



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/WATER QUALITY**

#### **EPA/CWA 404 Program/Florida**

On September 16, Environmental Protection Agency (EPA) published a notice and request for comments in the *Federal Register* (85 FR 57853) on Florida's request to assume administration of the Clean Water Act (CWA) §404 program. If approved, Florida will become the third state to assume that authority, after Michigan and New Jersey. EPA has reviewed Governor Ronald DeSantis' (R-FL) complete program submission for regulating discharges of dredged or fill material into waters of the United States (WOTUS) within the State's jurisdiction. Separately, Florida operates an Environmental Resource Permit (ERP) program that regulates the disposal of dredge and fill materials into waters of the State.

The §404 program would be administered by the Florida Department of Environmental Protection (FDEP), and would provide for both general and individual §404 permits. Florida has adopted 38 general permits, and has provided a description of the standards and process for granting individual permits, for state waters. Florida's laws prohibit individual §404 permits that would: (1) violate State water quality standards, except for approved temporary mixing zones; or (2) "...if there is a practicable alternative to the proposed activity which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."

Florida has a memorandum of agreement (MOA) with the Army Corps of Engineers (Corps) that identifies procedures for transferring pending permit applications. Existing §404 permits will remain with the Corps during the lifespan of those permits. Additionally, the Corps will retain §404 permit authority for waters used to transport interstate or foreign commerce and WOTUS located within Indian country. EPA has scheduled virtual public hearings for October 21 and 27. Pre-registered as a speaker or a listen-only attendee. Florida's MOA, regulations, and other program documents are available at [www.regulations.gov](http://www.regulations.gov), Docket #EPA-HQ-OW-2018-0640-004, and comments are due by November 2. EPA intends to make a decision on whether to approve Florida's request by December 17. See <https://register.gotowebinar.com/register/4295139229196503819>.

### **EPA/Columbia River/Toxics**

On September 16, the EPA announced the first grant awards, totaling \$2M, from the Columbia River Basin Restoration Funding Assistance Program. The program was originally authorized for \$30M to support water quality and toxics work in the Columbia River Basin. Awards are made to local governments, universities, non-governmental organizations, and several tribes, including the Confederated Salish and Kootenai Tribes in partnership with the University of Montana, the Yakama Nation, and the Nez Perce Tribe. Many of the projects are focused on monitoring chemicals and contaminants in the river and watershed ecosystem, including mercury, methylmercury, pesticides, and previously unmonitored contaminants, such as endocrine disruptors. Other projects focus on community outreach and education for under-served communities, farmers, and youth. A final set of projects look at green stormwater infrastructure and monitoring stormwater quality. EPA Region 10 Regional Administrator Chris Hladick said: "These grants represent a critical new component of EPA's efforts to protect and restore the Columbia River Basin. We expect that these grants will encourage others to invest in complementary work that will provide significant reductions in toxics in the Basin."

### **EPA/Toxic Substances Control Act**

On September 9, EPA hosted a call with interstate water organizations representing state and local entities to discuss and receive feedback on next steps in implementing the 2016 Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (PL 114-182), which amended the Toxic Substances Control Act (TSCA), as part of EPA's efforts to comply with Executive Order 13132 on federalism, with the intention of continuing to engage state and local governments as implementation moves forward.

The amendments specified that EPA establish a risk-based screening process and criteria for designating a chemical substance as either a high-priority or a low-priority substance. The established process includes three phases - prioritization, risk evaluation, and risk management. High-priority substances are subject to a risk evaluation, while low-priority substances are not. The criteria include hazard, exposure, persistence,

bioaccumulation, toxicity and cancer risk, among others. The evaluation will determine whether the risks presented by a chemical under the conditions of use present an “unreasonable risk” of injury to public health or the environment. If a chemical is determined to have unreasonable risk, it becomes subject to risk management actions.

