



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY EPA/Corps/WOTUS

On August 29, the Environmental Protection Agency (EPA) and Department of the Army's Corp of Engineers announced a final rule amending the definition of "Waters of the United States" (WOTUS) to conform to the U.S. Supreme Court's decision in *Sackett v. EPA* (#21-454). EPA Administrator Michael Regan said: "While I am disappointed by the Supreme Court's decision in the *Sackett* case, EPA and Army have an obligation to apply this decision alongside our state co-regulators, Tribes, and partners.... We've moved quickly to finalize amendments to the definition of 'waters of the United States' to provide a clear path forward that adheres to the Supreme Court's ruling. EPA will never waver from our responsibility to ensure clean water for all. Moving forward, we will do everything we can with our existing authorities and resources to help communities, states, and Tribes protect the clean water upon which we all depend."

Michael Connor, Assistant Secretary of the Army for Civil Works, said: "We have worked with EPA to expeditiously develop a rule to incorporate changes required as a result of the Supreme Court's decision in *Sackett*.... With this final rule, the Corps can resume issuing approved jurisdictional determinations that were paused in light of the *Sackett* decision. Moving forward, the Corps will continue to protect and restore the nation's waters in support of jobs and healthy communities."

The new rule removes the significant nexus test and revises the definition of "adjacent" to mean "having a continuous surface connection." The definition of "significantly affect" has been deleted. Tributaries, adjacent wetlands, and additional waters no longer include the significant nexus test. Adjacent waters have also had "wetlands and streams" removed. In regard to interstate waters, "interstate wetlands" has been removed from the text.

The following definitions have not been changed – "high tide line," "impoundments," "ordinary watermark," "territorial seas," "tidal waters," "traditional navigable waters," and "wetlands." Further, there are no changes

to the WOTUS exclusions. EPA also notes that the agencies amended WOTUS definition does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act. <https://www.epa.gov/wotus/amendments-2023-rule>

ADMINISTRATION/LITIGATION EPA/WQS/Endangered Species Act

On August 18, the U.S. District Court in Arizona vacated and remanded to EPA one of four cadmium water quality criteria (WQC) for further consideration (*Center for Biological Diversity v. EPA*, 22-cv-138). The plaintiff challenged EPA's 2016 revisions to ambient water quality criteria, arguing that EPA failed to consult with the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) as required under Section 7 of the Endangered Species Act (ESA). EPA argued that formal consultation was not required, except with states as they chose how to incorporate those criteria into their water quality standards.

The court held that issuing revised WQC is an "action" and, without nationwide consultation, is a violation of the ESA. The court determined that vacating all four cadmium criteria would risk environmental harm, as three criteria were more stringent than those prior to 2016. It agreed, however, to vacate the more lenient 304(a) chronic freshwater cadmium criterion due to the potential effect on protected species. The court determined that this would cause no disruption because states subsequently revising their water quality standards could simply use EPA's more stringent 2001 criterion. States that already adopted EPA's 2016 criteria could continue to rely on EPA's approval until their next triennial review.

WATER RESOURCES Bureau of Reclamation/New Mexico

On August 22, the Bureau of Reclamation (USBR) announced the groundbreaking for the next phase of the Eastern New Mexico Rural Water Project. When completed, the system will provide a safe, reliable water supply from Ute Reservoir to approximately 70,000

people in the municipalities of Clovis, Elida, Portales, Texico, Roosevelt County, and Cannon Air Force Base. The entire system will include approximately 120 miles of pipe, two raw water pump stations, a water intake facility, a smaller finished water booster pump station, storage tanks and a water treatment plant.

New Mexico Senators Martin Heinrich (D) and Ben Ray Luján (D) attended the groundbreaking along with USBR Deputy Commissioner Grayford Payne and State and Eastern New Mexico Water Utility Authority officials. “This project, which will strengthen the water supply, was years in the making to address the groundwater shortage in the region,” said Luján. Heinrich observed, “In Washington, we would have ‘Infrastructure Week’ every year, but we never really got serious about infrastructure or had the cohesive coalition to make a real investment the way that folks did when they created the Interstate Highway System or the New Deal. That changed with the Bipartisan Infrastructure Law. That was our moment to really invest in the things that will pay dividends for generations to come.” www.heinrich.senate.gov/newsroom/

The Bipartisan Infrastructure Law included over \$222M to expedite work on the project. Payne said: “The President’s Investing in America agenda is giving us this opportunity to provide immediate funding to accelerate the construction timelines on projects like this. As drought intensifies in the West, we must act quickly to ensure these communities have a stable water supply to continue to thrive.” USBR Albuquerque Area Manager Jennifer Faler said: “We value the partnership with these communities and New Mexico with a common goal of supplementing the groundwater supply of the area as the Ogallala Aquifer continues to decline.”

Groundwater

On August 28, the New York Times published an article, “America Is Using Up Its Groundwater Like There’s No Tomorrow,” the first in a series on the causes and consequences of disappearing water. The article expressed alarm over the decentralized nature of groundwater regulations, with a perception that groundwater is largely underregulated.

The NY Times examined groundwater depletion by conducting interviews with various federal and state agencies, including AZ, CA, CO, ID, KS, MT, ND, NM, NV, OK, OR, SD, TX, UT, and WA. They compiled data from the U.S. Geological Survey’s (USGS) National Water Information System, National Groundwater Monitoring Network, and additional local data on water levels with a minimum of 10 years of observations. They also compared results against the National Aeronautics and Space Administration’s (NASA) Gravity Recovery

and Climate Experiment (GRACE) that measures changes in groundwater mass over large areas. The article described declining aquifer levels throughout the U.S., and noted that two major aquifers serving Arizona and California, as well as the Ogallala aquifer serving Colorado, Kansas, Oklahoma, and Texas, are at their lowest levels since NASA began collecting data in 2002.

Don Cline, USGS Associate Director for Water Resources, said: “There is no way to get that back. There’s almost no way to convey how important it is.”

The article details, in addition to the dwindling supply, the risks of overpumping including land subsidence surface fissures, sinkholes, subsequent reduction of pore space, and saltwater intrusion. As visual evidence of aquifer depletion, the article details the development of fissures in the earth above dropping water tables in Arizona, California, Utah, and Texas. These are areas with some of the country’s fastest growing communities. It also discusses the impact of climate change on reducing available surface water.

The article said: “One of the biggest obstacles is that the depletion of this unseen yet essential natural resource is barely regulated. The federal government plays almost no role, and individual states have implemented a dizzying array of often weak rules.... Several states including Texas, Oklahoma and Colorado have rules that allow groundwater to be pumped from some regions until it’s gone.” They noted that some state officials are not authorized to track groundwater available for use. Oklahoma is “working to determine how much water remains in its aquifers, information that state lawmakers could use to set limits on pumping.”

Senator Ron Wyden (D-OR), presented with the NY Times’s findings, said the federal government needs to work with States to address what he called “the groundwater crisis.” The article acknowledged that any effort to impose federal oversight would likely face opposition. Courtney Briggs, Senior Director of Government Affairs at the American Farm Bureau Federation, said States were best suited to address groundwater problems and the federal government’s role should be to spend money on infrastructure projects and help farmers pay for new technology.

PEOPLE

New Mexico Governor Michelle Lujan Grisham has named **Tanya Trujillo**, former Assistant Secretary of the U.S. Department of the Interior for Water and Science, as a Policy Advisor and Deputy State Engineer, a newly created position. We look forward to continuing to work with Tanya in her new position.

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.