



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

ADMINISTRATION

Corps/Jurisdictional Determinations

On January 5, the Army Corps of Engineers (Corps) published an article regarding the effect of the 2020 Navigable Waters Protection Rule (NWPR) vacatur on jurisdictional determinations that were requested or approved prior to the U.S. District Court of Arizona decision on August 30, 2021. The article said: “An approved jurisdictional determination [AJD] is a document provided by the Corps stating the presence or absence of ‘waters of the United States’ [WOTUS] on a parcel or a written statement and map identifying the limits of [WOTUS] on a parcel. See 33 C.F.R. § 331.2. Under existing Corps’ policy, AJDs are generally valid for five years unless new information warrants revision prior to the expiration date. See [Corps] Regulatory Guidance Letter [RGL] No. 05–02....”

The article continued: “As a general matter, the agencies’ actions are governed by the definition of [WOTUS] that is in effect at the time the Corps completes an AJD, not by the date of the request for an AJD. AJDs completed prior to the court’s decision and not associated with a permit action (also known as ‘stand-alone’ AJDs under RGL 16-01) will not be reopened until their expiration date, unless one of the criteria for revision is met under RGL 05-02. A NWPR AJD could also be reopened if the recipient of such an AJD requests a new AJD be provided pursuant to the pre-2015 regulatory regime. In that case, the Corps will honor such request recognizing that if the recipient of a NWPR AJD intends to discharge into waters identified as non-jurisdictional under the NWPR but which may be jurisdictional under the pre-2015 regulatory regime, such recipient may want to discuss their options with the Corps. AJD requests pending on, or received after, the Arizona court’s vacatur decision will be completed consistent with the pre-2015 regulatory regime.” The article concluded: “As the agencies’ actions are governed by the regulatory definition at the time of the action, permit decisions made prior to the court’s decision that relied on a NWPR AJD will not be reconsidered in response to the NWPR vacatur. Permit decisions may be modified, suspended, or revoked per 33 C.F.R. § 325.7 where the regulatory criteria are met. The Corps will not rely on an AJD issued under the NWPR...in making a new permit decision. The Corps will make new permit decisions pursuant to the currently

applicable regulatory regime (i.e., the pre-2015 regulatory regime). Therefore, for any currently pending permit action that relies on a NWPR AJD, or for any future permit application received that intends to rely on a NWPR AJD for purposes of permit processing, the Corps will discuss with the applicant, as detailed in RGL 16-01, whether the applicant would like to receive a new AJD completed under the pre-2015 regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary JD or no JD whatsoever.” <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>

Infrastructure/Buy America

On January 19, the Biden Administration announced a new Made in America Council. The press release said: “Not only will the new Council help agencies effectively coordinate their more than \$600 billion in annual procurement spending, but it will also help streamline and strengthen the Administration’s work to effectively and efficiently implement the Infrastructure Investment and Jobs Act (IIJA). The Council will also share data that can help promote domestic sourcing and best practices across agencies that are facing similar challenges and opportunities, and also surface recommendations to help build and expand critical U.S. supply chains.” The press release lists some of the Administration’s related efforts over the past year, including a Made in America website for greater transparency for decisions on waivers and exemptions and guidance to help agencies increase opportunities for domestic sourcing. “The goal of the Council is simple: advance our Made in America goals by creating a regular forum and community for agencies to collaborate as they work to strengthen the use of Federal procurement and Federal financial assistance to increase reliance on domestic supply chains and reduce the need for waivers over time.” <https://www.whitehouse.gov/omb/briefing-room/2022/01/19/launching-a-new-made-in-america-council/>

ADMINISTRATION/WATER QUALITY

FDA/Agricultural Water

On December 6, the Food and Drug Administration (FDA) published a proposed rule, Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption Relating to Agricultural Water

(86 FR 69120). The rule would amend the agricultural water provisions in 21 CFR §112 established in 2015. Covered farms have found the microbial criteria and testing requirements for pre-harvest agricultural water difficult to implement, particularly where they have to establish a Microbial Water Quality Profile for dozens of surface water sources or upwards of 100 groundwater sources. Since 2015, the FDA has extended compliance deadlines and engaged with various stakeholders to find a workable solution that is both practically implementable and adequately protective of consumers. The proposed rule incorporates recommendations from those meetings. Comments are due by April 5.