Relevant to states, chemicals undergoing risk evaluations are subject to a “pause pre-emption,” meaning that regulatory actions at the state and local level must pause until the risk evaluation and potential subsequent risk management action are completed. Also, of note, the risk evaluation phase includes a review of the laws that may be better suited to regulating a particular chemical. For example, if a chemical is found in drinking water, but determined to have unreasonable risk through the TSCA process, the risk evaluation will determine if the Safe Drinking Water Act may be more appropriate for regulating that chemical.

The 2016 TSCA amendments directed EPA to choose ten chemicals from the 2014 Update to the TSCA Workplan for the initial risk evaluations. EPA also published a list of twenty other high-priority chemicals in December 2019 that will be evaluated in the coming year. The first two chemicals determined to have unreasonable risk, methylene chloride and 1-bromopropane, will be subject to risk management actions, with intended action dates set for the summer of 2021. Webinars are scheduled for September 16 (methylene chloride) and September 30 (1-bromopropane) to allow states, local governments, and stakeholders to provide feedback on potential rulemaking. All participants will have an option to speak for up to five minutes during the call. For further information, see <http://www.tscablog.com/>.

## **ENVIRONMENT/LITIGATION** **NEPA/Wild Virginia v. CEQ**

On September 11, the federal court for the Western District of Virginia denied a motion for preliminary injunction in *Wild Virginia v. CEQ* (#20-45). The motion sought a nationwide stay of the Council on Environmental Quality’s (CEQ) new National Environmental Policy Act (NEPA) rule, which went into effect on September 14. According to the court, the environmental organization plaintiffs asserted that the new rule is “inconsistent with NEPA because CEQ improperly (1) removes the requirement that agencies consider cumulative and indirect impacts on the environment, (2) removes the requirement that agencies evaluate all reasonable alternatives, (3) requires actions to be deemed ‘major’ before any environmental effects are to be considered, (4) allows projects to proceed during the NEPA process, and (5) diminishes the input from those with qualitative, rather than technical, knowledge. The plaintiffs also assert that CEQ is not

entitled to Chevron deference because the revisions directly conflict with the ‘unambiguously expressed intent of Congress.’”

The court said: “The plaintiffs here may ultimately succeed in this case, but at this point they have not made that clear showing. While the Rule and its relevant documents speak for themselves, it is not unlikely that interpretative testimony and expert opinion would be required for the proper determination of the validity of the Rule. Moreover, the jurisdictional standing and ripeness issues raised in opposition to the request for an injunction and in the pending Rule 12(b)(1) motions to dismiss may very well require evidence.” The court also noted concerns about the request for a nationwide injunction: “Finally, as recently noted by the Fourth Circuit, even assuming the power of a single district judge to issue a nationwide preliminary injunction, it should be restricted ‘to the most exceptional circumstances,’ particularly since such cases typically involve ‘rushed judicial decisionmaking, often under immense time pressure, based on expedited briefing, and in the absence of a factual record.’”

## **WATER RESOURCES** **Bureau of Reclamation/Colorado River**

On September 15, the Bureau of Reclamation (USBR) released updated modeling results for the Colorado River Basin operations. The Colorado River Simulation System (CRSS) results are released at least three times a year to provide water managers with information to plan for the future. Compared to the projections released in the Spring, CRSS projections show an increased chance of Lake Powell and Lake Mead falling to critically low reservoir levels by 2025, assuming dry hydrologic conditions similar to the past two decades. The Basin has experienced only 55% of the average runoff for this water year.

The press release said: “The Colorado River Basin is in its 21<sup>st</sup> year of an extended drought. As reservoir levels decline, Lake Powell and Lake Mead operations are potentially impacted.... The extended drought increases the importance of ongoing drought contingency actions and operational adjustments that Reclamation and partner entities have taken on the river. These actions successfully demonstrate that voluntary, compensated water conservation projects can conserve water for the Colorado River system storage and help mitigate the impacts of drought.”

USBR Commissioner Brenda Burman said their technical experts help “protect the water resources in the Basin, ensuring sustainable, reliable water and hydropower for the 40 million people who depend on this river.” See <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=72523>.

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