



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/WATER QUALITY** **EPA/CWA §404 Assumption**

On October 13, the comment period closed for the Environmental Protection Agency's (EPA) proposed rule on Clean Water Act Section 404 Tribal and State Program Regulation (88 FR 55276). The proposed rule noted that it "would facilitate the process of obtaining program approval by harmonizing program description requirements with program operation, compliance evaluation, and enforcement requirements; establishing a clear procedure for determining the extent of waters the Corps would retain following Tribal or State assumption; and delaying the effective date of EPA's program approval for a reasonable period of time to allow the assuming Tribe or State and the Corps time to complete preparations for implementation."

Western States that submitted comments on the proposed rule included the Alaska Department of Environmental Conservation (ADEC), the Idaho Department of Environmental Quality (IDEQ), the Nebraska Department of Environment and Energy (NDEE), and the Utah Department of Natural Resources (UDNR). The States generally expressed appreciation for EPA's efforts to streamline the CWA §404 assumption process. ADEC expressed appreciation for EPA's acknowledgment of the flexibility States enjoy when crafting a compensatory mitigation program tailored to their State.

Alaska and Idaho noted that it should not take the Corps of Engineers 180 days to make navigability determinations for all retained waters, as information on Section 10 navigable waters already exists. ADEC urged EPA to eliminate the requirement that States take concrete and substantial steps toward program assumption before the Corps begins their preparation of their retained waters list. ADEC noted that this list of retained waters is a foundational and preliminary piece of information that States need in order to evaluate what waters will be assumed. NDEE noted that the States should be able to work directly with the Corps to obtain the retained waters list rather than delaying the process by making an official request through EPA.

IDEQ requested further clarification regarding which waters may be assumed by States and Tribes or retained by the Corps. "In addition, resources should be made available that help Tribes and States document and further evaluate retained waters and to clarify the extent of adjacent wetlands for decision making. Under the proposed Rule, decision making will be complicated and slowed by administrative boundary authority, inconsistent application of regulations, ecosystem fragmentation, lack of coordination, enforcement challenges, and monitoring and data sharing. To expound, conflicts may arise if multiple Tribal or State authorities claim jurisdiction over the same wetlands which can lead to legal disputes and confusion over regulatory conflicts."

Alaska and Nebraska recommended deleting the provisions regarding the heightened standards for judicial review and rights of appeal for permits issued by States, noting among other concerns that EPA's higher scrutiny on States than on the Corps or Tribes creates a disincentive for assumption and is inconsistent with Congressional policy under CWA 101(b). While such standards of review are required for §402 NPDES permits, the CWA is silent with regard to §404 permits. The proposed rule also discredits the hard work of EPA's partner States as they engage in public participation.

Alaska, Idaho, and Nebraska expressed concerns about the provisions to allow Tribes without treatment-as-states (TAS) status to recommend permit conditions, particularly to protect off-reservation treaty resources. While they acknowledged the importance of State-Tribe engagement, the States noted that the identification and protection of these treaty rights are matters between Tribes and the federal government. Tribes without formal TAS status may still comment on proposed permits as members of the public, and may seek protection of their treaty resources through EPA, but imposing such requirements on States exceeds the authority of the CWA.

Idaho and Nebraska expressed appreciation for the optional 120-day delay to the effective date of an approved State program, noting that this allows for hiring and training new program staff, increasing resources for

implementation, and gives pending permits time to complete their review process. IDEQ noted that a phased approach should be the default rather than the 30-day delay provided in the rule.

See: <https://westernstateswater.org/policy-letters/2023/cwa-404-rulemaking>.

