Issue #2679
September 18, 2025

Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/WATER RESOURCES
House/WRDA

On September 10, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held a hearing to review the implementation of recent Water Resources Development Acts (WRDAs) by the U.S. Army Corp of Engineers. Subcommittee Chairman Mike Collins (R-GA) criticized the Corps for study delays, dredging backlogs, and mismanagement of vital locks and dams. Ranking Member Frederica Wilson (D-FL) expressed concern about the Corps' effectiveness considering the "tremendous pressure" the Corps is under due to budget and personnel cuts, unscheduled water releases, and expedited permits. She emphasized the need for consistent, robust funding for Corps implementation and water infrastructure.

Representatives Vince Fong (R-CA), Tracey Mann (R-KS), and Jeff Hurd (R-CO) highlighted the importance of water supply, particularly in the West. Fong asked how the Corps plans to incorporate available technology, such as Airborne Snow Observatory (ASO) and Forecast Informed Reservoir Operations (FIRO) to better protect communities from floods and increase water supply levels. Hurd asked what lessons the Corps has learned from FIRO in the past in terms of preparation and resiliency in the face of drought.

Assistant Secretary Adam Telle of the Army Civil Works and Lt. Gen. William H. "Butch" Graham, Jr. responded by highlighting the need to update water control manuals to incorporate FIRO. Graham noted that FIRO has worked to predict atmospheric rivers in California, and the Corps believes it is applicable elsewhere. The Corps is committed to evaluating watersheds across the country for FIRO eligibility, such as the Rio Grande, Arkansas, and Colorado Rivers. He said the Assistant Secretary's guidance has been to "[wring] every ounce of value" from existing facilities by operating them differently, rather than spending on new infrastructure. Telle said the Corps can accelerate FIRO adoption by sharing expertise across Corps districts, possibly by moving experienced staff to different regions, or creating Centers of Excellence.

Mann asked how the Corps will work with the Environmental Protection Agency (EPA) to provide a definition of Waters of the United States (WOTUS) that adheres to the precedent established in the *Sackett* decision. Telle responded "We're in the process of issuing a proposed rule that will permanently enshrine the *Sackett* decision in the way that the Corps and the EPA go about carrying out their responsibilities. I look forward to this action providing clarity and understanding to stakeholders across the country so that we can get to work. We can provide liberty and freedom to Americans as they go about doing what they do best, which is to innovate and deliver on the economy." Mann also asked about the status of implementing the WRDA 2024 provision to elevate water supply as a primary mission of the Corps. Telle confirmed that water supply is a critical focus of the Corps' work.

WATER QUALITY/LITIGATION
Agriculture/NPDES Permits

On September 5, the U.S. District Court of Appeals for the Ninth Circuit upheld a district court's ruling in favor of the U.S. Bureau of Reclamation and the San Luis and Delta Mendota Water Authority in *Pacific Coast Federation of Fishermen's Associations, Inc., et al. v. Ernest Conant, et al.* (9th Circuit, #23-15599).

In the underlying case, filed in 2011, plaintiffs challenged whether the Grasslands Bypass Project in California's Central Valley qualified for Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit exemption for agricultural return flows. The district court initially agreed with the exemption in 2017. In 2019, the Ninth Circuit remanded on three procedural errors but upheld the district court's broad interpretation of "irrigated agriculture" to include "all activities related to crop production." On remand, while addressing the procedural errors, the district court concluding that the defendants had successfully established the exemption because each alleged pollutant (groundwater seepage from non-irrigated land, sediment in the drain, water from the Vega Solar Project, and flows from highways, residences, and other non-irrigated lands) was either from a nonpoint source or from a point source related to the Project's overall

drainage function. See WSW #2601, #2367.

On this appeal, the Ninth Circuit panel defined the issue as a question of "whether the statutory exemption for irrigation return flows has been wrongly applied to the Project because diffuse 'nonpoint source' pollution – such as pollution from rainwater runoff or windblown dust and algae – comingles with the Project's return flows prior to discharge into Waters of the United States."

