



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/WATER RESOURCES

Drinking Water and Wastewater Infrastructure Act

On April 29, the Senate passed the Drinking Water and Wastewater Infrastructure Act of 2021 (S. 914) with a bipartisan vote of 89-2. It authorizes a variety programs through FY26, including reauthorizing the Clean Water State Revolving Fund (SRF) and Drinking Water SRF collectively at nearly \$30B, with an additional \$6B in grant funding.

A Senate Committee on Environment and Public Works summary states: "This legislation: 1) Prioritizes environmental justice by targeting grant programs and technical assistance to small, disadvantaged, rural, and tribal communities; 2) Empowers states with increased funding and program flexibilities to invest in community water projects that address aging infrastructure and improve water quality; 3) Tackles lead contamination in drinking water through increased funding for lead pipe replacement and technical assistance; 4) Authorizes funding to connect households to water services, install decentralized wastewater systems, and improve sanitation in Alaska rural and Native Villages; 5) Supports climate-resilient water projects to address the worsening impacts of climate change on drinking water and wastewater infrastructure; 6) Invests in the drinking water and wastewater needs of tribal communities; and 7) Fosters the development and deployment of emerging technologies that result in cleaner, safer, and more reliable water."

The Clean Water SRF will grow to \$3.25B annually over the next five years for a total reauthorization of \$14.65B. It requires a State to use 10-30 percent of its capitalization grant to provide assistance to disadvantaged communities. It also reauthorizes the Drinking Water SRF at the same funding level as the Clean Water SRF for the first time, increases the minimum dedicated to disadvantaged communities from six percent to 12 percent, and allows up to 35 percent of DWSRF grants to be allocated to disadvantaged communities.

The bill provides \$500M for water infrastructure resiliency and sustainability grant programs to prepare communities to respond to natural hazards, such as drought, flooding and other extreme weather events.

This includes \$25M annually for the Drinking Water Infrastructure Resilience and Sustainability program for small and disadvantaged communities (five times the size of the current program), and also creates a new program for medium and large systems funded at \$50M annually. It creates a new \$25M/year Clean Water Infrastructure Resiliency and Sustainability program open to all communities, providing grants to fortify wastewater systems from climate change impacts.

The Tribal Drinking Water Program is authorized at \$50M annually, with 50 percent of the funds to be used by tribes nationally, while the rest must be used to fund 50 projects equally distributed between the Missouri River Basin, Upper Rio Grande River Basin, Colorado River Basin, Lower Colorado River Basin and the Arkansas-White-Red River Basin. States may reserve 2% of CWSRF funds to provide technical assistance to small, rural and tribal publicly-owned treatment works, and authorizes \$230M for Alaska Native Villages.

The bill increases existing Assistance for Small and Disadvantaged Communities grant program funding, creates a new competitive program based on the prevalence of underserved communities, and requires a water services affordability study and subsequent assistance program. It also authorizes \$710M for addressing lead contamination in drinking water through several existing programs. Finally, the bill provides \$300M over five years for new grant programs to deploy new and emerging technologies.

LITIGATION/WATER QUALITY

Corps' Nationwide Permit 12/Clean Water Act

On May 3, a complaint for declaratory and injunctive relief was filed against Lieutenant General Scott A. Spellmon, in his official capacity at the U.S. Army Corps of Engineers (Corps) regarding the 2021 issuance of Nationwide Permit 12 (NWP 12), a general permit issued for oil and gas pipeline projects pursuant to Section 404(e) of the Clean Water Act (*Center for Biological Diversity et al. v Lieutenant General Scott A. Spellmon*, No. 4:21-cv-00047-BMM, District of Montana). The lawsuit states, "The Corps violated the Endangered Species Act [ESA], the National Environmental Policy Act [NEPA], the Clean Water Act [CWA], and the Administrative Procedure Act [APA] by issuing NWP 12

without adequately assessing its significant direct, indirect, and cumulative environmental effects."

