



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/CONGRESS

WOTUS

On April 6, President Biden vetoed H.J. Res. 27 to rescind the 2023 Waters of the United States (WOTUS) rule. He said: "The resolution would leave Americans without a clear definition of 'Waters of the United States.' The increased uncertainty caused by H.J. Res. 27 would threaten economic growth, including for agriculture, local economies, and downstream communities. Farmers would be left wondering whether artificially irrigated areas remain excluded or not. Construction crews would be left wondering whether their waterfilled gravel pits remain excluded or not. The resolution would also negatively affect tens of millions of United States households that depend on healthy wetlands and streams." See WSW #2550.

ADMINISTRATION/WATER QUALITY

EPA/Drinking Water SRFs/Lead

On April 3, Radhika Fox, Assistant Administrator for Water, Environmental Protection Agency (EPA), sent a memorandum to regional water division directions on FY2023 Allotments for the Drinking Water State Revolving Fund (DWSRF) based on the results of the Seventh Drinking Water Infrastructure Needs Survey and Assessment (DWINSA). She noted that the Infrastructure Investment and Jobs Act (IIJA) provided \$50B to EPA "to strengthen the nation's drinking water, wastewater, and stormwater systems – the single largest investment in water the federal government has ever made. As of the end of March 2023, EPA has awarded over \$5.1B to 60 states, territories, and tribes." The Consolidated Appropriations Act (PL 117-328) provided additional funding for the allotments.

The memo said: "Compared to the previous year, there are minor changes in the allocation percentages in the allotment formula...used to distribute the base appropriation, [IIJA] General Supplemental and [IIJA] Emerging Contaminant funds. The allotment formula for the [IIJA] Lead Service Line Replacement [LSLR] funding, however, is changing.... In 2021, as a part of the 7th DWINSA, EPA collected information on service lines from water systems across the country for the first

time in assessment history. Based on the information reported by each state, EPA projects a national total of 9.2M LSLs. The 7th DWINSA provides the best available national and state-level projections of lead service line counts and EPA is using these results to allocate the [FY23 IIJA LSLR] funding. This new LSL-specific formula will allow the states with more LSLs to receive financial assistance commensurate with their need as soon as possible, furthering public health protection nationwide."

Further, the memo notes: "In August 2022, EPA released the Guidance for Developing and Maintaining a Service Line Inventory to support water systems with their efforts to develop inventories and to provide states with information for oversight and reporting to EPA. The guidance provides essential information to help water systems comply with the Lead and Copper Rule Revisions requirement to submit an initial inventory of service line materials by October 16, 2024."

The memo itemize the distribution of base DW SRF appropriations, state-by-state, as well as IIJA DWSRF supplemental funds, funds for emerging contaminants, and LSLR funding. EPA has yet to release the specific LSLR formula used. LSLR funding for a number of western states has changed dramatically from the previous federal fiscal year. For example, California's allotment dropped from \$250.1M to \$28.65M; Texas \$222.16M to \$146.25M; Washington \$63.34M to \$28.65M; Colorado \$56.02M to \$32.6M; Arizona \$51M to \$28.65M; Oklahoma \$40.2M to \$28.65M; and Oregon \$37.3M to \$28.65M.

Also of note, of the \$1.126B appropriation in FY23 for DWSRF capitalization grants, over half (\$609,255,899) was for congressionally directed spending projects (earmarks).

ADMINISTRATION/WATER RESOURCES

Colorado River

On April 14, the Bureau of Reclamation sent a proposed Supplemental Environmental Impact Statement (SEIS) for Near-term Colorado River Operations to the Federal Register for publication. The SEIS would revise the December 2007 Record of

Decision associated with the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines). The modifications are being considered due to the historic drought, low reservoirs, and the potential for low runoff conditions in the Colorado River Basin (CRB) to continue, which could lead Lake Powell and Lake Mead to decline to critically low elevations, impacting operations envisioned through the interim period (prior to January 1, 2027).

