



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS **State of the State Address**

On January 31, Texas Governor Greg Abbott set priorities for the current legislative session, including meaningful ethics reforms and passing a resolution calling for a Convention of States, as permitted by Article V of the U.S. Constitution. “For decades, the federal government has grown out of control. It has increasingly abandoned the Constitution, stiff-armed the states and ignored its citizens. This isn’t a problem caused by one president. And it won’t be solved by one president. It must be fixed by the people themselves. That’s why we need a Convention of States – authorized by the Constitution – to propose amendments.... The proposed amendments would include things like term limits, restoring the 10th Amendment, an amendment that reins in federal regulation and...a balanced budget amendment. We should demand that the federal government do two things. One: Fulfill important – but limited – responsibilities as written in the Constitution. And two: On everything else, leave us alone, and let Texans govern Texas.”

CONGRESSIONAL UPDATE **Ninth Circuit Jurisdiction**

Three bills have been introduced to move several Western states out of the overburdened 9th Circuit and into a newly created 12th Circuit. On January 3, Rep. Michael Simpson (R-ID) introduced the Ninth Circuit Court of Appeals Judgeship and Reorganization Act (H.R. 196). The bill divides the 9th Circuit into: (1) a new 9th Circuit, composed of California, Guam, Hawaii, and Northern Mariana Islands; and (2) the Twelfth Circuit, composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The President must appoint two additional judges for the former 9th Circuit, three judges for the new 9th Circuit, and two additional temporary judges for the former 9th Circuit. The bill: (1) specifies the locations where new circuits are to hold regular sessions; (2) distributes active circuit judges of the former 9th Circuit to the new circuits; (3) allows senior circuit judges of the former 9th Circuit to elect assignment; and (4) authorizes administrative coordination between any two contiguous circuits.

On January 13, Rep. Andy Biggs (R-AZ) introduced the Judicial Administration and Improvement Act (H.R. 250), with four Arizona Republican co-sponsors. The bill is similar to H.R. 196, but divides the 9th Circuit differently, with Washington and Oregon remaining in the new 9th Circuit.

On February 2, Senators Jeff Flake (R-AZ) and John McCain (R-AZ), in coordination with Arizona Governor Doug Ducey, re-introduced the Judicial Administration and Improvement Act (S. unassigned). The Senate version of the bill would assign Washington to the 12th Circuit and keep Oregon in the 9th Circuit. The bill specifies that the new 12th Circuit would not be bound by the precedent of the former 9th Circuit decisions, which would have the same persuasive authority as other Circuits.

In a joint press release, Senator Flake, member of the Senate Judiciary Committee, noted that the 9th Circuit covers 20% of the U.S. population, and the circuit hears over 12,000 appeals each year, with an average wait time exceeding 15 months. He said: “Establishing a new circuit with stronger local, regional, and cultural ties will ease the burden across the West....” Governor Ducey said: “This is about responsible, good government. The 9th Circuit is by far the most overburdened court in the country. Its pending cases are more than double the caseload of the next busiest court....” Senator McCain said: “With this legislation, we will continue the effort forged by Senator Jon Kyl to create a new 12th Circuit in order to ensure that all Arizonans have timely and fair access to the federal courts.”

WATER QUALITY **CWA 404/Corps Nationwide Permits/WOTUS**

On January 6, the U.S. Army Corps of Engineers (Corps) published revised and renewed nationwide permits (NWP) in the *Federal Register* (82 FR 1860). These permits are intended to provide incentives to avoid and minimize impacts on aquatic resources, and are necessary for work in streams, wetlands and other Waters of the United States (WOTUS) under the Clean Water Act (CWA) §404 and the 1899 Rivers and Harbors Act §10. The new NWP will take effect March 19, 2017, replacing the existing permits, which automatically expire on March 18, 2017. The Corps is reissuing 50 permits and adding

two new permits, NWP 53 covering the removal of low-head dams, and NWP 54, covering the construction and maintenance of living shorelines. Most of the reissued nationwide permits have no major changes from 2012.

