



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION **Corps/Rulemaking**

On February 15, the Army Corps of Engineers (Corps) published a proposed rule (89 FR 12066) that establishes Agency Specific Procedures (ASPs) for its implementation of the 2015 Principles, Requirements, and Guidelines (PR&G) for water resources investments. The proposed rule would change how the costs and benefits of proposed water resource investments would be evaluated, and identify which Corps programs and activities are subject to the PR&G. The proposed rule would adjust cost-benefit assessment criteria for federal investment decision-making to include consideration of ecological benefits, public safety concerns, and environmental justice. The 2020 Water Resources Development Act (WRDA) directed the Corps to issue its final ASPs.

The proposed ASPs would ensure all projects, plans, and programs subject to the PR&G are using the same Guiding Principles and considerations in developing alternatives and recommendations. The guiding principles for the planning process include environmental justice, floodplains, healthy and resilient ecosystems, public safety, sustainable economic development, and a watershed approach. The proposed rule outlines how each of these principles should be incorporated into all phases of the planning and decision-making process. Specific methods of implementation include: (1) developing nature-based alternatives; (2) assessing baseline and projected ecosystem health for each alternative; (3) including social and environmental metrics to measure economic impacts; and (4) assessing impacts on existing and potential future uses of watershed resources.

The preamble of the proposed rule states: "The level of a given Federal investment would be determined on a present value basis over the life of the Federal investment and the net public benefits of an investment would be assessed and used to guide Federal decision making. Federal water resources investments should strive to achieve water resources goals and maximize discounted net public benefits, with appropriate considerations laid out in the PR&G."

EPAs/SRFs

On February 20, the Environmental Protection Agency (EPA) announced \$5.8B in funding for states, tribes, and territories to invest in drinking water and clean water infrastructure upgrades. The Clean Water State Revolving Fund (SRF) will receive \$2.6B for wastewater and stormwater infrastructure. The Drinking Water SRFs will receive \$3.2B for drinking water infrastructure. These allotments will be distributed among all states and territories to fund projects aiming to deliver clean drinking water, replace lead pipes, improve wastewater and sanitation infrastructure, and to clean up PFAS pollution in water. Half of the funding will be provided as grants or forgivable loans to disadvantaged communities. The announcement includes funding from the Infrastructure Investment and Jobs Act (IIJA) General Supplemental funds and Emerging Contaminant funds for SRFs programs for FY24.

ADMINISTRATION/CONGRESS **State of the Union Address**

On March 7, President Biden delivered his State of the Union Address. He discussed the war in Ukraine, reproductive rights, and the economy. He said: "In fact my policies have attracted \$650 Billion of private sector investments in clean energy and advanced manufacturing creating tens of thousands of jobs here in America! Thanks to our Bipartisan Infrastructure Law, 46,000 new projects have been announced across your communities – modernizing our roads and bridges, ports and airports, and public transit systems. Removing poisonous lead pipes so every child can drink clean water without risk of getting brain damage. Providing affordable high speed internet for every American no matter where you live. Urban, suburban, and rural communities — in red states and blue. Record investments in tribal communities. Because of my investments, family farms are better able to stay in the family and children and grandchildren won't have to leave home to make a living. It's transformative." He also discussed his position on climate action. He said: "I'm taking the most significant action on climate ever in the history of the world. I am cutting our carbon emissions in half by 2030... Conserving 30% of America's lands and

waters by 2030. Taking historic action on environmental justice for fence-line communities smothered by the legacy of pollution. And patterned after the Peace Corps and AmeriCorps, I've launched a Climate Corps to put 20,000 young people to work at the forefront of our clean energy future."

LITIGATION

Florida/EPA/FWS/CWA §404 Assumption

On February 15, the U.S. District Court for the District of Columbia issued a partial ruling on a motion for summary judgment that EPA and the U.S. Fish and Wildlife Service (USFWS) violated the Endangered Species Act (ESA) when they approved Florida's application to assume Clean Water Act (CWA) §404 permitting authority (*Center for Biological Diversity et al. v. Michael S. Regan, et al.*, 1:21-cv-00119). The court held that the agencies had circumvented ESA requirements by approving programmatic Section 7 consultation, providing broad ESA liability protection for all future state permittees. The court vacated the USFWS' programmatic Biological Opinion (BiOp) and Incidental Take Statement (ITS), as well as EPA's approval of Florida's §404 assumption application. The order resolves part of the lawsuit, but leaves unresolved other claims regarding violations of the CWA and the Administrative Procedures Act (APA).

The plaintiffs argued that the USFWS' programmatic BiOp, programmatic ITS, and technical assistance processes "create an ESA scheme that is not authorized by law" and "give [Florida] a workaround regarding the mechanisms that Congress provided for establishing take limits, extending liability coverage, and determining jeopardy to species." They also allege that the EPA relied on the facially deficient Section 7 statements and failed to consult with the National Marine Fisheries Service (NMFS).

The defendants argued that even if their Section 7 consultations were insufficient, the agencies had created a technical assistance process between Florida and the agencies to address all of the ESA requirements on a permit-by-permit basis by requiring Florida to consult with USFWS regarding each application. The Defendants requested that the Court only vacate approval to those projects in the category of "may affect, likely to adversely affect" listed species.

The Court permitted defendants to submit a request for a limited stay of vacatur of Florida's §404 assumption within 10 days of the decision. On February 26, the federal defendants filed their supplemental brief, arguing against a limited stay. They noted that a bifurcated program would be impractical and inconsistent with the CWA, and would violate 40 CFR 233.1(b), which provides that partial state programs are not approvable.

On February 26, the State of Florida and the Florida Department of Environmental Protection (FDEP) filed a brief in support of the partial stay. They noted that they had over 1,000 pending §404 individual and general permit applications for roads and bridges, hospital construction projects, school buildings and facilities, affordable housing, military base projects, power grid reliability projects, and various projects to improve water quality in the Everglades. They emphasized the need for the stay to minimize the disruptive consequences of vacatur. They asked for clarification on several questions the court left unanswered regarding procedures for applications that "may affect" listed species and their continued authority over applications that do not.

The Florida intervenor defendants alternatively presented the approach used by New Jersey and Michigan, involving memoranda of agreement (MOAs) that facilitate EPA or USFWS review where the State identifies applications that may affect ESA listed species. They noted that while the court found the Florida Section 7 consultation deficient, the formal process went "above and beyond what was done in the other two states at the assumption stage" where no programmatic BiOp was ever prepared.

WATER RESOURCES

Oregon/AgriMet

On February 23, the U.S. Bureau of Reclamation (USBR), the Oregon Department of Water Resources (ODWR), and the Oregon State University Extension Service (Extension), completed the installation and launch of nine new AgriMet weather stations throughout Oregon. AgriMet is a network of automatic agricultural weather stations dedicated to collecting data for crop water use modeling

The Oregon legislature appropriated funding in 2023 (HB2018, HB2010) for both OWRD and OSU to expand the AgriMet network, allowing the collective purchase of 30 new AgriMet stations and hiring additional support staff. OSU Extension and OWRD identified key agricultural areas to optimize the impact of new installations. This development builds on investments made by OWRD in prior years to purchase new stations and to fund O&M of five USBR-purchased stations.

PEOPLE

On February 28, Senator **Mitch McConnell** (R-KY) announced that he will step down from his position in November. He began his service in the Senate in 1985, and has served as the Republican Party Leader since 2007. He said: "One of life's most underappreciated talents is to know when it's time to move on to life's next chapter. So I stand before you today ... to say that this will be my last term as Republican leader of the Senate."

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