The SEIS addresses three alternative guidelines for the operation of Glen Canyon Dam and Hoover Dam: (1) the No Action Alternative, which would continue to implement the existing agreements; (2) Action Alternative 1, which includes assumptions for reduced releases from Glen Canyon Dam as well as assumptions for additional Lower CRB shortages based on the concept of priority (i.e., water rights seniority); and (3) Action Alternative 2, which would distribute shortages in the Lower CRB by an equal percentage.

Alternatives 1 and 2 model progressively larger additional shortages as Lake Mead's elevation declines and models larger additional shortages in 2025-2026 as compared with 2024. The total shortages and Drought Contingency Plan contributions in 2024, as modeled, are limited to 2.083 million-acre-feet because this is the maximum volume analyzed in the 2007 Interim Guidelines final environmental impact statement.

Appendices accompanying the SEIS include: (A) Overview of Colorado River Operations; (B) Hydrologic Modeling of Submitted Proposals; (C) Colorado River Mid-term Modeling System (CRMMS) Model Documentation; (D) Shortage Allocation Model Documentation; and (E) Table of Sensitive Species.

Written comments are due 45 days after publication. Reclamation is particularly interested in receiving specific recommendations related to the analyses or alternatives that can be considered and potentially integrated into the SEIS. Reclamation will hold virtual public meetings on May 4, 8, 10, and 16. Registration is available at <https://www.usbr.gov/ColoradoRiverBasin/SEIS.html>.

CONGRESS

CWA/State §401 Water Quality Certifications

On March 30, the House passed the Lower Energy Costs Act (H.R. 1) by a vote of 225-204, largely split along partisan lines. Division C addresses Water Quality Certification and Energy Project Management. Under §30002, the bill would amend CWA §401, limiting the authority and timing for states to issue certifications. The bill would require each State to publish new certification requirements within 30 days of when the bill is enacted.

"A decision to grant or deny a request for certification shall be based only on the applicable provisions of sections 301, 302, 303, 306, and 307, and the grounds for the decision shall be set forth in writing and provided to the applicant. Not later than 90 days after receipt of a request for certification, the State, interstate agency, or Administrator, as the case may be, shall identify in writing all specific additional materials or information that are necessary to grant or deny the request."

The bill would: (1) strike consideration of "activities" and limit certifications to only "discharges"; (2) require a direct discharge into navigable waters; (3) remove the requirement for state applications, allowing a "request for certification" to trigger several statutory requirements; and (4) replaces broad consideration of "water quality requirements" in several places with the more specific provisions of CWA 301, 302, 303, 306, or 307. The bill also added a new subsection (e) at the end that said: "For purposes of this section, the applicable provisions of sections 301, 302, 303, 306, and 307 are any applicable effluent limitations and other limitations, under section 301 or 302, standard of performance under section 306, prohibition, effluent standard, or pretreatment standard under section 307, and requirement of State law implementing water quality criteria under section 303 necessary to support the designated use or uses of the receiving navigable waters."

Additionally, H.R. 1 §10009 includes provisions to promote interagency coordination for review of natural gas pipelines. Subsection (e) explicitly exempts natural gas pipelines from the CWA §401 state certification process. "Notwithstanding section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341), an applicant for a Federal authorization shall not be required to provide a certification under such section with respect to the Federal authorization."

The Federal Energy Regulatory Commission (FERC) is established as the lead agency to coordinate all state, federal, local, and tribal agencies with authority to issue certificates authorizing natural gas pipelines. At FERC's invitation, the agencies may participate in a 90-day review process. The bill would authorize FERC to reach out to a state (or interstate pollution control agency) where any discharges of pollutants may originate and allow them to act as a participating agency during the review process. While the state may make recommendations about terms or conditions to mitigate the discharge of pollutants, FERC may only include such proposed terms and conditions if it "finds that the term or condition is necessary to ensure that any activity [that will directly result in a discharge into the navigable waters]...conducted pursuant to such authorization or certification will comply with the applicable provisions of [CWA] sections 301, 302, 303, 306, and 307...."

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.