## **ADMINISTRATION/WATER RESOURCES** **EPA/Cybersecurity**

On October 11, EPA rescinded its March 3 interpretive memorandum Addressing Public Water System (PWS) Cybersecurity in Sanitary Surveys or an Alternate Process. On July 12, the 8th Circuit Court of Appeals stayed the memorandum in *State of Missouri, et al v. EPA* (#23-1787). The initial memorandum outlined EPA's interpretation that existing regulations required states to assess cybersecurity when conducting sanitary surveys or other state programs. The States of Arkansas, Iowa, and Missouri objected this intrusion on their sovereignty to regulate drinking water. Their lawsuit argued that EPA was imposing increased technology costs on small and rural PWSs, and enabling EPA to withdraw millions in funding and to take over enforcement of the Safe Drinking Water Act if States do not comply. The States noted that under American's Water Infrastructure Act of 2018, Congress intended only for larger community water systems to assess the risk and resilience of their systems, and required EPA, not the States, to retain these certifications.

EPA's website stated: "Cybersecurity attacks on drinking water and wastewater systems occur frequently and are a significant threat to their operations. EPA encourages all states to voluntarily review public water system cybersecurity programs to ensure that any vulnerabilities are identified and corrected, and assistance is provided to systems that need help." EPA will continue to offer technical assistance such as cybersecurity risk assessments, expert consultation, training, and funding. <https://www.epa.gov/waterresilience/cybersecurity-sanitary-surveys>

## **Water Supply Outlook/El Niño**

On October 12, the U.S. Department of Agriculture's Natural Resources Conservation Service's (NRCS) Water and Climate Update reported disproportionate amounts of annual precipitation throughout most of the Western U.S. for the past water year 2023: "The SNOTEL sites in the Pacific Northwest received some of the lowest annual precipitation amounts on record, while other locations in the intermountain west and southwestern U.S. received near-record high amounts of precipitation for the year."

On October 12, the National Oceanic and Atmospheric Administration's (NOAA) Climate Prediction Center (CPC) issued an El Niño/Southern Oscillation (ENSO) Diagnostic Discussion. The CPC reported that El Niño is expected to continue in the Northern Hemisphere through next spring, with an 80% chance during March-May 2024. Recent CPC observations and the North American Multi-Model Ensemble (NMME) indicate at least a "strong" event November - January. The CPC noted that strong events only increase chances that some impacts will occur, but do not guarantee strong impacts locally.

On September 26, the National Science Foundation's National Center for Atmospheric Research (NCAR) published an ENSO forecast using the Seasonal-to-Multiyear Large Ensemble (SMYLE), an experimental prediction system aimed at closing the gap between subseasonal-to-seasonal and decadal prediction timescales. NCAR says SMYLE has accurately hindcasted past El Niños. Similar to NOAA's predictions, SMYLE predicts a strong El Niño through February. <https://news.ucar.edu/>

## **LITIGATION**

### ***Texas v. New Mexico and Colorado***

On October 6, the States of Texas, New Mexico, and Colorado filed a joint notice to the U.S. Supreme Court that they have no exceptions to the Special Master's report, which included their Consent Decree (#22O141). The U.S. filed exceptions on the grounds that it was not a party to the Consent Decree, that its claims have not been resolved, that the Consent Decree violates the Rio Grande Compact, and that it imposes obligations on the U.S. without its consent. Replies are due December 4.

## **MEETINGS**

### **2024 WSWC/ICWP Washington Roundtable**

The WSWC Spring (203rd) Meetings and Washington Roundtable, with optional visits to Congressional offices and Federal Agencies, will be held in Washington, DC, the week of March 11-15, 2024. The Roundtable and WSWC meetings will be held at the Xylem Reservoir Center for Water Solutions on March 13-14. A hotel room block has been reserved at the Cambria Hotel Washington D.C. Navy Yard Riverfront. The cut-off date for reservations is February 10. Any reservations requested after the cut-off date will be accepted based on availability and at prevailing rates. For hotel accommodations, a tentative meeting schedule, and further information as it becomes available please see: <https://westernstateswater.org/events/2024-wswc-spring-203rd-meetings-and-washington-roundtable/>.

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**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.**