



# 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](http://www.westernstateswater.org)

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

### **ADMINISTRATION/WATER QUALITY** **EPA/Groundwater/Maui Guidance**

On September 16, the Environmental Protection Agency (EPA) announced that it was rescinding the Trump-era guidance entitled “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) Permit Program.” The press release noted that the guidance created a new factor for determining whether a point source discharge to groundwater was the “functional equivalent” of a direct discharge to a water of the United States, skewing the analysis and reducing clean water protections by reducing the number of required NPDES permits.

The press release said: “EPA will work with state permitting agencies and the regulated community to implement the Supreme Court’s decision in *County of Maui*, consistent with law and science. The Office of Water is evaluating appropriate next steps. In the interim, consistent with past practice and informed by the factors specified by the Supreme Court, EPA will continue to apply site-specific, science-based evaluations to determine whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires a permit under the Clean Water Act. The agency is committed to working with its state co-regulators, Tribes, and local partners to better protect water quality that is essential to public health and thriving ecosystems.” See <https://www.epa.gov/npdes/releases-point-source-groundwater>.

### **CONGRESS/WATER QUALITY** **Infrastructure/State Revolving Funds**

In a September 7 letter to House Speaker Nancy Pelosi and Minority Leader Kevin McCarthy and Senate Majority Leader Charles (Chuck) Schumer and Minority Leader Mitch McConnell, five interstate organizations expressed both support and concern related to infrastructure legislation and spending. “The Association of State Drinking Water Administrators (ASDWA), the Association of Clean Water Administrators (ACWA), the Environmental Council of the States (ECOS), the Council of Infrastructure Financing Authorities (CIFA), and the

Western States Water Council (WSWC), which represent state agencies and programs, strongly support the funding for the Clean Water and Drinking Water State Revolving Funds (SRFs) in the Infrastructure Investment and Jobs Act (H.R. 3684). “Increased funding for drinking water, wastewater and stormwater infrastructure will increase protection for public health and the environment – saving lives and safeguarding finite water resources for generations to come.”

The letter continued, “However, the requirement for state cash match on appropriations in the bill jeopardizes the ability of states to quickly and efficiently access this federal funding for water infrastructure projects. When combined with cash match requirements for annual appropriations, the Infrastructure Investment and Jobs Act significantly increases cash match requirements for states.” The cash match requirement would be 10% for Fiscal Years (FY) 2022 and 2023, rising to 20% for FY2024-2026. “Combined, state cash match requirements are likely to exceed \$6.629 billion over the next five years, more than double the amount required over [the] last five years. For reference, the American Recovery and Reinvestment Act didn’t require any cash match for appropriations for the Clean Water and Drinking Water SRFs. Under federal law, cash match must be deposited into the SRFs before states can draw down the first dollar of federal funds. States that are unable to deposit cash match into their SRFs during the fiscal year the funding is appropriated, or the next fiscal year, will lose their funding (essentially within two fiscal years).”

The letter explains, “States face different challenges based on how cash match is generated, either through state appropriations or through interagency loans and bonds that depend on interest payments from SRF loans to repay debt.... Uncertainty about the pandemic and economic recovery, along with constraints from balanced budget requirements, are likely to force state legislatures to make difficult decisions about funding important programs. States that have experienced catastrophic natural disasters, such as Hurricane Ida, flooding, tornados, or wildfires, will face even greater challenges.... Some states make interagency loans or issue bonds to fund cash match. These loans and bonds are secured and repaid using interest payments on SRF subsidized loans, which are provided at below market

interest rates. Very low interest rates and federally mandated additional subsidy (requirements to provide federal funds as grants instead of subsidized loans) have significantly eroded this source of revenue for cash match.... Alaska's Clean Water and Drinking Water SRFs couldn't meet cash match requirements for funding provided in the 2019 Additional Supplemental Appropriation for Disaster Relief Act (ASADRA) and ultimately lost those federal funds. With such significant increases in cash match requirements, it's likely that more states will face similar circumstances."