The proposal to reissue NWPs was published in the *Federal Register* on June 1, 2016, soliciting comments from NWP users and other interested parties. The Corps requested feedback on some potential revisions, including definitions of terms such as “waters of the United States,” “adjacent,” and “ordinary high water mark,” following publication of the 2015 WOTUS Rule. Implementation of the WOTUS Rule has been stayed by the 6th Circuit since October 9, 2015. The Corps received approximately 54,000 comments, and determined to rely on existing definitions and to retain the proposed acreage limits and preconstruction notification (PCN) thresholds for NWPs. Some commenters noted that the WOTUS Rule was only in effect for several weeks before the court’s stay, which was insufficient time to collect data and examples of the effects of the rule on the utility of the NWPs in order to provide meaningful comments to the Corps.

The current regulations and guidance will be the definition of “Waters of the United States” published in the November 13, 1986, issue of the *Federal Register* (51 FR 41206) plus the January 2003 clarifying guidance regarding the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (68 FR 1995) and the December 2008 guidance entitled Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*. The text of the NWP’s general conditions and definitions were modified so that they do not cite specific provisions of 33 CFR 328 impacted by the 2015 WOTUS Rule. The Corps’ districts will process PCNs and voluntary requests for NWP verifications according to the current regulations and guidance, and will not implement the 2015 WOTUS Rule unless the stay is lifted and the Rule goes back into effect. “If the Corps determines that the NWPs issued today need to be modified to address changes in the geographic scope of Clean Water Act jurisdiction or other regulation changes, the Corps will conduct rulemaking in accordance with the Administrative Procedure Act prior to making those changes.” See <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

WATER RESOURCES

Drought/Water Supply Outlook

WSWC members and other water users, administrators and managers are invited to join a number of webinars and workshops to be held regarding the water supply outlook in various basins and

regions. Many are held on a regular basis, in coordination with the National Integrated Drought Information System (NIDIS).

In addition, the U.S. Drought Monitor is posted every Thursday, and a monthly Drought Outlook is published, as well as 1-month and 3-month outlooks for temperature, precipitation and drought. For future reference, go to <https://www.drought.gov/drought/calendar>.

The Colorado Basin River Forecast Center (CBRFC) produces water supply forecasts for the Colorado River and eastern Great Basin, with teleconference and internet briefings, typically conducted monthly. The next briefing is scheduled at 11:00 am MT on Tuesday, February 7, for the Colorado River Basin, followed at 1:30 p.m. MT by a briefing on the Great Basin. The conference call phone is 1-877-929-0660 and access code 1706374. Access to the web-based presentation requires registration. To sign up, go to the calendar above. Questions or comments can be directed to greg.smith@noaa.gov.

An Upper Colorado River Basin Drought Early Warning System (DEWS) webinar will be held at 10 a.m. MT, on Tuesday, February 14, hosted by the Colorado Climate Center at Colorado State University with support from NIDIS. Access registration information through the calendar. Questions or comments can be directed to nolan@atmos.colostate.edu.

Monthly North Central U.S. Climate Summary and Outlook webinars take place on the third Thursday, next on February 16, at 1 p.m. CT with a focus on the area from the Great Lakes/Ohio River Basin to the Rockies. Topics include recent climate trends, events, variability, impacts, and outlooks for the coming weeks and months, followed by questions. Register on the calendar above.

The next Pacific Northwest DEWS Drought and Climate Outlook webinar takes place at 11 a.m. PT, on February 27. Register through the calendar.

The next California-Nevada DEWS Outlook webinar is at 11 a.m. PT, Monday, March 27.

On March 8-9, the Missouri River Basin User Forum: Drought Early Warning for the Lower Basin will take place in Nebraska City, NE at the Lied Lodge. The forum will assess the current status of drought monitoring and prediction in the Missouri River Basin (MRB); identify what tribes, states, watershed groups, and municipalities are doing for anticipating drought; the current status of drought planning and how early warning information matches these efforts; and identify next steps to improve the MRB Drought Early Warning Information System (DEWS). For registration information, see <https://joss.ucar.edu/meetings/2017/missouri-river-basin-drought-early-warning-information-system-lower-basin-meeting>.

The WESTERN STATES WATER COUNCIL is an organization 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.