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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES
Army Corps of Engineers/Nationwide Permits

On January 13, the Army Corps of Engineers (Corps) published their final rule regarding the Reissuance and Modification of Nationwide Permits in the *Federal Register* (86 FR 2744). The rule finalizes 16 nationwide permits (NWPs), 32 general conditions and associated definitions. These include 12 existing NWPs and four new NWPs, including new NWP 58 that addresses utility line activities including for water. An additional 40 NWPs are not being reissued or modified, and will be in effect under the January 6, 2017 final rule along with associated general conditions and definitions until their expiration in March 2022.

WSWC members' primary concerns were with: (1) the removal of the Pre-Construction Notice (PCN) requirements for all federal agencies and federal permittees; (2) the removal of the 300 linear-foot limit for losses of streambed and replacement with a half-acre limit within ten NWPs; and (3) the need for states to authorize the proposed NWPs, rather than the final NWPs, due to the deadline for blanket Clean Water Act (CWA) Section 401 Water Quality certifications (see WSW #2431 Special Report).

The Corps decided to keep the PCN requirements for federal and non-federal agency permittees. As stated in the final rule, "After reviewing the comments received in response to this aspect of the proposal, the Corps agrees that there is no substantive basis for establishing different PCN requirements for federal and non-federal permittees. The Corps is thus retaining the existing PCN requirements for federal permittees." PCNs require a permittee to submit a proposal to the Corps district engineer prior to construction to ensure the proposed activities comply with the terms and conditions of the NWP. At this stage, the district engineers often work with states to review that the activities will meet state water quality standards and ensure the individual and cumulative impacts do not have more than minimal environmental impacts, as required by the NWPs.

As proposed, the Corps removed the 300 linear foot limit for losses of streambed in ten of the NWPs. In the rule, the Corps cited reasons for removing this limit, including: (1) retaining the half-acre limit for losses of non-jurisdictional waters and wetlands will help further Congressional intent with respect to Section 404(e) of the Clean Water Act; (2) this provides equivalent quantitative limits for all categories of non-tidal jurisdictional waters, which will continue to be subjected to the half-acre limit for losses; (3) it will increase administrative efficiencies; and (4) it provides more accurate accounting of the impacts of activities authorized by the ten NWPs. The Corps also noted that, in conjunction with PCN requirements and review by district engineers, regional conditions and activity-specific conditions can be added. This change will ensure no more than minimal environmental impacts.

The rule states, "Quantifying losses of streambed in acres or square feet will be more accurate, provide a more substantial and defensible basis for decision-making by district engineers on PCNs for these activities, and provide more accurate data for the Corps to track cumulative impacts of the activities authorized by these NWPs."

In response to concerns over the removal of the 300 linear foot limit, the Corps implemented a 3/100-acre threshold for compensatory mitigation in paragraph (d) of General Condition 23 (mitigation general condition). The proposed rule added a 1/10-acre threshold for streambed losses, similar to the existing 1/10-acre threshold for compensatory mitigation for wetland losses. The final rule states, "As explained in the discussion of general condition 23, this change in the stream mitigation threshold aligns with current practice for stream mitigation requirements in the NWP program, and the recommendations for the stream mitigation threshold provided by commenters."

Regarding concerns from states who needed to submit blanket Section 401 Water Quality Certifications for the NWPs prior to the final rule, the Corps stated, "Section 401 of the Clean Water Act states that no permit shall be issued until water quality certification has been obtained or waived. Therefore, the water quality certification process must be completed before the final NWPs are issued…. The water quality certification regulations issued by EPA this year also state that water quality certification requests are made for proposed

general permits, not the final general permits." It goes on to state, "The Corps acknowledges that the water quality certification process for the 2020 Proposal is a departure from past practice; however, it is consistent with section 401 and EPA's final certification regulation at 40 CFR part 121. In the 16 NWPs issued in this final rule, there were no substantive changes that trigger a requirement for the Corps to submit new certification requests for NWPs." See www.federalregister.gov, Document Number 2021-00102 for the final rule in its entirety.

