



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **Corps/CWA/Pebble Mine**

On April 15, the U.S. Army Corps of Engineers (Corps) Alaska District, denied an appeal from mine developers, the Pebble Limited Partnership (PLP), asking the Corps to reconsider its decision to deny a federal water permit for the Pebble Mine project. The Corps decision cited the Environmental Protection Agency's (EPA) 2023 veto of the project as a controlling factor.

The Record of Decision was issued in 2020, and determined that the discharges would result in significant degradation of aquatic resources in the Bristol Bay watershed (WSW #2431). In January 2023, EPA used its §404(c) veto authority to preemptively deny the Pebble Mine permit (WSW #2507). Among other petitions, the State of Alaska filed a complaint in the U.S. Court of Federal Claims seeking compensation for the blocked project (WSW #2603).

PLP appealed the Corps' decision in April 2023. The Corps determined that specific elements of the request had merit, and remanded the permit decision back to the Alaska District for reconsideration. In remanding to the Alaska District, the Corps specifically instructed it to evaluate the impact of EPA's veto decision on the Corps' Administrative Appeal Decision. Following technical evaluation of the appeal in light of the EPA veto, the Corps has determined that "the EPA veto is a controlling factor, and the application is denied without prejudice."

CONGRESS/WATER QUALITY **FY25 Budget/CWA**

On April 30, the House Appropriations Subcommittee on Interior, Environment, and Related Agencies held a hearing on EPA's FY2025 Budget Request. The Subcommittee questioned EPA Administrator Michael Regan on the EPA's post-*Sackett* Waters of the United States (WOTUS) Rule, use of funds, air quality standards, and the regulation of Aqueous Film Forming Foam (AFFF) as a fire retardant for wildfires.

In his opening remarks, Subcommittee Chair Rep. Mike Simpson (R-ID) advocated for an appropriate balance between environmental protection and economic growth. He expressed concern that EPA is suppressing industry and reliable power, and that EPA's administration of the WOTUS Rule is overly broad. He also expressed concern about rising budgetary requests, and allocations of those funds, including "zeroed out" requests toward bipartisan programs such as Rural Water Technical Assistance Grants.

On WOTUS, Simpson said: "I was pleased that the Supreme Court reined in the EPA with the *Sackett* decision on the Waters of the United States Rule, a rule that has been changing and no one seems to be able to come up with a final rule that we're going to be using. The decision narrowed what waters are federally-regulated under the Clean Water Act. I have long been concerned that the Biden Administration's definition of federal waters is overly broad and took control away from the states.... In fact, a lot of people don't understand that if the EPA doesn't control the waters, the states regulate the waters. It's not that they're unregulated. It's that the states regulate them. And the overbroad rule that was written by the EPA takes that power away from the states in many cases."

Regan responded: "I committed to follow the science and follow the law when I took this role. When the decision [on the *Sackett* case] came from the Supreme Court, that is no different. We are following the law. The *Sackett* decision was very prescribed and so we issued guidance quickly after issuing our revised rule last fall and continued to work with the Army Corps to be sure that we are following the implementation desires of the Supreme Court.... We have codified and clarified exclusions in support of farmers, like prior converted cropland, and for ranchers, like the artificial ponds for drinking water. So there are a lot of good things that were preserved as well."

On AFFFs, Simpson said: "I'm very concerned about our wildfires losing fire retardant as a tool to fight wildfires. Our firefighters should not be out in the field without the means to fight the fire. They are already

putting their lives at risk. Can you provide an update on how the EPA is working with the Forest Service to ensure continued use of fire retardant?"

Regan assured the Committee that EPA has Facilities Agreements with the U.S. Forest Service (USFS) and are in talks to establish permitting. He said: "This is a conversation that Secretary Vilsack and I together have been looking at and monitoring. We both want to be very clear that we do not want to take any tools away from our firefighters. We will not do that."

CONGRESS/WATER RESOURCES **Weather Reauthorization Act/S2S**

On April 30, the House passed the Weather Act Reauthorization Act of 2023 (H.R. 6093) by a vote of 394-19. The bill aims to improve the National Oceanic and Atmospheric Administrations (NOAA) weather research, forecasting and prediction, and expand commercial opportunities for the provision of weather data. The WSWC sent a letter to the House Committee on Science, Space and Technology leadership in support of the bill on March 4. (WSW #2603).

The bill was introduced by Committee Chair Frank Lucas (R-OK) who said: "H.R. 6093 builds upon the successes of the Weather Act of 2017 while continuing to advance new research and development programs. The bill will increase NOAA's access to critical commercial forecasting data and strengthen emergency preparedness to ensure communities across the country have timely and useful information to prepare for high-impact weather events. I want to thank Ranking Member Lofgren, my colleagues on both sides of the aisle, and our valuable stakeholders for supporting this critical piece of legislation."

The amended bill improves severe weather forecasting by modernizing research programs, establishing new research and development programs related to next generation radar, atmospheric rivers, coastal flooding and storm surges, aviation weather, and more. It increases NOAA's access to private forecasting data and codifies a Commercial Data Program to facilitate procurement and use of private sector data. It also seeks to improve the communication of weather and water events to the public, and provides agricultural producers improved resources for water management, including two pilot projects in the Western and Central U.S. for subseasonal to seasonal (S2S) research and forecasting.

Water Supply and Conservation Act of 2024

On April 18, the WSWC sent a letter to the House Committee on Transportation and Infrastructure

leadership expressing interest in the Water Supply and Conservation Act of 2024 (H.R. 7065), introduced in January. The bill would include water supply and water conservation as a primary mission of the U.S. Army Corps of Engineers (Corps) in its work for water resources development projects.

The letter stated that explicitly including water supply and water conservation as part of the Corps' mission would promote greater federal-state cooperation and collaboration. It also outlines WSWC's support of: (1) collaboration at all levels of government and sectors; (2) cooperative operation of water projects; (3) use of innovative and forecast-informed reservoir operations; (4) the federal government playing a significant role in financing water infrastructure; (5) upholding State authority to manage water resources; and (6) legislation to require the Corps' compliance with procedural state law regarding states' surface waters. WSWC expressed appreciation for the limitations in Section 2(b)(4) of the bill which states that nothing in the bill is to affect any authority of a State to manage, use, or allocate the water resources of that State.

LITIGATION/WATER QUALITY **CBD v. EPA/CWA §404 Assumption**

On April 23, the U.S. District Court for the District of Columbia denied Florida's motion to stay its decision vacating the State's Clean Water Act (CWA) Section 404 authority (*Center for Biological Diversity et al. v. Michael S. Regan, et al.*, 1:21-cv-00119). Florida argued that vacating its authority over the §404 program would cause irreparable harm to its state sovereignty in a cooperative-federalism program, would delay public projects and impede the enforcement of existing permits.

The District Court held that Florida failed to respond to the court's reasoning for its decision and failed to identify any theory of appeal on which it is likely to prevail. It noted that the Corps is able to administer the §404 program as it did before Florida's assumption. The court disagreed that Florida's expended resources would be remedied by permitting a stay. The court also rejected the argument that the State's sovereignty is at risk of "irreparable harm," holding that "regardless of whether Florida is authorized to implement [federal] law with respect to navigable waters of the United States, it remains free to enforce state law and to exercise its traditional sovereign authority to prevent pollution and other environmental harms in the State.... Nothing that the Court has decided curtails in any manner the State's authority to exercise this traditional sovereign authority."

On April 26, Florida appealed the decision on the motion to stay to the D.C. Circuit Court (#24-5101) (WSW #2599).

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