



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN STATES WATER COUNCIL Washington DC Spring Meetings

The Western States Water Council (WSWC) held its Spring 2022 meetings in Arlington, Virginia on April 5-7, in conjunction with meetings of the Interstate Council on Water Policy (ICWP) and National Water Supply Alliance (NWSA), and a joint roundtable that brought together over 120 federal, state, interstate and local water managers and scientists both in person and virtually. A panel with federal Water Subcabinet and Western Federal Agency Support Team (WestFAST) members also addressed those attending.

The WSWC's working committees met briefly and recommended for Council action four position statements and changes to the Council's rules of organization. Sunsetting Position No. 478 in support of Rural Water Infrastructure Needs and Projects was revised and readopted. The updates recognized the \$420 million for the Bureau of Reclamation for rural water projects in the 2021 Bipartisan Infrastructure Law to benefit tribal and non-tribal underserved communities by providing better access to potable water. The position noted more money is needed to address rural water needs and reiterated our strong support for the expenditure of Reclamation Fund revenues for their intended purposes, including rural water projects authorized by Congress.

Position No. 479 renewed the Council's support for "reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through efficient permitting processes, while appropriately protecting environmental resources and respecting States' 401 certification authority under the Clean Water Act and States' authority over water allocation within their borders."

Position No. 481 regarding Clean Water Act (CWA) Jurisdiction was considered at last September's Council meetings but was reconsidered and revised at this meeting. It states: "[I]t is imperative that EPA and the Corps actively seek meaningful state consultation, engagement, and participation in the review and development of any new proposed or final rule to define Waters of the United States...." It calls for an "enduring and broadly supported definition" that "acknowledges

and addresses the needs, priorities, and concerns of states as co-regulators," as well as "robust, meaningful, and representative state participation and consultation in the development and implementation of any rule, acknowledging the inherent federalism implications." It references Congress' intent "to maintain a reasonable balance of state and federal authority and the purposes of CWA Sections 101(b) and 101(g)." Further, it notes that the *Sackett v. EPA* case now pending before the U.S. Supreme Court may further clarify the interpretation of jurisdiction. It says the rule should specifically exclude from regulation under the CWA groundwater and "historically recognized agricultural exemptions." Further, it suggests there is a need to "balance definitional clarity with flexibility in implementation to address the unique landscapes, flow regimes, and legal frameworks in various regions of the Nation," including recognizing regional differences "building upon existing classification systems based on hydrology, geology, and climate."

The Council approved a separate new position (No. 480) related to the Migratory Bird Treaty Act (MBTA) and regulations to be developed by the U.S. Fish and Wildlife Service (USFWS) related to "takings." USFWS is seeking for the first time to promulgate a regulation that would prohibit "incidental" takes while allowing for government agency activities through general and specific permits. The position declares that States are primarily responsible for the management and protection of water resources and "migratory birds and the environments upon which they depend." Moreover, "various state and local governmental agencies own or operate water use or distribution facilities which benefit water users and the public as well as migratory birds and their respective environments; and...many, if not most, of the senior state-granted rights to the use of waters in western rivers and streams predate federal environmental protections by decades, and the certainty provided by early water rights continues to be the foundation for past, present and future investments...."

Further, the position notes that "...the West and its flora and fauna, including protected species, are part of a unique and unparalleled heritage reflecting the Nation's value for wild and open spaces, as well as a western conservation ethic.... [W]estern States and many western water uses are also committed to the preservation of western species through reasonable,

transparent and effective regulatory protections and restrictions, as well as conservation incentives for private property owners.” Therefore, “the Council calls upon federal agencies to engage in a substantive discussion of past, present and future efforts to work in concert with State agencies to implement Congress’ intent to resolve water and species protection issues and to ensure the creation of flexible regulations that do not interfere with state management of water resources.”

The changes to the rules of organization relate to the treatment of sunseting positions and clarify policy coordination procedures between the Council and Western Governors’ Association.

On April 5, the WSWC Water Resources and Water Quality Committees met and addressed the sunseting positions and other position changes. The drought and water supply outlook was a focus of the former with Elizabeth Ossowski, National Integrated Drought Information System, Cara McCarthy, National Water and Climate Center and Roger Gorke, EPA – National Drought Resiliency Partnership. The outlook continues to be bleak as severe, extreme and exceptional drought ravage much of the West.

Much of the discussion in the Water Quality Committee revolved around the evolving CWA Waters of the United States (WOTUS) rule, with some speculation regarding the pending Supreme Court decision in *Sackett v. the U.S. EPA*. Mary Lou Soscia, EPA, spoke about promulgation of federal baseline Water Quality Standards for Tribes. Chris Carlson, U.S. Forest Service (USFS) discussed recent and future webinars on Wildfire and Water Resources hosted by the Western Federal Agency Support Team (WestFAST).

The WSWC Legal Committee and Full Council met on April 6, and took actions on positions as described above. Stephen Czapka, Division of Bird Conservation, Permits, and Regulations, USFWS, provided an update on the proposed MBTA regulations on takings. Mike Eberle, National Water Uses and Rights Program Lead, USFS, described and expressed appreciation for WSWC input on a white paper relate to Wild and Scenic Rivers protections. Michelle Bushman WSWC Assistant Director provided updates on legislation and litigation, WSWC legal surveys, and WaDE water rights terminology.

On April 7, members of the Water Subcabinet and WestFAST principals joined WSWC, NWSA and ICWP members. The panel consisted of: Tanya Trujillo, Assistant Secretary for Water and Science, Department of the Interior; Gloria Montaño Greene, Under Secretary for Farm Production and Conservation, U.S. Department of Agriculture; Zach Schafer, Senior Advisor, Office of

Water, EPA; Robyn Colosimo, Director of Policy and Legislation, Office of the Assistant Secretary of the Army (Civil Works); Brad Doorn, Water Resources Program Manager, National Aeronautics and Space Administration (NASA); and Roger Pulwarty, Senior Scientist, NOAA. Together they addressed several questions related to interagency cooperation, collaboration with States as stakeholders, drought resilience and climate issues, financial and technical assistance, improving seasonal precipitation forecasts, infrastructure initiatives, moving from research to application of the science, and serving rural and indigenous communities.

The Summer 2022 WSWC meetings will be held on August 2-5, in Poulson, Montana on Flathead Lake at the KwaTaqNuk Resort. For further information as it becomes available, see: <http://westernstateswater.org/upcoming-meetings/>.

LITIGATION/WATER QUALITY **CWA §401**

On April 6, the U.S. Supreme Court granted an emergency stay, pending appeal, in *Louisiana v. American Rivers* (#21A539). The stay has the effect of reinstating the 2020 Clean Water Act Section 401 Certification Rule, which was vacated last October by the U.S. District Court for the Northern District of California. “The district court’s October 21, 2021 order, insofar as it vacates the current certification rule, 40 C.F.R. Part 121, is stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such a writ is timely sought.”

Justice Kagan wrote a dissenting opinion, joined by Chief Justice Breyer and Justice Sotomayor, noting the failure of the applicants to show evidence of irreparable harm. “They claim that the vacated rule gave them ‘protections’ against States that previously ‘abuse[d]’ their statutory authority to review infrastructure projects for compliance with water-quality standards. But the applicants have not identified a single project that a State has obstructed in the five months since the District Court’s decision.... And the application fails to show that proper implementation of the reinstated regulatory regime – which existed for 50 years before the vacated rule came into effect – is incapable of countering whatever state overreach may (but may not) occur.... By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court’s emergency docket not for emergencies at all. The docket becomes only another place for merits determinations – except made without full briefing and argument.”

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.