



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/LITIGATION

California/CWA/NWPR/WOTUS

On February 17, several Democratic members of Congress filed a motion to submit an amicus brief in *California v. Wheeler* (3:20-cv-03005, U.S. District Court for Northern California). The arguments support the Plaintiff states' position in their motion for summary judgment regarding the inadequacies and violations alleged in the Navigable Waters Protection Rule, defining "Waters of the United States" (WOTUS) under the Clean Water Act (CWA). Western members of Congress joining the brief included: Representatives Raúl M. Grijalva (AZ), Nanette Diaz Barragán (CA), Julia Brownley (CA), Mark DeSaulnier (CA), Jared Huffman (CA); Barbara Lee (CA), Zoe Lofgren (CA), Doris Matsui (CA), Grace Napolitano (CA), Juan Vargas (CA), Suzanne Bonamici (OR), Peter DeFazio (OR); and Senators Dianne Feinstein (CA) and Martin Heinrich (NM).

The brief noted their interest is in providing the Court "...with an understanding of the text, structure, and goals of the [CWA] our predecessors enacted in 1972 – along with its subsequent amendment in 1977, which further confirmed Congress' intent – and with an understanding of the ways in which the so-called 'Navigable Waters Protection Rule' (NWPR) dishonors that intent." The brief argued that the NPWR decreased water protection. "Where Congress called for science-based decision-making, the NWPR largely ignores the science of clean water. And where Congress called for a collaborative, comprehensive, and mandatory federal and state cleanup of the nation's waters..." the federal agencies based their rule on "fallacious notions about [CWA] federalism." They also argued that the NPWR undermines statutory mandates and that the Environmental Protection Agency (EPA) and Corps of Engineers (Corps) failed to provide Congress "with basic information about the environmental consequences" of the rule.

Federalism is important, "But the Congresses that crafted the [CWA]... chose to enlist the states in a mandatory and nationwide project of improving water quality, and to give states discretion to add extra layers of water quality protection if they chose to do so. It

chose cooperative federalism over deregulatory federalism. Nothing about Congress's vision supports using environmentally irrelevant jurisdictional boundaries to carve out huge geographic areas where the addition of pollutants to waters would be unregulated."

Regarding CWA §101(b), "This language clearly emphasizes the importance of states. But it says nothing about jurisdictional boundaries. Instead, it speaks of 'water resources' generally, drawing no distinctions within that broad category. This language therefore expresses Congress's desire for the states to be heavily involved in protecting waters that are subject to [CWA] jurisdiction. It says nothing about excluding a class of aquatic features from that protection." Section 101 "also indicates that the purpose of state involvement was to restrain water pollution, not to authorize it," and §101(a) emphasized the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Taken together, the text clarifies the goal: "Congress was enlisting the states in pursuit of the crucial national goal of protecting water quality. It was not trying to limit the scope of the [CWA's] coverage."

The brief argued that the NWPR actually undermines state authority and principles of federalism. "[CWA] implementation has honored Congress's blueprint for substantial state roles in advancing water quality, while also preserving states' ability to be partners in water quality protection and to manage land and water resources.... In practice, states do take the lead in implementing nearly every key part of the statute. They adopt water quality standards. They draft water pollution budgets and engage in continuing planning processes. Nearly every state holds delegated authority to issue NPDES permits. And while only two states (New Jersey and Michigan) have elected to hold delegated authority to issue §404 permits, states influence those permits in a variety of ways. Using their authority under §401, states routinely work with the Corps' district offices to craft the terms of section 404 permits, and they also work with the Corps to implement compensatory mitigation programs. State involvement, in short, pervades every key part of [CWA] implementation, and state implementation of that authority is often intertwined with and supported by federal efforts and contingent upon waters falling within [CWA] jurisdiction. Consequently,

unless states enact new legislation and appropriate additional funds, many of these state programs would actually shrink if [CWA] jurisdiction is narrowed.”

