



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/WATER RESOURCES

Corps of Engineers

On June 3, the Army Corps of Engineers (Corps) published a notice of virtual meetings regarding the modernization of Army Civil Works Policy Priorities (87 FR 33756). The notice also established a docket #COE-2022-0006 for public input. Among other policy initiatives, the Corps is soliciting input on implementation of the Principles, Requirements, and Guidelines (PR&G). The PR&G guides the evaluation and formulation of water resources projects proposed by federal agencies. The 1983 PR&G were updated in 2014 to emphasize projects that maximize economic development, avoid unwise use of floodplains, protect and restore ecosystems, and provide the greatest public benefits. Congress directed the Corps to develop Agency Specific Procedures (ASPs) in WRDA 2020.

The ASPs will consider PR&G features, including: (1) public benefits, including climate resiliency and environmental justice; (2) elevating plans from local sponsors to solve local problems; (3) elevating the nonstructural plans; (4) facilitating choices where the public benefits approach involves tradeoffs of monetized and non-monetized effects, resulting in an elevation of the role of qualitative data and the need for professional judgment in making recommendations; (5) facilitating collaboration for data sharing, model development and agency-to-agency consultations; (6) elevating ecosystem, sustainable economic development, floodplain, environmental justice, public safety and watershed considerations; (7) analyses scaled to the size and complexity of the project; and (8) enabling limited fiscal resources to solve local problems with smaller projects. The Corps will hold a virtual public meeting on July 18, and will hold meetings on various other topics throughout July. <https://www.army.mil/article/257206/>

EPA/Infrastructure

On June 9, 2022, EPA hosted a "Dialogue with Intergovernmental Associations on the Bipartisan Infrastructure Law." The Office of Water outlined several technical assistance initiatives that are rolling forward this summer. First, the application deadline for the Environmental Finance Center opportunity has been extended from June 17 to July 1 and the total funding

available has been increased from \$68 million to \$100 million. Second, EPA intends to work directly with some environmental justice communities to develop SRF applications, in partnership with States. Third, EPA continues to work on efforts to accelerate lead service line replacement. Finally, a new initiative for unsewered communities will be launched in early July. EPA reiterated their commitment to work closely with States and others on all of these initiatives.

CONGRESS

OpenET

On June 7, the WSWC submitted written testimony to the Senate Energy and Natural Resources Committee Public Lands, Forests & Mining Subcommittee strongly supporting efforts to enhance and expand the availability of and open access to consistent and comprehensive water supply, demand and water use data and information, such as through an Open Access Evapotranspiration (OpenET) data program. The testimony supported related federal authorizing legislation and appropriations, including S. 2568, introduced by Senator Catherine Cortez Masto directs the U.S. Geological Survey (USGS) to establish such a program delivering satellite-based evapotranspiration data to advance the quantification of evaporation and consumptive water use.

The bill would authorize the creation of a software system and data platform by means of an operational use partnership that is crucial to improving access to data and information for more effective water management and use. As part of the program, the USGS would provide data users with field-scale estimates of evapotranspiration data across large landscapes over certain periods of time, enter into cooperative agreements with program partners (e.g., institutions of higher education, States, private sector entities, or nongovernmental organizations) to provide for the efficient and cost-effective administration of the program, and provide non-reimbursable matching funding for programmatic and operational activities.

Drought

On June 7, Earl Lewis, Chief Engineer, Kansas Department of Agriculture, Division of Water Resources,

testified on behalf of the Western States Water Council before the Senate Agriculture Committee Subcommittee on Conservation, Climate, Forestry and Natural Resources regarding the Western Water Crisis: Confronting Persistent Drought and Building Resilience on our Forests and Farmland. The testimony read in part, “Water is the lifeblood of the West. This is most apparent in the agricultural sector, which consumes the predominant share of the freshwater resources throughout western states. Agriculture sustains many rural economies, provides important employment opportunities, and is a vital national industry.... Periodic drought and competing demands for scarce water resources threaten the sustainability of the agricultural economy, highlighting the need to promote efficient water use that achieves net water savings while still maximizing production.... Federal funding is critically important for many agricultural communities, and USDA plays a crucial role in implementing programs that deliver assistance. USDA programs help to provide water and wastewater infrastructure, technical assistance, financial assistance, and conservation measures that ensure water is available to allow the agricultural industry to survive, if not thrive.... These are difficult times for water in the West and an unprecedented time for agriculture.” <https://www.agriculture.senate.gov/hearings>