The lawsuit alleges the Corps did not fulfill its responsibilities in relation to ESA Section 7 consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS), despite court orders from a previous lawsuit regarding NWP 12 consultation issued in 2017 (*Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044 (D. Mont.), appeal pending, No. 20-35412 (9th Cir.)). It also takes issue with the fact that in reissuing NWP 12 in 2021, the Corps did not "make any meaningful changes to its CWA or NEPA analyses, even though this Court anticipated the Corps would do so on remand [of Northern Plains].” Specifically it states, “The Corps allows oil and gas pipelines to use NWP 12 repeatedly for each water crossing along a project’s length, with no limit to the number of times a pipeline can use NWP 12 or the total number of acres of wetlands that a project can impact. NWP 12 thereby allows the Corps to artificially treat large interstate pipeline projects as hundreds or even thousands of separate ‘single and complete projects’ to avoid the more transparent and thorough individual permit process required by Section 404, which includes public notice and comment and an analysis of the project’s overall impacts and alternatives pursuant to NEPA and the CWA. This use of NWP 12 causes more than minimal direct and cumulative adverse environmental effects in violation of CWA Section 404(e).”

Finally, the lawsuit challenges the Corps' environmental analysis (EA). “The Corps’ EA violated NEPA by failing to adequately evaluate the environmental impacts of pipeline projects permitted by NWP 12. The EA fails to adequately analyze the direct, indirect, and cumulative impacts associated with approving major oil pipelines under NWP 12, such as the effects of numerous water crossings, impacts from the creation of pipeline rights-of-way (including the removal of high-quality forested wetlands), or the pipelines’ contribution to climate change. And the EA does not evaluate the specific risks or impacts of oil spills into waterways from pipelines at all. In fact, the analysis in the NWP 12 EA is the same boilerplate language contained verbatim in the decision documents for each of the other NWPs. The Corps has therefore failed to take the “hard look” at the environmental impacts of NWP 12 activities, as NEPA requires.”

WATER RESOURCES

Arizona/Colorado River/Drought

Over 700 viewers participated in a virtual briefing on April 29, addressing the unprecedented, drought-related water management challenges facing Arizona and the entire Colorado River system. Tom Buschatzke, Director of the Arizona Department of Water Resources, Ted

Cooke, General Manager of the Central Arizona Project, and Dan Bunk, Bureau of Reclamation described the situation. “The reason we’re meeting today is that Lake Mead is 38 percent full,” said Cooke. “And only five feet above the Tier 1 shortage trigger elevation.” Given the extraordinarily dry 2020/21 winter and persistent drought conditions, by the end of 2021, water levels at the reservoir are projected to fall to a point (1075 feet) that trigger 2022 reduced deliveries of Colorado River water. In 2000, the elevation of Lake Mead was over 1210 feet.

The “Tier” system was adopted by the Seven Basin States and the Department of the Interior basin states as part of a shortage sharing agreement that Mexico also signed. An official shortage determination will not be made until August, but Reclamation determined in April that Tier 1 cuts appeared likely. The reductions would constitute about 30 percent of CAP’s normal supply; about 18 percent of Arizona’s Colorado River supply; and less than 8 percent of Arizona’s total water use. Arizona’s usual 2.8 million acre-foot share, delivered through the 336-mile Central Arizona Project (CAP) canal system, will be cut by 512,000 acre-feet, absorbed by CAP customers, mainly agriculture in central and south-central Arizona. Despite mitigation efforts, some farmers may have to reduce irrigated acreage by 30-40 percent.

Municipal and industrial users and Tribes will receive their full supply, though Buschatzke observed individual communities’ drought plans may impose water use restrictions. “There may be some cities who during the shortage decide, ‘we may want to start preparing. The drought might last for another 20 years.’” Some transfers between urban and agricultural users are expected. In lieu of recharging Colorado River water for credit under the States’ water banking system, Arizona will offer the same credit if municipalities allow that water to go to agricultural users. The State is also providing tens of millions of dollars toward mitigation efforts.

Buschatzke explained, in detail, the decades-long effort by Arizona to prepare for water supply cuts, noting the 2019 Drought Contingency Plan (DCP) successfully helped delay Lake Mead’s descent to dangerously low levels. “DCP was not meant to eliminate the chance of shortage overall. DCP is a success. We likely would already be in Tier 2 without the DCP.” The Lower Basin DCP among Arizona, California and Nevada expanded on the shortage-sharing agreements put in place by the Colorado River States in 2007. In a process known as “reconsultation,” the Bureau of Reclamation and the Basin States are preparing now for negotiations on a new set of operational rules that will take effect at the end of 2026. Buschatzke said, “We need folks to be educated about the real risks, the real challenges and where we have plans in place and actions in place that are going to minimize those risks.” See: <https://new.azwater.gov/news/articles/2021-06-0>.