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# Colorado Water Congress

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04/21/00

USDA - Forest Service
Content Analysis Enterprise Team
Attn: UFP Building 2, Suite 295
5500 Amelia Earhart Drive
Salt Lake City, Utah 84116

Re: Unified Federal Policy for Insuring a Watershed Approach to Federal Land and Resource Management

The Colorado Water Congress (CWC) is a statewide organization whose members include municipalities, conservancy and conservation districts, industries, special districts, state agencies, ranchers, farmers and others who are dedicated to protecting and placing to beneficial use Colorado's water resources. It advocates positions on water policy and provides education and information on water issues affecting Colorado and the West. It has closely tracked developments under the Administration's Clean Water Action Plan and is an active participant in the TMDL rulemaking process at the state and federal levels. Hence, it reviewed with interest the Unified Federal Policy and offers for consideration the following comments.

## INTRODUCTION

The CWC is certainly not opposed to a watershed approach to water quality protection, and it supports the coordination of efforts by the various involved federal agencies who exercise authority over federal lands. However, the CWC is adamantly opposed to the now widespread practice of adopting "rules" under the guise of guidance so as to avoid APA procedures and deprive interested parties of potential legal recourse. It is hoped that this initiative does not fall into that category.

The CWC also welcomes cooperation by federal representatives with state and local efforts and endorses an appropriate level of deference to watershed restoration and preservation efforts being undertaken at the local level. Finally, it enthusiastically supports the statements found on page 8835 of the notice to the effect that "nothing in the proposed policy is intended to adjudicate, determine, or otherwise affect water rights." Unfortunately, the policy itself leaves many unanswered questions such that the CWC cannot determine if the above statement will prove to be true in the long run.

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**COMMENTS**

The CWC provides the following more specific comments on the proposed policy.

1. The policy is admittedly derived from the Administration's Clean Water Action Plan. However, the Action Plan is not the product of Congressional debate and legislative approval. Hence, the agencies are embarking upon a course of conduct which could have significant regulatory implications, especially for those who do business on federal lands, without virtue of statutory authorization. Therefore, the implementation of this policy will need to be closely circumscribed. The CWC recommends that the following language be added to the policy: "The initiatives identified herein are not intended to affect existing land use authorizations or to adversely impact the renewal thereof."

2. Though the "policy goals" reference "good stewardship and effective watershed management" in the context of preventing and reducing water pollution, they fail to note the dual objective of maintaining federal lands for the "multiple uses" identified in the statutes creating the land use designations. In fact, the goals do not acknowledge the organic forest purposes of timber and water production. This should be rectified.

3. No detail is provided upon what will constitute the "common science-based approach." Hence, specific comments thereon are not possible. However, the CWC is concerned that the agencies may look to a "biological integrity" or "biocriteria" measurement tool without acknowledging its current shortcomings, including its site-specific application limitations and the absence of a regulatory foundation therefore. In addition, given that changes in the "flow regime" can impact such criteria, it is important for the agencies to recognize and honor state water allocation systems and rights acquired thereunder in the utilization of such "science."

4. The "delineation, assessment, and classification" of watersheds may be performed utilizing "common tools," and "consistent procedures," but must take into account site-specific conditions and "local" determinations regarding these subjects.

5. It is unclear exactly what is being referenced when it is stated that watershed assessments will determine "potential" conditions. Is this the condition post-remediation? If so, how will such a determination be made? Is this the condition after allowable land and water use activities occur, such as increased logging or water diversion and storage? Exactly how will the assessment of "potential" conditions be utilized?

6. Reference is also made to "classifying" the condition of the watershed. What will these classifications be? What are the classification criteria? To what end will the classifications occur? How will the classifications fit with existing state stream classifications? These questions must be answered.

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7. It is indicated that assessments in "priority watersheds" will occur on a 10 year cycle. Though the CWC is supportive of an assessment period which affords adequate time to implement, and monitor the impact of, any necessary remediation measures, and 10 years may be an appropriate timeframe, how will this be integrated with any TMDL listing cycle?

