a new provision authorizing remediating parties who are not responsible for water quality problems at inactive and abandoned mines to undertake mine drainage control, abatement and reclamation work in accordance with a plan and a permit approved by EPA, provided that the only exposure to enforcement liabilities of such parties would be for violations of the permit for failure to follow the approved reclamation plan and environmental problems or threats to public health caused by their negligence.
- Compliance Assurance: *Encourage* compliance assistance approaches especially for small communities and businesses through additional appropriations under section 106 authorized for that purpose. *Authorize* the use of up to 10% of any increased appropriations under section 106 for compliance assistance activities. *Remove* the requirement for states to annually inspect all majors. Instead, *Require* states to develop an

effluent sampling strategy for permitted point sources to provide a reasonable basis for verification of discharge monitoring reports and sampling and analytical procedures conducted by permittee. States should establish a compliance priority rating system for identifying problem dischargers and related water quality concerns in order to focus both State and EPA compliance sampling and inspection resources in an annual cycle.

- Alternative Storm water Management Approaches: *Provide* states the option to address any or all categories of Storm water under the state's nonpoint source management program, so long as the results of that program in terms of water quality protection are substantially equivalent to the results of implementing section 402(p) requirements. *Recognize* that Storm water and non-point source runoff are substantially equivalent. EPA studies that led to the Storm water program found that half of the pollution in Storm water came from agricultural runoff.
- Storm water Management: *Recognize* that because of the intermittent frequency of Storm water events and the wide variability in the quality and quantity of runoff, controls must typically take the form of structural and non-structural best management practices (BMPs), rather than active treatment processes. Therefore, directly enforceable numerical effluent limitations—stated either as concentration limits or as mass loading limits—are not an appropriate regulatory tool for most types of Storm water discharges. However, quantification of Storm water impacts will be an essential step in moving toward the attainment of water quality standards in water bodies impacted by Storm water runoff. *Provide* that where a total maximum daily load has been established for a water body—quantified target levels may be included in a Storm water discharge permit as a trigger for additional control efforts to be initiated, if shortcomings in an initial set of BMPs are determined to be a significant factor in preventing the desired ambient receiving water quality from being achieved. Such targets could be used, e.g., to trigger (1) a reopening of a permit to insert additional control requirements or (2) a requirement to

implement additional controls or contingency measures included in the initial permit. Quantified water quality targets and a monitoring and response feedback mechanism may often be necessary to assure progress toward the goal of attaining water quality standards.

- Storm water Funding: Authorize adequate federal funding for both state program implementation and research efforts. Establish a new Storm water funding line item , with an initial authorization of 70 million dollars annually for five years. Of this amount, 50 million dollars should be authorized for state program implementation, under either section 402(p) or section 319. Twenty million dollars should be authorized to fund projects within states that develop and/or implement innovative, cost-effective municipal storm water control measures designed to achieve the technology-based and/or water quality-based objectives established for the storm water permit program.
- Sub-delegation of Storm water Permitting: *Provide* states the option to delegate administration of the storm water discharge permit program to municipalities or other sub-state levels of government, or to other state agencies, for particular categories of industrial Storm water discharges for which the state determines that administration of the permit requirements at that level of government is appropriate and will otherwise satisfy section 402(p) requirements.
- Industrial Storm water Coverage: *Require* management of industrial sources of Storm water in a manner that does not create impacts upon ground water. *Provide* that no permit is required for industrial facilities that pose no threat to water quality.

STATE REVOLVING FUND PROGRAM

- X Administrative Fees: *Authorize* an increase in administrative fees for conducting the necessary activities for implementing SRF programs. Such fees should not exceed the

greater of 6% of all capitalization grant awards, or 1/2% per year of the valuation of the state fund, or \$600,000 per year.

- Disadvantaged Community Subsidy: *Provide* a definition of disadvantaged communities such that the term would mean a service area, or portion thereof, of a treatment works with respect to which the average residential sewage treatment charges meet affordability criteria established by a state in accordance with EPA guidelines. Authorize states to subsidize disadvantaged communities, including providing subsidization of principal, as is necessary to ensure conformity with such affordability criteria. Restrict the amount of assistance made by a state to a disadvantaged community to a specified amount consistent with maintaining the long term viability of the fund. *Authorize* states to extend the term of a SRF loan up to 40 years after project completion or the design life of the treatment works, whichever is less.
- SRF Funding: *Authorize* appropriations for SRF Capitalization Grants at a level of \$2 billion per year independently from any appropriations for the Drinking Water SRF.
- Cross Cutting Requirements: *Modify* section 602 such that a state's obligation to comply with federal laws and authorities other than those within this act which are applicable to a state's award of assistance, will be satisfied if such assistance is awarded pursuant to a state statute, rule executive order or program which addresses the intent of such federal laws or authorities. Federal laws and authorities not satisfied by this subsection should apply only to funds directly made available by federal capitalization grants. All federal laws and authorities other than those within this act should cease to be applicable to the award of assistance by a state once the state has obligated funds directly made available by federal capitalization grants.

- Land Eligibility: *Authorize* the use of SRF assistance for the purchase of any necessary land, easement, or right-of-way not already owned by the recipient, provided the amount of assistance does not exceed the acquisition price as determined in accordance with the Uniform Relocation and Real Property Acquisition Act of 1970.
- Loans for Confined Animal Feeding Operations: *Authorize* SRF loans for privately owned Confined Animal Feeding Operations perhaps, for a limited period following reauthorization and subject to a total funding cap. This limited authorization for funding private entities to design and construct appropriate environmental protection systems is justified based upon the substantial new regulatory challenges such operations are facing throughout the country at this time.