The organizations suggest legislative alternatives to: (1) eliminate the state cash match for federal appropriations in the Infrastructure Act; (2) in the short term allow States to use State and Local Fiscal Recovery Funds from the American Rescue Plan Act for cash match; (3) eliminate the match on the additional federally mandated subsidy in the bill, which would cut the match requirement by almost half, and prevent states from going into debt to match funds that must be given away as grants and grant-equivalents; or (4) eliminate the mandate for additional subsidy and thereby increase the revenue states would have available to meet future cash match requirements, which is a sustainable solution that will help states meet the cash match over the long-term.

The letter concludes, "Thank you for your consideration of these recommendations. On behalf of our members, thank you for leadership in investing in America's infrastructure, especially water infrastructure which is so critical to healthy lives and livelihoods." Chair Jen Verleger (ND) signed the letter on behalf of the WSWC, following review by a select number of Water Quality Committee members. Others signing were ACWA President Andrew Gavin (Susquehanna River Basin Commission), ASDWA President Cathy Tucker-Vogel (KS), CIFA President James McGoff (IN), and ECOS President Patrick McDonnell (PA).

## **LITIGATION/WATER RIGHTS** **California/Groundwater/Adjudication**

On September 7, the California Department of Water Resources received notice of the commencement of the comprehensive groundwater adjudication in *Indian Wells Valley Water District v. All Persons Who Claim a Right to Extract Groundwater in the Indian Wells Valley Groundwater Basin, etc., et al.* (Orange County Superior Court, Case No. 30-2021-01187275-CU-OR-CJC).

The original complaint was filed by Mojave Pistachios, LLC. The cross-complaint by the Indian Wells Valley Water District (IWWVD) seeks "a judgment to comprehensively determine and adjudicate all groundwater rights in the Basin and to provide a physical solution for the perpetual and continuous management of the Basin."

IWWVD's website noted that water use in the basin has exceeded groundwater supply for years, resulting in an "overdraft" condition. IWWVD is a member of the Indian Wells Valley Groundwater Authority, formed pursuant to the Sustainable Groundwater Management Act (SGMA). The Authority developed and adopted a groundwater sustainability plan (GSP), and several lawsuits were filed alleging that the GSP actions to regulate water use and impose fees were unlawful and excessive, leading in part to the present adjudication.

IWWVD's website said: "The Basin underlies approximately 382,000 acres or approximately 600 square miles of land. Approximately 301,000 acres of land overlying the Basin are federal property managed by Naval Air Weapons Station China Lake, the Bureau of Land Management, and the Forest Service. The non-federal lands overlying the Basin consist of the City of Ridgecrest and unincorporated land in the Counties of Kern, Inyo, and San Bernardino. Water rights of the federal government are beyond the jurisdiction of the State to regulate. Under applicable law, the federal government may only participate in a water rights lawsuit if such a case is considered to be what is called a 'comprehensive adjudication' involving all stakeholders/pumpers. The District is therefore taking the necessary action of filing a comprehensive adjudication. Such steps will involve all stakeholders/pumpers; protect the general welfare of the Basin; protect the District's right to pump groundwater from the Basin; protect groundwater quality; and to manage water costs to the public. The goal of the District's action is to bring long-term and enforceable sustainability to the Basin." See <https://www.iwwvd.com/basin-adjudication/>.

On September 2, the O'Melveny law firm announced that they had filed a complaint for a comprehensive adjudication of the Cuyama Valley Groundwater Basin, another basin in an overdraft condition. They noted a growing number of groundwater adjudications subsequent to the 2014 SGMA requirements. See [www.omm.com](http://www.omm.com)

## **PEOPLE**

**Candice Hasenyager** has been named Director of the Utah Division of Water Resources. Hasenyager replaces WSWC member **Todd Adams** who was appointed this week as Deputy Director for the Department of Natural Resources (DNR). Adams fills a vacancy created by Rory Reynolds who is retiring after 31 years with DNR. DNR Executive Director Brian Steed said: "Candice is a natural leader with a strong track record of water resource management. Her leadership will be critical in addressing Utah's water challenges. She has helped lead the state through one of the worst droughts in history and will continue to look for innovative ways to stretch and best manage our water supply."

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**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.**