CONGRESS/ENVIRONMENT

Nominations/U.S. Fish and Wildlife Service

On January 12, the Senate Committee on Environment and Public Works (EPW) advanced for Senate consideration President Biden’s nomination of Martha Williams to be Director of the United States Fish and Wildlife Service (by a vote of 16-4). Full Senate consideration is the next step. Chairman Tom Carper (D-DE) said: “Ms. Williams has a proven track record of bringing people together to solve complicated conservation challenges. That is why her nomination enjoys such broad stakeholder support, including from environmental organizations and sportsmen and women alike. She is ready to roll up her sleeves and get the job done should she be confirmed.” Williams returns to Department of the Interior having served as Deputy Solicitor for Parks and Wildlife between 2011 and 2013, providing counsel to the National Park Service and the Fish and Wildlife Service. She was an Assistant Professor at the Blewett School of Law at the University of Montana in Missoula, Montana where she co-directed the university’s Land Use and Natural Resources Clinic. She also served as the Director of the Montana Department of Fish, Wildlife and Parks from 2017 to 2020.

“Martha brings with her decades of experience, deep knowledge, and a passion for conservation, wildlife management, and natural resources stewardship,” said Secretary Deb Haaland. “I look forward to continuing to work with her as the Department carries out its mission to protect...and restore the lands, waters, and wildlife upon which we all depend on.”

WATER RESOURCES

Nebraska

On January 10, Governor Pete Ricketts (R-NE) proposed a major canal project in Colorado and southwest Nebraska to support irrigation, power production, and municipal water supplies under the authority of the South Platte River Compact. The project would require legislative funding. Ricketts emphasized the need to protect Nebraska water supplies threatened by planned developments in Colorado. The press

release said: “Signed in 1923, the Compact divides the waters of the South Platte River, ensuring certain flows will be delivered to Nebraska at the state line near Julesburg, Colorado. Construction of the canal and storage system (colloquially known as the ‘Perkins County Canal’ at the time the Compact was signed) along the Nebraska-Colorado border will preserve Nebraska’s sovereign right to its share of the South Platte River water into the future.” Several other water projects have been developed by a special legislative committee over the past six months and have been recommended for approval, including flood control measures along the Lower Platte River and the creation of a 4,000-acre reservoir between Lincoln and Omaha. <https://governor.nebraska.gov/press/gov-ricketts-state-leaders-announce-proposals-strengthen-water-resources>

Utah/Coordinated Action Plan for Water

On January 13, Governor Spencer Cox (R-UT) and state agencies released the first chapter of Utah’s Coordinated Action Plan for Water in an effort to tackle water issues with a goal “to compile past recommendations, prioritize them, negotiate trade-offs among competing objectives, and create a plan of action for the state’s top priorities to ensure the best use of this valuable resource.” The first 24-page chapter addresses state investments in water infrastructure. Future chapters will address communities, agriculture, and healthy watersheds. Agencies preparing the chapters include the Departments of Natural Resources (DNR), Environmental Quality (DEQ), and Agriculture and Food (UDAF). The document will guide the work of executive branch agencies.

The infrastructure chapter covers policy issues, increasing Utah’s water supply, conservation, the relationship between water pricing and infrastructure needs, agricultural conversion, water storage capacity, water reuse, weather modification, various infrastructure funding mechanisms, existing state and federal funding under the American Rescue Plan Act (ARPA) and IJJA, and funding gaps.

Previous water planning efforts identified over 200 recommendations to better secure Utah’s water future. The report identified five key priority actions and associated steps to address Utah’s water infrastructure needs: (1) a framework for resources, data collection, funding, and planning for local governments and water providers; (2) streamlining the needs assessment process; (3) continue funding matches and ensure that the grant and loan evaluation criteria are advancing the state’s priorities; (4) streamlining approvals for innovative projects such as reuse, desalinization, green infrastructure, surface storage, aquifer storage and recovery, and public-private partnerships; and (5) investing in research, data collection, and operator training. <https://gopb.utah.gov/waterplan/>

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.