



# WESTERN STATES WATER

## Addressing water needs and strategies for a sustainable future.

Issue #2695

April 6, 2026

Chair - Julie Cunningham; Executive Director - J.D. Strong; Editor - Elysse Ostlund Campbell

### **ADMINISTRATION**

#### **Army Corps/ Nationwide Permits**

On March 16, the Army Corps of Engineers established a public docket “Notice of Solicitation of Input on Potential Future Changes to Nationwide Permits; Establishment of a Public Docket; Request for Input,” (Docket ID: COE-2026-0001) seeking feedback from all interested parties on ways to increase the efficiency of the nationwide permit (NWP) program.<sup>1</sup> The public comment period will close on May 15, 2026. Comments will inform potential modifications to the NWPs that may occur before the 2026 NWPs expire on March 15, 2031. The Corps is mainly requesting input on how to make the permitting process faster and less burdensome, while still ensuring that environmental impacts stay minimal and waterways remain navigable.

The Corps issued guiding questions on several key aspects of the NWP program, including: (1) identifying permit requirements, impact limits, and general conditions that create unnecessary review burdens; (2) ways to streamline the pre-construction notification and verification process; (3) suggestions for new permit categories that could better accommodate common activities not well-served by existing permits; (4) how current terms and conditions could better ensure that dredging and fill activities cause minimal harm to waterways, both individually and cumulatively; (5) how rules governing ocean disposal of dredged material could be improved; and (6) broader suggestions on how to make the overall permit program—including the Chief of Engineers' reissuance process—more efficient and effective.

### **CONGRESS**

#### **Senate/Energy and Natural Resources**

On March 17, the Senate Energy and Natural Resources Subcommittee on Water and Power held a hearing to receive testimony from David Palumbo, Deputy Commissioner of Operations, Bureau of Reclamation, and Terry Turpin, Director of the Office of Energy Projects, Federal Energy

Regulatory Commission (FERC), on pending water and power legislation.<sup>2</sup>

Senator John Hoeven (R-ND), Chairman of the Subcommittee on Water and Power, highlighted the unique challenges Western states face regarding drought and floods. He discussed the bipartisan Dakota Water Resources Act Amendments of 2026 (S. 4040), which he recently reintroduced with the support of Senator Alex Padilla (D-CA).<sup>3</sup> S. 4040 would reauthorize the Dakota Water Resources Act (DWRA) and increase funding under the Municipal, Rural, and Industrial (MR&I) water supply grant program. Ranking Member Ron Wyden (D-OR) highlighted the record-low snowpack facing Western states and his Watershed Results Act (S. 1242), which would create a Watershed Outcomes Fund to finance 2-5 pilot projects in Reclamation States, using advanced watershed analytics to identify conservation projects with a high likelihood of cost-effectively achieving certain outcomes. S. 1242 establishes a pay-for-performance model, providing \$17M per year for payments to partners who produce measurable, quantifiable, and verifiable improvements. “The concept for the legislation is simple. If you want to improve your local waterway that is great, but demonstrate to us you have the best way of doing it before the taxpayer dollars go out.”

Senator Daines introduced four bills including: (1) the Lower Yellowstone River Native Fish Conservation Act (S. 3409); (2) the Hydro Power Licensing Transparency Act (S. 3500), introduced alongside Senator Cortez Masto (D-NV), which aims to increase transparency in the licensing process for hydropower projects by requiring FERC to submit annual reports to Congress regarding the status of pending applications; (3) the Fort Peck Water System Reauthorization Act (S. 3635), which would extend Reclamation's authorization to finalize the construction of essential water infrastructure through December 2028; and (4) the Cooperative Watershed Management Program Reauthorization Act (S. 4041), which would reauthorize the existing program to provide \$40M from FY2027-FY2031. Senator Lisa Murkowski

(R-AK) advocated for the Fair Licensing for Operators of Water Structures Act (S. 3518), which aims to cut red tape for small operators performing routine dam maintenance and create a modernized licensing pathway for micro-hydrokinetic projects.

