



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chair - Jennifer Verleger; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

WESTERN GOVERNORS/WATER RESOURCES

California/Drought

On May 10, California Governor Gavin Newsom issued an emergency drought proclamation covering 41 counties. The press release noted that warm temperatures, early snow melt, low soil moisture, and early withdrawals have contributed to a drastic reduction in water supply, affecting farmers, fish, and wildlife in the affected counties. "The Governor's proclamation directs the State Water Board to consider modifying requirements for reservoir releases and diversion limitations to conserve water upstream later in the year to maintain water supply, improve water quality and protect cold water pools for salmon and steelhead. The state of emergency also enables flexibilities in regulatory requirements and procurement processes to mitigate drought impacts and directs state water officials to expedite the review and processing of voluntary transfers of water from one water right holder to another, enabling available water to flow where it is needed most."

The proclamation proposed a \$5.1B spending package to address emergency drought needs and long-term resilience. Newsom said: "Shoring up our water resilience, especially in small and disadvantaged communities, is imperative to safeguarding the future of our state in the face of devastating climate change impacts that are intensifying drought conditions and threatening our communities, the economy and the environment. This package of bold investments will equip the state with the tools we need to tackle the drought emergency head-on while addressing long-standing water challenges and helping to secure vital and limited water supplies to sustain our state into the future."

He proposed: \$1.3B for drinking water and wastewater infrastructure; \$150M for groundwater cleanup and water recycling projects; \$300M for Sustainable Groundwater Management Act implementation to improve water supply security, water quality and water reliability; \$200M for water conveyance improvements to repair major water delivery systems damaged by subsidence; \$500M for multi-benefit land repurposing to provide long-term, flexible support for water users; \$230M for wildlife corridor and fish passage projects to improve the ability of wildlife to migrate safely; \$200M for habitat restoration to support tidal wetland,

floodplain, and multi-benefit flood-risk reduction projects; \$91M for critical data collection to repair and augment the state's water data infrastructure to improve forecasting, monitoring, and assessment of hydrologic conditions; \$60M for State Water Efficiency and Enhancement Program grants to help farmers reduce irrigation water use and greenhouse gas emissions from agricultural pumping; \$33M for fisheries and wildlife support; and \$27M for emergency and permanent solutions to drinking water drought emergencies. <https://www.gov.ca.gov/new/sroom/>

Governor Newsom declared a regional state of emergency in the Russian River watershed on April 21, including two counties where reservoir water levels are at record lows. He directed state agencies "to take immediate action to bolster drought resilience and prepare for impacts on communities, businesses and ecosystems if dry conditions extend to a third year."

North Dakota/Drought

On April 1, North Dakota Governor Doug Burgum declared a statewide drought disaster. The executive order (EO) notes that North Dakota is experiencing its worst drought on record since 2000, with drought conditions expected to expand through the growing season. The 2021 fire season has been unprecedented, with large fires beginning in January. The reported acreage burned already tripled that of 2020. Deficient snow, dry conditions, high temperatures, and wildfires have impacted communities, farmers, ranchers, crops, livestock, and the economy. The EO activated the State Emergency Operations Plan to assist local and tribal officials with response, recovery, mitigation, and restoration of services and infrastructure.

Texas/Drought

On April 15, Texas Governor Greg Abbott issued a disaster declaration for 73 counties experiencing exceptional drought conditions and the threat of wildfires as well as other threats to public health, property, and the economy. Parts of Texas experienced severe storms and flash flooding during the last week of April, but on May 7, the disaster declaration was renewed for 54 counties still in exceptional drought.

WATER RESOURCES

CWA §401 Rule/Corps

On May 11, Attorneys General (AGs) from the States of California, New Mexico, Oregon, Washington, Connecticut and Maryland, along with the California State Water Resources Control Board, sent a letter to the Army Corps of Engineers (Corps) expressing concern about recent Corps denials of State Clean Water Act (CWA) §401 certifications of nationwide permits (NWP). The Corps based their decisions on implementation of the new Environmental Protection Agency (EPA) §401 Certification Rule that went into effect September 11, 2020 (85 FR 42210).

