



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **Corps/EPA/§401 Certification Rule**

On November 4, the Army Corps of Engineers (Corps) provided informal notification that they were suspending final permit decisions that rely on Clean Water Act (CWA) §401 state certifications or waivers: "Due to the decision of the United States District Court for the Northern District of California on October 21, 2021 to remand EPA's 2020 401 [Water Quality Certification (WQC)] rule with vacatur, the Corps of Engineers is not finalizing permit decisions that rely on a 401 WQC or waiver under EPA's 2020 rule at this time. The Corps is working to provide more refined guidance that provides a way forward that allows us to finalize permit decisions." www.spk.usace.army.mil/Missions/Regulatory/

EPA's website noted that the court's nationwide order "requires a temporary return to EPA's 1971 Rule until EPA finalizes a new certification rule. EPA's own review of the 2020 Rule identified substantial concerns with a number of provisions that relate to cooperative federalism principles and CWA §401's goal of ensuring that states and Tribes are empowered to protect water resources that are essential to public health, ecosystems, and economic opportunity. The agency has already begun working on a regulatory effort to address those concerns." On June 1, EPA invited feedback on its intention to reconsider and revise the rule (86 FR 29541), eliciting over 3,000 comments. Over the summer, EPA also held several stakeholder and co-regulator listening sessions. WSW #2434, 2453, 2454, 2459, 2461, 2464, 2468, and www.epa.gov/cwa-401/2020-clean-water-act-section-401-certification-rule-0.

Corps/EPA/WOTUS

On November 18, the EPA and Corps announced their proposed rule to re-establish the pre-2015 definition of "waters of the United States" (WOTUS), updated and informed by Supreme Court decisions. The proposed rule would maintain the longstanding exclusions of the pre-2015 regulations including agricultural exemptions and exclusions in the CWA. Categories of waters such as tributaries and wetlands would be included as WOTUS if they have a relatively permanent connection or a significant nexus to traditionally navigable, interstate,

or other categories of waters. The proposed rule will be available for public comment for 60 days once published in the *Federal Register*.

EPA and the Corps hosted a brief WOTUS call with intergovernmental organizations and their members, notifying them of the proposed rule. They will host three public hearings in January, as well as the regional roundtables to discuss the pre-2015 proposed rule.

ADMINISTRATION/WATER RESOURCES **Infrastructure Task Force**

On November 15, President Biden issued his Executive Order on Implementation of the Infrastructure Investment and Jobs Act (IIJA). It set implementation priorities, including "effectively coordinating with State, local, Tribal, and territorial governments in implementing these critical investments." It also established an Infrastructure Implementation Task Force within the Executive Office of the President, led by two co-chairs: (1) the Director of the National Economic Council, Brian Deese; and (2) a new position, the White House Infrastructure Coordinator, Mitch Landrieu. Other members of the task force include; the Secretaries of Interior (DOI), Agriculture, Commerce, Labor, Transportation, and Energy; the Administrator of the Environmental Protection Agency (EPA); the Directors of the Offices of Management and Budget (OMB) and Personnel Management; the Director of the Domestic Policy Council; the National Climate Advisor; and the heads of other departments, agencies, and offices as invited by the co-chairs to participate. www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-implementation-of-the-infrastructure-investment-and-jobs-act/

The White House statement said the task force will "coordinate effective implementation across the government and advance the Administration's priorities" and "will be committed to break down barriers and drive implementation of infrastructure investments across all levels of government to realize the President's vision of rebuilding our nation's infrastructure and positioning the U.S. to compete and win in the 21st century." www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-president-bidens-executive-or

Colorado River

On November 15, thirty Colorado River Basin tribes sent a letter to Secretary of the Interior Deb Haaland and the Governors of the Seven Basin States, emphasizing the essential role of the tribes in developing the next framework for the long-term management of the Colorado River system, replacing the 2007 Interim Guidelines. The letter said: “Basin Tribes hold water rights to approximately 3 million acre-feet of Colorado River water, which equates to about 25% of the river’s current average annual flow. This percentage will only increase as climate change continues to diminish overall runoff amounts and reduces the amount of water available to lower priority users.”