Further, the brief argued that federal and state authority routinely coexist under the CWA as intended. “Even if a waterway is subject to federal jurisdiction, states still retain primary responsibility for allocating water rights in that waterway. If the waterway is navigable-in-fact – and thus unquestionably subject to [CWA] jurisdiction – the state in which it is located still owns its streambed. Similarly, so long as streams or wetlands are not on federally-owned land, states and local governments retain their land use authority over those streams and wetlands and surrounding uplands. Nor is there de facto preemption of that authority. If states or local governments want to authorize development in areas with jurisdictional aquatic features, they generally can, and they routinely do so; the Corps issues tens of thousands of fill permits every year, and permit denials are exceedingly rare.”

ADMINISTRATION/WATER RESOURCES **Corps/Levee Engineer Circular**

On February 22, the Corps released its revised draft guidance Engineer Circular (EC) No. 1165-2-218, Engineering and Design: USACE Levee Safety Program. “This document establishes the policies for implementing the [Corps] Levee Safety Program, and describes [Corps] activities, roles and responsibilities for federally authorized levees. This document also describes activities that sponsors are required to conduct or participate in consistent with their project agreements.” The Corps EC attempts to use more plain language. It also incorporates past suggestions such as “an appeals process for risk assessment findings, a flexible inspection process that recognize one size doesn’t fit all for frequency of inspections, and a much greater focus on partnership and relationships with our non-federal sponsors.” ECs typically establish internal agency policy, and are temporary, unless converted to an Engineer Regulation that does not expire.

The EC outlines a comprehensive process for ensuring levee safety and identifies the required and optional activities for both the Corps and local levee sponsors. It includes: (1) levee site visits and inspections a minimum of every five years; (2) risk assessments that evaluate hazard and the levee itself every ten years; (3) how operations, maintenance, repair, replacement and rehabilitation activities, typically undertaken by the sponsor are determined and prioritized; (4) goals for communicating the condition of the levee to local agencies and decision-makers, and how the Corps and local sponsors will share information and communicate with outside agencies; (5) upkeep of the National Levee Database (NLD) and development of a Levee System Summary for each levee in the NLD;

and (6) requirements for personnel and program management plans, as well as monitoring, and internal and external audits.

Coordination with local sponsors is emphasized. The Corps is required to review information about inspections, site visits, and risk assessments with sponsors, and to work with the sponsors to develop a prioritized list of recommendations and a management plan for the levees based on these assessments.

The EC appendices provide further details, including how the Corps chose a risk-informed approach for dam and levee safety. “The use of risk assessments resulted in more transparency in both the safety evaluations and the resulting decisions. In addition, risk assessment allowed for the evaluation of how levees could fail that do not fit within deterministic criteria-based analysis or a pure comparison to design standards – [the Corps] now focuses its analyses around potential failure modes.” For example, piping and internal erosion of soil embankments or foundations; stability of embankments and flood walls; and interactions between concrete structures and embankments. This approach enables transparency and the flexibility to put resources where they are most needed, “reducing expenditures on activities which do little to reduce risk.” It also improves flood fighting plans and communications with emergency management agencies, including the Federal Emergency Management Agency (FEMA). It discusses how the data and information gleaned from the inspections and risk assessments can be used to determine eligibility for the Corps’ PL 84-99 Rehabilitation Program and FEMA’s National Flood Insurance Program.

The EC concludes, “Regularly checking in and being comfortable having frank discussions are key to a strong relationship and the basis for understanding and solving levee-related challenges together. [The Corps] will work with levee sponsors to ensure they are included in all Levee Safety Program activities. At a minimum, district Levee Safety Program Managers will work with levee sponsors to ensure they are aware of and invited to participate in all Levee Safety Program activities; Obtain, verify, and update information about levees; Provide access to information about their levee in the National Levee Database; Make clear which information will be publicly available on the National Levee Database and review that information together prior to sharing it; Discuss risk information about their levee and how it can be used; Agree to a strategy for sharing levee condition and performance information that aligns with authorities and responsibilities; Regularly coordinate, particularly for communication related activities; Share levee information with others.”

Contact the WSWC office for a draft of the EC. Any feedback can be sent to EC218@usace.army.mil. The final EC is expected on May 21.