The Ninth Circuit agreed with the district court's reasoning that: (1) the agricultural return flows exemption applies only if the discharge does not include additional discharges, meaning point sources, from activities unrelated to crop production; and (2) an activity is "related to crop production" so long as it "is related to the function and operation of the overall drainage plan." Consequently, the defendants needed to establish that each alleged pollutant source was either from a nonpoint source or from a point source related to the Project's overall drainage function. Both courts were satisfied that the defendants had carried this burden.

The Court disagreed with plaintiffs' argument that the exemption for "discharges composed entirely of return flows from irrigated agriculture" requires all pollutants to originate "entirely" from irrigated agriculture, meaning any commingling with pollutants unrelated to irrigated agriculture would necessitate an NPDES permit. The Court said the statutory text is ambiguous as to what category of objects "entirely" is meant to exclude (i.e., every pollutant or every discharge). But the Court concluded that the exemption applies "so long as the return flow does not contain additional point source discharges from activities unrelated to crop production."

The panel held that the plaintiffs' theory did not follow from the statutory text, was inconsistent with the purpose and structure of the CWA, and would practically "render the irrigation return flow exemption a dead letter." They held that the plaintiffs failed to raise a genuine dispute of material fact. "Under plaintiffs' reading of the statute, an irrigation system would have to ensure that no windblown dust ever enters the return flow conveyance for the return flow to qualify under the statutory exemption–a scientific impossibility. Plaintiffs have not been able to explain how any irrigated agriculture system would ever qualify for the exemption."

EPA/Tribal Reserved Rights Rule

On September 16, the EPA notified the U.S. District Court for North Dakota that it will no longer defend the 2024 Water Quality Standards (WQS) Regulatory Revisions to Protect Tribal Reserved Rights Rule (89 FR 35717), in *Idaho et al. v. EPA*, 1:24-cv-00100.

The 2024 Rule amended the WQS regulation at 40 CFR part 131 to: (1) define Tribal reserved rights for purposes of that regulation; (2) establish and clarify the responsibilities of states with regard to Tribal reserved rights in the WQS context; and (3) establish and clarify the EPA's related responsibilities and oversight role. WSW #2612, Special Report #2548

In May 2024, twelve states asked the Court to vacate the Rule because it exceeds EPA's authority under the CWA. The States argued that Congress did not "give the EPA the power to commandeer states into protecting and adjudicating alleged tribal reserved rights for the government" and that the CWA focuses on water quality, not on protecting specific rights for tribal or non-tribal members of the public. The rule requires case-by-case inquiries into undefined reserved rights that can only be resolved by courts, often over the course of a decade or more. "[T]reaty rights promised by the federal government to the tribes are socially, politically, and legally complex issues." EPA provides no guidance or mechanism for dispute resolution for "inevitable disagreements – between the tribes themselves, between tribes and States and between the tribes and the federal government – over the extent and nature of any alleged reserved rights." Such disagreements "have been the subject of countless lawsuits." WSW #2621.

EPA filed a notice this week that it does not oppose the vacatur of the 2024 Rule. "Upon review of the statute, the Rule, and the issues presented in the litigation, the United States now agrees that EPA lacked statutory authority under the Clean Water Act. The United States therefore withdraws its motion for summary judgment and its opposition to Plaintiffs' motion for summary judgment and to Plaintiffs' motion for preliminary injunction, and does not oppose Plaintiffs' request that the Court vacate the 2024 Rule."

The notice continued to explain that following the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the United States has concluded that EPA exceeded its CWA authority by requiring States to "consider and protect express or implied reserved rights asserted by tribes" when establishing water quality standards. The United States therefore agrees with Plaintiffs that the 2024 Rule is unlawful… the 2024 Rule goes beyond the plain language of the CWA, which does not require that states consider tribal reserved rights in establishing water quality standards. Under CWA section 303(c), states have the primary responsibility for reviewing, establishing, and revising standards applicable to their waters." States may choose to consider and protect tribal reserved rights, but EPA "lacks authority to require states to do so."