Deputy Commissioner Palumbo opposed many of the pending bills due to concerns over duplicative purposes and increased federal costs, though he supported many of the legislative goals of the sponsors. He opposed the Watershed Results Act (S. 1242) as duplicative of existing programs, but agreed to work with Senator Wyden's office on incorporating pay-for-performance elements into WaterSMART. He opposed the Growing Resilient Operations from Water Saving and Municipal-Agricultural Reciprocally-beneficial Transactions Act (S. 3737) as agricultural water efficiency projects fall outside Reclamation's core mission, while acknowledging to Senator Padilla the West's need to do more with less water. He opposed the Making Our Communities Resilient through Enhancing Water for Agriculture, Technology, the Environment, and Residences Act (S. 3738) for expanding Reclamation's scope and undermining the "beneficiary pays" model, while agreeing with Senator Padilla that programmatic authorizations help Reclamation act more nimbly when responding to drought. He raised significant concerns about the Snow Water Supply Forecasting Program Reauthorization Act (S. 2437), the Urban Canal Modernization Act (S. 2753), S. 3409, the Water Security and Drought Resilience Act (S. 3732), and the Water Project Navigators Act (S. 3792), citing in each case issues of redundancy, cost, or regulatory expansion. He supported S. 3635 and S. 4040 pending technical fixes, as well as the Large-Scale Water Recycling Reauthorization Act (S. 3693), the Glen Canyon Dam Selective Withdrawal Feasibility Act (S. 3743) provided costs are fully reimbursable.

Director Turpin testified about the agency's critical role in licensing and overseeing over 1,600 non-federal hydropower projects, which account for more than half of all developed hydropower in the United States. FERC is facing a surge in its workload, with over 410 projects expected to begin the relicensing process over the next ten years, and the commission conducted over 2,000 dam safety-related inspections in FY2025 alone. During the question-and-answer session, Turpin urged Congress to provide clearer statutory direction on national interest priorities to help align the conflicting missions of the various federal and state agencies involved in the complex permitting

process. He also agreed with Ranking Member Wyden on the importance of "technological neutrality" and supported the use of technology testbeds to reduce the financial and regulatory risks for companies developing innovative marine energy solutions

### **Senate/Environment and Public Works**

On March 18, 2026, the Senate Environment and Public Works (EPW) Subcommittee on Fisheries, Water, and Wildlife held a hearing to examine the implementation, challenges, and opportunities of the Endangered Species Act (ESA). The hearing featured testimony from conservation and water management experts including former Nebraska WSWC Member, Tom Riley. Subcommittee Chair Pete Ricketts (R-NE) drew on his experience as Governor of Nebraska to highlight the success of the Platte River Recovery Implementation Program, a multi-state collaboration involving Nebraska, Colorado, and Wyoming alongside the DOI. He argued that the program's success, including boosting whooping crane populations to "historically high levels," showed that conservation works best when it is "collaborative, science-based, transparent, and predictable for all stakeholders involved."<sup>4</sup>

He said: "Improving coordination, communication, and transparency among federal agencies, states, and other stakeholders should be a central part of ESA's implementation moving forward. Programs like the Platte River Recovery Implementation Program demonstrate that collaborative conservation can work, but similar models have not been consistently applied elsewhere."

Both Senator Ricketts and EPW Committee Chair Shelley Moore Capito (R-WV) argued that rather than effectively recovering species, the ESA as currently implemented mostly creates regulatory obstacles and uncertainty, needlessly blocking activities like post-disaster rebuilding, infrastructure construction, and key industry operations.

Brian Yablonski, Chief Executive Officer of the Property and Environment Research Center, argued that "states probably manage 99%" of the ~200,000 species in North America, and could take on more ESA responsibilities through §6 cooperative agreements. When Chairman Capito asked why this delegation isn't already happening, Yablonski cited resistance in federal agency mindsets and the threat of litigation, noting that a 2012 attempt to shift species management to Florida was approved by President Obama and

abandoned after the agency was immediately sued.

Thomas Riley testified that ESA implementation should be rooted in current science, real-world ecological performance, transparency, and regulatory certainty within the working landscapes of the West. To improve the implementation of the ESA, Riley offered three specific policy recommendations for Congress: (1) Codify the Critical Habitat Exclusion Analysis and the withdrawal of the §4(d) “blanket rule,” allowing federal agencies to consider economic impacts and national security concerns when designating habitats; (2) Increase incentives for voluntary conservation on private lands; and (3) Invest in proactive conservation under ESA §7(a)(1). He advocated for expanding funding to design ecological functions into projects during their early planning stages. He stressed that integrating species’ needs proactively is much more efficient and cost-effective than attempting to retrofit infrastructure after regulatory conflicts have already arisen. Riley advocated for five concrete principles he believes should guide ESA reform: basin-wide collaboration, locally grounded science, respect for working landscapes, coordination with existing state water management systems and interstate river governance, and regulatory certainty with clear program milestones.

“Because water is scarce and heavily managed across much of the western United States, effective ESA implementation frequently requires coordinated management of large river systems, interstate water agreements, and collaboration among federal agencies, states, and local stakeholders... The ESA remains one of the most important conservation laws in the United States. Nebraska’s experience demonstrates that its goals can be achieved most effectively when implementation is collaborative, science-based, transparent, and predictable. Programs such as the Platte River Recovery Implementation Program and the restoration of the Eastern Nebraska saline wetlands demonstrate that species recovery and economic activity can coexist when stakeholders work together within a clear and accountable framework.”