8. Under the factors to be included as a basis for identifying priority watersheds, the agencies reference "issues the federal agencies identify, including possible adverse effects on water quality," and "change[s] to [the] flow regime." What kind of "issues" are contemplated here? This needs to be further defined. In addition, it is inappropriate to identify "changes to flow regime," independent of water quality or aquatic life impacts, as a prioritizing factor. That is to say, flows do not, in and of themselves, merit such examination. Furthermore, even to the extent such a flow analysis is relevant to CWA goals, both existing water rights and future water production opportunities must be protected.

9. Reference is made to identifying and designating waterbodies which warrant "special protection." What form will that protection take? Since this is a "policy," which is not being subjected to the APA rulemaking process, what independent authority will be utilized to afford these waterbodies such special protection?

10. The policy speaks of addressing nonpoint sources of pollution through the adoption of "management strategies." The CWC is fearful, and justifiably so given the statements in the Clean Water Action Plan and Forest Service actions to date, that these "strategies" may include closing more and more forest roads, roads which are essential for access to water diversion and storage facilities and for other appropriate land uses, including silvicultural practices which promote water production. The Forest Service has an obligation to "lay its cards on the table" if this is the direction in which it is headed.

11. Reference is also made to identifying BMPs and management strategies which will "meet" water quality requirements. It should be acknowledged that standards can not always be met given current technology and necessary public land uses, but that efforts will be made to achieve further progress. At some point, the agencies may have to join others in seeking standards/use modifications to more accurately reflect ambient conditions.

12. Reference is made to a periodic review and amendment of "policies and management plans for federal lands" so as to meet goals for watershed protection and improvement. However, no mention is made of insuring that such policies and plans continue to respect existing uses of federal lands, uses which arise under contractual arrangements, permits, licenses or otherwise. Likewise, no mention is made of maintaining historical multiple use objectives. Hence, a change is appropriate.

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13. It is further stated that the agencies shall utilize TMDL results in watershed planning and resource management activities. However, it is unclear how that will be accomplished. The Department of Agriculture recently submitted written comments upon EPA's proposed TMDL rule which questioned whether the statutory authority to regulate "nonpoint" sources under the Section 303(d) program can be found in the Act. Indeed, there is substantial reason to question such authority. It would be totally inappropriate for the agencies to now establish a "policy" rooted in a concession that such authority does exist. While the implementation of voluntary BMPs, in coordination with local watershed initiatives, is appropriate, any further steps (without Congressional authorization) are inappropriate.

14. It is further indicated that agency "rules, policies and procedures" that affect water quality or watershed conditions will be reviewed to insure compliance with CWA requirements which may arise at any level of government. It should be stated that any proposed modifications will be the subject of public notice and comment. Otherwise, essential due process rights will have been ignored.

15. The proposed policy states that it will be a "goal" to adopt "water quality standards that better account for nonpoint source pollution." What does this mean? How will "standards," designed to protect uses, be correlated to the "sources" of pollutants? Will there be a modification of standards to reflect uncontrollable or natural pollutant sources?

16. Reference is made to a review of policies that "affect land and water uses and water quality" to insure watershed protection and water quality compliance. Once again, it must be made clear that any policy relating to "water uses" must respect state water allocation systems and rights obtained thereunder consistent with the Wallop Amendment to the CWA (Section 101(g)) and the McCarran Amendment. In addition, land use policies must honor necessary access rights associated with the operation, maintenance, repair and replacement of water facilities and other legitimate structures.

17. It is stated that a common framework will be developed for addressing "aquatic ecosystem issues." Any such framework must have a basis in, and be consistent with, delegated statutory authority. It should be so stated in the policy. In addition, development of the approach should be subject to public notice and comment, as a myriad of interests, including water users, may be directly affected.

18. The CWC supports the effort to seek participation by "interested stakeholders in watershed planning and management decisions." This is necessary to insure local support and to adequately protect vested interests which may be impacted by watershed planning decisions.

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19. Finally, the "glossary of terms" defines "watershed conditions" with a reference to "water flow characteristics and processes." Once again, though flow is admittedly a component in the assessment of watershed conditions, established rights to flow must be honored and any policy must accommodate the future utilization of flow to meet not only water quality related objectives, but historical consumptive use requirements, such as municipal drinking water use.

Thank you for the opportunity to comment; it is hoped that the final policy will reflect the observations made herein.

Sincerely,

Richard D. MacRavey
Executive Director

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