LITIGATION/WATER QUALITY ***Sackett v. EPA/WOTUS***

On June 14, the U.S. Supreme Court scheduled oral argument in *Sackett v. EPA* (No. 21-454) for October 3, 2022. Four amicus briefs were filed by 45 states, including AK, AZ, CA, CO, ID, KS, MT, NE, ND, NM, OK, OR, SD, TX, UT, WA, and WY. A joint amicus brief from 26 states that included AZ, ID, KS, MT, NE, ND, OK, SD, TX, UT, and WY, argued that the Supreme Court should reject the significant nexus test to define WOTUS because: (1) it usurps state authority, encompassing intrastate waters with little meaningful connection to navigable waters; (2) it is not found in the text of the CWA; (3) it presses the limits of the Constitutional Commerce Clause powers; and (4) the real-world consequences of the test have demonstrated that it is a confusing, unworkable standard that “imposes serious costs, encourages litigation, and leaves relevant stakeholders in the dark....”

Alaska filed an individual amicus brief, arguing for an interpretation of “waters of the United States” (WOTUS) that is limited to relatively permanent bodies of water, and wetlands that are indistinguishable because they share a physical surface connection. “Alaska also bears the cost of the [federal] agencies’ fluctuating interpretations of [WOTUS]. The regulatory climate is unpredictable, with an agency determining one year that a project is in a jurisdictional wetland and then, after a

change of administration, that it is not.... As the [CWA’s] reach expands, Alaska’s Department of Environmental Conservation must do more mandatory inspections and reporting under its delegated [CWA] section 402 program and more section 401 certification analyses. It faces more litigation as parties challenge its work. The department is actively redesigning its permitting system to increase predictability, but keeping pace with changing definitions squanders state resources.”

Colorado filed a separate amicus brief, emphasizing the importance of a “robust floor of federal water quality protection” with minimum water quality standards and the careful balance of state and federal interests. The brief supported the significant nexus approach and the exercise of federal jurisdiction over tributaries and adjacent wetlands. “The Court need not articulate a wide-ranging new test applicable to all surface waters to resolve this case, which involves a limited question of appropriate federal jurisdiction over wetlands. EPA and the Corps are currently engaged in an effort to revise the regulatory definition of [WOTUS] that will consider a broad range of stakeholder input and address important legal and scientific nuances among different categories of water resources.”

A joint amicus brief from 17 states plus the District of Columbia, including CA, NM, OR, and WA, supported the respondent EPA’s position. They argued that wetlands “with a subsurface-water or other hydrological connection to navigable waters” have a significant nexus to and directly affect navigable waters, and are therefore WOTUS. They noted that the CWA’s federal minimum standards to protect waters from pollutants discharged into wetlands are necessary to protect downstream states against the risks of weaker or non-existent standards or enforcement actions in upstream states. “Before the CWA, a patchwork of inconsistent state laws proliferated in the absence of uniform federal regulation. Because States could reap the economic benefits of local development while shifting the environmental, regulatory, and economic costs of such development downstream, individual States failed to protect the Nation’s interconnected, shared water system. Congress enacted the CWA in large part to remedy this interstate problem, by setting a federal ‘floor’ of national minimum pollutant controls applicable in every State.... Moreover, Amici States have structured their regulatory programs in reliance on the CWA’s protection of wetlands with a significant nexus to navigable waters and their tributaries. Thus, in addition to the limitations on their ability to alter regulatory shortcomings in upstream States, Amici States would incur significant costs to fill the regulatory gaps within their own States that would follow an interpretation of the CWA that withdrew federal protection from such wetlands.”