The AGs stated, “We mince no words: the Corps’ actions will cost jobs, millions of dollars in unnecessary delays, and will allow some projects to go forward without any conditions to protect state water quality, resulting in significant environmental degradation. Moreover, these actions are purportedly based on the [§401 Rule] that: (1) is subject to review and potential rescission or significant revision pursuant to Executive Order 13990; and (2) even as written, the Corps is misapplying the rule. It is not too late to correct these issues and repair the longstanding cooperative relationship between the States and the Corps in the implementation of the [CWA]. In fact, the impacts of these actions are wholly avoidable, and both the States and EPA have proposed ways in which this situation can be remedied.”

The letter noted two unprecedented Corps actions: (1) issuing “decline to rely” letters to States that included certain language that was interpreted by the Corps as “re-opener” provisions in their certifications; and (2) waiver determinations for several of the States’ NWP §401 certifications for alleged failure to provide written explanations and legal citations for the conditions imposed on their certifications, per the new §401 Rule.

The AGs wrote that the “decline to rely” letters “are both illegal and unfounded.” Language within the CWA requires federal agencies to accept the conditions a state puts on federal projects through §401 authority, regardless of consistency with agency policy. Additionally, “even if these ‘decline to rely’ letters were procedurally valid, the Corps is incorrect in concluding that the certifications include ‘re-opener’ provisions.” States were asked to certify the NWPs with draft regional permit conditions, not final conditions. “For that reason, the States’ §401 certification decisions included provisions allowing them to revisit their certification to address final [NWP] conditions that differ from the draft permit conditions.” This type of language had long been used in prior certifications, qualifying that projects that do not meet NWP coverage may need to obtain individual §401 certifications.

Regarding waiver determinations, “The federal government’s authority to declare a waiver based on

federal procedural requirements is - at best - highly questionable. In drafting this provision of the §401 rule, EPA cited no authority for this position. Indeed, this portion of the rule flies in the face of congressional intent, applicable case law, and the foundation of ‘cooperative federalism’ upon which the [CWA] is built.” The AGs said the Corps has been unreasonable in the application of the CWA provision that allows them to establish a “reasonable period of time (which shall not exceed one year)” for states to submit certifications. The Corps has not extended the arbitrary 60-day timeframe to allow States to remedy concerns the Corps has with certification provisions, despite the authority to do so.

The AGs concluded: “In summary, the Corps must change course and engage with the States to find solutions to the current [NWP] situation - a situation that is the direct result of the Corps’ misapplication of an already haphazard §401 rule that may be rescinded or significantly revised in coming months. Refusal to rectify the situation will result in significant harm to the environment, regulated parties, impacted industries and impacted states.” <https://oag.ca.gov/system/files/attachments/press-docs/USACOE%20Letter.pdf>

MEETINGS

Western States Water Council - Summer Meetings

The WSWC will meet in-person on June 23-25, at the Holiday Inn at Buffalo Bill Village in Cody, Wyoming. Please note the May 21 room reservation deadline. The Executive Committee will meet virtually on June 3, then report to the Full Council. All meeting attendees must register in advance, whether attending in person or remotely via Zoom. For registration, reservations and further information, please see: <https://westernstateswater.org/events/wswc-summer-2021-meetings/>.

Schedule of Meetings

Wednesday, June 23

1:30 pm Water Resources Committee

Thursday, June 24

9:00 am Water Quality Committee

1:30 pm Legal Committee

Friday, June 25

9:00 am Full Council Meeting

PEOPLE

On May 4, **Kevin Frederick**, Administrator, Water Quality Division, Wyoming Department of Environmental Quality, and WSWC Member retired after 31 years with the agency. Kevin was appointed to the WSWC in May 2018 and served on the Water Quality Committee, which he also served as vice-chair. We congratulate Kevin on his retirement and wish him the best in his future endeavors.

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.