WATER QUALITY

South Dakota/State Revolving Fund

On January 7, the South Dakota Department of Environment and Natural Resources announced approval of $8.7M for drinking water, recycling, and solid waste projects. The funding includes loans for water tower construction and drinking water system improvements, with $7.5M to the Minnehaha Community Water Corporation (MCWC), and $637,000 (plus $160,000 in principal loan forgiveness) to Edgemont.

The MCWC project includes construction of approximately 8.2 miles of 12-inch water transmission main, a 250,000-gallon water tower located near Humboldt, a 750,000-gallon water tower located near Brandon, and a control valve station allowing MCWC to increase storage capacity in two separate areas of its distribution system.

The Edgemont project previously received funding in 2015, 2017, and 2019, to complete multi-year system improvements that included well rehabilitation, a new well, a water treatment facility, an elevated storage tank and water main installation. Edgemont will use the additional funding to design and install a pretreatment system to reduce iron levels in the raw water supply.

South Dakota and the Environmental Protection Agency (EPA) contribute to the Drinking Water State Revolving Fund, which provides low-interest loans for public drinking water system projects. Principal forgiveness is a subsidy option that results in a reduced loan payment amount for the borrower. https://denr.sd.gov/dfta/info/info.aspx

WATER RESOURCES

Reclamation/New Mexico/Texas

On January 12-14, under the Rio Grande Compact, the Bureau of Reclamation released about 730 acre-feet from El Vado Reservoir, which connects to the Rio Grande via the Rio Chama. New Mexico is working toward fulfilling its delivery obligations to Texas despite continuing drought conditions. Drought in 2020 contributed to several complications in international, interstate, and intrastate water deliveries along the Rio Grande, and drought conditions have not abated. (See https://www.usbr.gov/uc/albuq/water/SanJuanChama/Reservoirs/elvado_indx.html, and WSW #2424 #2420, #2415, #2398.)

Under the terms of the Rio Grande Compact, New Mexico must deliver water to Elephant Butte Reservoir based on the quantity collected the previous year. Because 2019 was a relatively wet year, New Mexico started 2020 with a 60,000 acre-foot delivery obligation to Texas. This debt grew over the summer when Texas and Colorado agreed to an emergency release of 36,000 acre-feet of the debit water in El Vado Reservoir, in order to extend the summer water supply along the dry Rio Grande in New Mexico. Texas has since requested that New Mexico release all the water it can spare into the Rio Grande to replenish the depleted Elephant Butte Reservoir. (*Santa Fe New Mexican News*, 1/14/21)

Texas and New Mexico are involved in ongoing litigation over the applicability of the Rio Grande Compact to groundwater pumping in New Mexico, *Texas v. New Mexico* (U.S. Supreme Court, #22O141). On November 5, 2020, both Texas and New Mexico, as well as the Bureau of Reclamation as an intervenor, filed motions for partial summary judgment. A hearing before a Special Master will be held on the motions in March 2021. The trial is currently scheduled for Summer 2021.

Apart from the Rio Grande, the two States have also been involved in litigation to resolve a question of water deliveries under the Pecos River Compact. In *Texas v. New Mexico* (U.S. Supreme Court, #22O65), Texas objected to the River Master's accounting of evaporative losses at Brantley Reservoir in New Mexico. Following Tropical Storm Odile in 2014, Texas and New Mexico were inundated. Water was held back to prevent further disaster. Although Texas was prepared to receive its compact delivery by March 2015, New Mexico's infrastructure was still damaged, and water releases would have caused further catastrophe. The water remained in the reservoir through the hot summer, where significant evaporative losses occurred. The water was finally released in August 2015. At issue is whether the River Master clearly erred in calculating New Mexico's delivery credit for evaporation, and appropriately entertained New Mexico's request for delivery credit.

The Supreme Court heard arguments on October 5, 2020, and on December 14, issued its decision. Referring to section C.5 of the River Master's Manual, the court concluded: "The water was stored in New Mexico at the request of Texas. Some of the water then evaporated before it was released to Texas. Under those circumstances, as the River Master correctly concluded, New Mexico is entitled to delivery credit for the evaporated water. That result is both legally accurate and entirely fair. We deny Texas's motion for review."