The letter acknowledges the first-ever shortage declaration in the basin, and the decreasing elevations of water in the Lake Mead and Lake Powell Reservoirs, and the need to adapt system management to changing climate conditions. “Basin Tribes are aware of ongoing efforts by the Bureau of Reclamation and the seven basin states to adapt the Drought Contingency Plans to the existing and emerging hydrologic conditions, and seek to be involved in these discussions and decisions. Basin Tribes’ involvement in these ongoing decisions, as well as the process of developing the Next Framework, is a necessity with regard to, and in recognition of, the impacts to Basin Tribes of the continuing drought and looming basin-wide shortages.”

The tribes note that although the 2007 Interim Guidelines don’t expire until 2026, the time for meaningful input from tribes is much sooner. “We believe that the most significant parts of the substantive negotiations are likely to unfold over the next 2-2 ½ years in order to have enough time to finish the NEPA process and seek the necessary Congressional approvals ahead of the expiration of the 2007 Interim Guidelines....”

The tribes formed the Colorado River Basin Tribal Coalition, and they refined a set of guiding principles that best represent the position of the coalition. They said the federal trust responsibility requires that the United States include the tribes in the development and implementation of policies on the river system’s management. The coalition expects a commitment from the Biden Administration to protect the tribes’ water rights and resources, to provide technical assistance to evaluate the impacts of any proposals, to meaningfully include tribes in deliberations, consultations, and negotiations.

The coalition further said: “We recognize the needs and interests of tribes to develop and use their currently unused and undeveloped water rights may conflict with basin-wide efforts to reduce overall water use. However,

the United States should support the full utilization of presently unused or under-used tribal water rights, and the Next Framework must provide operationally functional and flexible tools to accommodate the interests of tribes in fully utilizing their water rights while simultaneously recognizing the Basin-wide needs to reduce overall consumptive use. Such tools could include, but are not limited to: (a) compensated forbearance of tribal water rights; (b) off-reservation marketing for all Basin Tribes; and (c) allowing Basin Tribes to dedicate currently unused water to compensated system conservation programs.”

Lower Colorado River Basin

On November 11, the Las Vegas Review-Journal reported that the Lower Colorado River Basin States “are developing a \$100 million plan that will leave more water in Lake Mead over the next couple of years.” The Bureau of Reclamation is currently in negotiations with Arizona, and water districts in Nevada and California over further reductions in water use. “During the consultation period, Nevada and Arizona conducted modeling that showed consumption of Lake Mead’s water will have to be reduced by 500,000 acre-feet annually through 2026 to stay above 1,020 feet.”

Tom Buschatzke, Director of the Arizona Department of Water Resources (ADWR), said ADWR is committing \$50M to the effort, and noted that the preference for reaching the 500,000 acre-foot reduction is voluntary conservation over forced cuts. The Southern Nevada Water Authority (SNWA) is scheduled to consider approval of \$20M over the next two years. They are looking at making water use more efficient, using the saved water to bolster Lake Mead’s elevation. Reclamation is also looking at making water delivery more efficient.

In November, the Lake Mead water level was just below 1,066 feet, and the 2019 Drought Contingency Plan requires the Lower Basin States to discuss ways to prevent the lake from falling below 1,020 feet. Buschatzke said: “You don’t have much of a buffer left to deal with that (rapidly declining water level) if you have a bad year of runoff in the system.”

John Entsminger, SNWA General Manager, said: “This plan builds upon the Drought Contingency Plan and other programs with our Colorado River partners that are keeping Lake Mead levels about 50 feet higher today. While there are still some details to finalize, we expect this will further help protect the lake, and that’s good for Southern Nevada and our river partners.”

The article concluded: “Buschatzke said the goal is to finalize the two-year agreement next month, then get to work on filling out the remaining three years of the plan.”