### **LEGAL/WATER QUALITY** **CWA §404 Authority/ CBD v. EPA**

On March 27, the U.S. Court of Appeals for the D.C. Circuit ruled that the Environmental Protection Agency (EPA) and the Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA) when they granted Florida Clean Water

Act (CWA) §404 permitting authority in 2020 in *Ctr. for Biological Diversity v. Zeldin*, No. 24-5101 (D.C. Cir. March. 27, 2026).<sup>5</sup> The ruling upholds a 2024 decision by the U.S. District Court, which found that the agency had unlawfully circumvented ESA requirements by approving programmatic §7 consultation, providing broad ESA liability protection for all future state permittees (WSW #2599). 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.

After hearing arguments in May 2025, the D.C. Circuit Court ruled that the FWS BiOp was unlawful and must be set aside. FWS failed to conduct a proper, detailed analysis of how the permitting program would affect ESA listed species, improperly deferring the necessary rigorous evaluation to a state-run “technical assistance” process. The Court noted that FWS itself stated in the BiOp that it was “not feasible nor [was] it required, to conduct a meaningful site-specific and species-specific affects analysis in this BiOp,” because the consultation was on a programmatic action.

The Court said this reasoning was “demonstrably incorrect” because the technical assistance program was not as protective as the §7 consultation process. “In fact, the technical assistance process was specifically designed to be ‘streamlined’ and less ‘burdensome,’ and therefore omitted the precise analytical steps that must be taken before a Service may issue a no-jeopardy determination under §7.” Consequently, the Court ruled that EPA had also violated the ESA by relying on the deficient BiOp to approve the program.

The Court also struck down the FWS’s Incidental Take Statement (ITS), ruling that it was arbitrary and capricious because it violated applicable regulations in three distinct ways. First, the ITS failed to quantify “the amount or extent” of anticipated incidental take on ESA-listed species, violating 50 C.F.R. § 402.14(i)(1)(i). Second, the ITS omitted specific “reasonable and prudent measures” to minimize the impact of that incidental take, violating 50 C.F.R. § 402.14(i)(1)(ii). Third, the ITS unlawfully relieved federal agencies of their mandatory duty to reinstate formal consultations in the event of take limits being exceeded (violating 50 C.F.R. § 402.14(i)(5)) or

new protected species and habitats being listed (violating 50 C.F.R. § 402.16).

Additionally, the Court held that the EPA's determination that it need not consult with the National Marine Fisheries Service (NMFS) was arbitrary, capricious, and contrary to law. Although NMFS advised that its protected species were absent from Florida's assumable waters, the court explained that under 50 C.F.R. § 402.02, the definition of "action area" should include "all areas to be affected directly or indirectly." The Court ruled that the required analysis should have included downstream consequences both in time and area, pointing out that the FWS BiOp itself noted that freshwater eventually makes its way to the coastline, where it could impact NMFS-protected marine species.

"The FWS based its BiOp's no-jeopardy determination on a flawed effects analysis and inaccurate assumptions about the efficacy of the technical assistance process. Moreover, the flawed ITS would allow Florida's §404 permittees to claim exemptions from take liability, without requiring those permittees to meet applicable requirements under either §7 or §10 of the ESA. In addition, the EPA erroneously determined that consultation with the NMFS was not required under §7. All of those errors fatally undermine the EPA's approval of the permitting program, and that decision cannot be salvaged with additional explanation."

## **WESTERN GOVERNORS**

### **House Energy and Water/ Appropriations**

On March 26, the Western Governors' Association submitted written testimony to the House Appropriations Subcommittee on Energy and Water Development to outline its funding and policy priorities for FY 2027. WGA called for a strong, cooperative partnership between the federal government and the states.

WGA wrote: "Western Governors recognize the importance of a close and productive working relationship between states, territories, and the federal government and understand that effective intergovernmental cooperation depends on federal recognition of states as co-sovereigns and partners."<sup>6</sup> To support western water needs, WGA urged Congress to provide adequate funding for new water projects as well as the rehabilitation of aging water, wastewater, and hydropower facilities.

Highlighting the importance of the Bureau of Reclamation's WaterSMART program and the U.S. Army Corps of Engineers' Planning Assistance to the States program for modernizing delivery infrastructure and aiding comprehensive water planning, WGA advocated for leveraging greater private investment in water infrastructure through tools like loan guarantees, revolving funds, and water trust funds. They argued that long-term sustainability should drive funding decisions, urging the use of capital budgeting and asset management principles rather than incremental annual spending choices. WGA also requested robust funding for accurate water data collection, pointing out that "[a]ccurate data helps avoid increased wildfires, impaired ecosystems, degraded agricultural production, and threatened municipal and industrial water supplies."

Addressing the rapid growth of western energy generation, the WGA encouraged investments in grid modernization, cybersecurity defense systems, and weatherization technologies. The testimony supported continued funding for the State Energy Program and the Weatherization Assistance Program to promote regional transmission planning and home energy efficiency. WGA underscored the need for efficient infrastructure permitting processes. The Governors urged the Subcommittee to ensure federal agencies have highly qualified staff to conduct timely environmental reviews and suggested that leveraging existing rights-of-way could streamline approvals. They noted that federal permitting frameworks must remain flexible to accommodate the highly diverse geography, economies, and political goals found across western communities, concluding that "[c]reating a robust federal permitting framework that accommodates the diverse natural and political landscape of the West is essential for the success of the region."

## **MEETINGS**

### **WestFAST Webinar**

On Wednesday April 15 at 10 AM MST, WestFAST will hold its first webinar of 2026. The webinar will feature Department of Energy's (DOE) WestFAST representative, Charles Scaife (WSW #2619), who will present on recent DOE research on the water-energy nexus in the context of rapid data center growth. Drawing on ongoing analysis and national laboratory efforts, Scaife will discuss how

---

energy and water demands are increasingly constraining infrastructure development, the tradeoffs associated with different cooling technologies, and emerging approaches to support coordinated, basin-scale planning and resource management.

Charles is an energy–water systems research manager and hydrologist serving as a Program Manager at DOE’s Office of Critical Minerals and Energy Innovation. He leads the Energy–Water Resources Program, which advances research, tools, and partnerships to strengthen the reliability, resilience, and coordination of energy and water systems across the United States.

The Energy–Water Resources Program focuses on emerging challenges at the energy–water nexus, including growing demands from data centers, regional water constraints on energy infrastructure, and the need for integrated planning across power, water, and industrial systems. Through this work, he manages a multi-million-dollar federal research portfolio and collaborates with national laboratories, utilities, state agencies, and international partners to translate technical analysis into actionable strategies for infrastructure planning and resource management.

This is a public webinar and no registration is required. Please visit [westernstateswater.org/upcoming-westfast-webinars/](https://westernstateswater.org/upcoming-westfast-webinars/).

## **REFERENCES**

- <sup>1</sup> U.S. Army Corps of Engineers (USACE) “Notice of Solicitation of Input on Potential Future Changes to Nationwide Permits; Establishment of a Public Docket; Request for Input.” Federal Register. March 16, 2026. <https://www.federalregister.gov/documents/2026/03/16/2026-05051/notice-of-solicitation-of-input-on-potential-future-changes-to-nationwide-permits-establishment-of-a>.
- <sup>2</sup> U.S. Senate Committee on Energy and Natural Resources. “Water and Power Subcommittee to Receive Testimony on Pending Legislation.” March 17, 2026. <https://www.energy.senate.gov/hearings/2026/3/water-and-power-subcommittee-to-receive-testimony-on-pending-legislation>.
- <sup>3</sup> U.S. Senator John Hoeven of North Dakota “Hoeven Reintroduces Legislation to Increase Funding Authorizations for Water Supply Projects in North Dakota” March 11, 2026. <https://www.hoeven.senate.gov/news/news-releases/hoeven-reintroduces-legislation-to-increase-funding-authorizations-for-water-supply-projects-in-north-dakota>.
- <sup>4</sup> U.S. Senate Committee on Environment and Public Works. “Hearing Examining the Challenges and Opportunities with Implementing the Endangered Species Act.” March, 2026. <https://www.epw.senate.gov/public/index.cfm/2026/3/hearing-examining-the-challenges-and-opportunities-with-implementing-the-endangered-species-act>.
- <sup>5</sup> *Center for Biological Diversity v. Zeldin*, No. 24-5101 (D.C. Cir. Mar. 27, 2026), <https://media.cadc.uscourts.gov/opinions/docs/2026/03/24-5101-2165874.pdf>.
- <sup>6</sup> Western Governors’ Association. “Western Governors Submit Testimony on FY 2027 Appropriations to U.S. House - WGA - Western Governors’ Association.” Westgov.org. 2026. <https://westgov.org/policy/correspondence-letter/western-governors-submit-testimony-on-fy-2027-appropriations-to-u.s.house>.

---

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.