



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES **Corps/Water Supply Rule**

On May 12, the Western States Water Council (WSWC) submitted a comment letter addressing the U.S. Army Corps of Engineers (Corps) proposed water supply rule, "Use of Corps Reservoir Projects for Domestic, Municipal and Industrial Water Supply." The letter expresses concern over the lack of substantive state participation in the development of the rule. "State input for such a water supply rule is critical, particularly where the Corps policies will result in a disproportionate impact on western water resources, where the laws differ significantly from the laws governing riparian water users along rivers in the East. The Western States have primary, often exclusive authority over the protection, development, and management of waters within their boundaries, including natural surface waters flowing through Corps reservoirs and dams. We believe that the Corps' assertions of broad authority over surface waters and the potential interference with the lawful exercise of state water rights are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States."

WSWC notes that the definition of "surplus waters" must explicitly exclude the natural flows that would exist regardless of federal dams and reservoirs. Otherwise, the Corps proposed rule would interfere with state authority to develop, use, manage, control, distribute, and allocate state water, and in some states may interfere with vested property rights in water with Constitutional protections. "We request that the Corps enter into an open and authentic dialogue with the states designed to achieve a mutually acceptable policy that reflects the Constitutional division of powers, state primacy over water resources allocation, and the realities of western water law, with a flexible but consistent approach that accounts for the significant physical, hydrological, and legal differences that exist between the states."

Comments from the Texas Commission on Environmental Quality, which manages Texas' surface water, noted the lack of coordination with states in developing this rule, the obvious federalism implications of the rule, and that the imposition of a major national

policy without state consultation as not only inappropriate, but it results in flawed policy. "Corps policies, as set out in this rulemaking, have the potential to undermine state authority to allocate and manage water resources in Texas. The discussion in the proposed rule related to consumptive and non-consumptive use and the purposes for which Texas can allocate water conflicts with Texas statutes. In addition, the proposed section on water supply storage accounting does not take into account how water is managed and allocated in Texas." The storage accounting method appears to apply a narrow solution to a localized problem on a nationwide basis, without considering differences between state laws. "The Corps' allocation of return flows and other made inflows to all users in a reservoir would result in water that is permitted to an existing Texas water right being allocated to other users in a manner that violates state statutes and ownership of state water.... Texas water right holders have made significant investments to utilize their permitted water. The proposed rule would have the effect of allocating this water to someone else and the Corps accounting would directly conflict with the terms of the state issued water rights."

Oklahoma addressed a concern that the definition of surplus water could allow the Corps to go beyond its responsibility to provide specified entities with storage water for certain authorized purposes, affecting state water supplies and tribal water rights. Additionally, the Corps only has authority to provide storage space for water allocated by the state, not to assume control over natural flows or issue storage contracts or easements for non-project waters. "Under this proposed definition of surplus, water that naturally flows into Lake Texoma and is authorized for use in Oklahoma could be reallocated to users in Texas. If USACE continues to include natural flows in the surplus definition, Oklahoma's water supply could be in danger."

South Dakota stated that the proposed rule is unacceptable, re-writing Congressional intent and ignoring state water laws and the science and engineering of hydrology. The rule attempts to "mandate a federal take-over of all our unappropriated natural flows," as well as existing appropriations of natural flows of the Missouri River that pre-date "the Pick-Sloan Act and the construction of the Missouri River dams. The proposed

rule in its current form threatens to strip away those water rights through future water supply agreements, renewal of access easements, and other processes for which the [Corps] has no authority.” South Dakota law issues water rights for as long as water users put the water to beneficial use. The Corps’ rule creates uncertainty for water rights holders obtaining their water from Corps reservoirs, because there is no guarantee that the Corps will renew water supply agreements when they expire. This will hinder development in South Dakota.

Idaho stated, “The Corps must exclude Idaho from the scope of the Rule because it is based on theories of the nature, extent, and administration of state water rights devised by the Corps that are incompatible with Idaho water law. The Corps was required by the McCarran Amendment, 43 U.S.C. §666, to assert in Idaho’s Snake River Basin Adjudication any claim or argument that federal law requires Idaho to adopt the Corps’ theories of the nature, extent, and administration of water rights for the Corps’ reservoirs. Having failed to do so, the Corps is now precluded as a matter of law from attempting to impose through the Rule a system of water rights and water administration that conflicts with Idaho water law.”

The comment period for the proposed rule has been extended to August 18, 2017. A selection of letters submitted to the Corps may be found at: <http://www.westernstateswater.org/letters/>.

WESTERN GOVERNORS’ ASSOCIATION **Regulatory Reform**

On May 15, WGA sent a letter to Justin Clark, Director of Intergovernmental Affairs at the White House, responding to the President’s Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The letter provides a detailed list of reforms, based on the Governors’ past interactions with federal agencies, that would help realign the state-federal relationship so that it operates as a true partnership. Attached to the letter was a 21-page table with an agency-by-agency menu of possible reforms.

“Western Governors are excited to work in authentic partnership with the federal government. Governors are optimistic that the new Administration will be eager to unleash the power and creativity of states for the common advantage of our country. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united.”

The document starts with crosscutting recommendations that would impact more than one agency or branch of the federal government, then moves on to agency-specific recommendations. Each

suggested reform includes a link to WGA’s relevant policy resolutions. Federal agencies mentioned in the reforms include: Army Corps of Engineers; Bureau of Land Management; Department of Energy; Environmental Protection Agency; Federal Emergency Management Agency; Federal Regulatory Commission; Fish and Wildlife Service; Forest Service; National Marine Fisheries Service; and the National Oceanic and Atmospheric Administration. Several of the reforms recommend consultation with the states before promulgating rules, regulations, or other agency action that impact state management and allocation of water resources.

The letter and recommended reforms may be found at: <https://www.westgov.org>.

WATER RESOURCES/ENVIRONMENT **Sub-Seasonal to Seasonal Precipitation Forecasting**

The California Department of Water Resources (CDWR) and the WSWC hosted another workshop on improving sub-seasonal to seasonal (S2S) precipitation forecasting in San Diego, California on May 17-19. The meeting drew 45 state and federal agency officials, climatologists, hydrologists and meteorologists, scientists, graduate students and water managers. Jeanine Jones, CDWR and WSWC Vice-Chair, provided a summary of past efforts, future challenges and desired outcomes. She also presented examples of the potential value of improved longer range forecasts from California’s recent drought. WSWC Executive Director Tony Willardson provided context for S2S forecasting within the broader view of current water policy, law, water rights administration, and water resources development and management.

Mike Anderson, CDWR State Climatologist compared predicted and observed outcomes for the 2016 and 2017 water years. Dave DeWitt, National Weather Service (NWS), Climate Prediction Center, summarized opportunities and challenges to achieving greater predictive skill with existing tools and science. A panel of water managers discussed forecast informed reservoir operations (FIRO), with another panel of scientists outlining research and advances in predictability. Tom Graziano, NWS, described the National Water Model’s capabilities and possible improvements. Separate panels addressed improving the transition from research to operations, and the potential user applications of S2S forecast improvements. The agenda and presentations are posted on the WSWC website, and a summary of the workshop will be prepared. Please see <http://www.westernstateswater.org/improving-long-range-weather-forecasts-sub-seasonal-to-seasonal-precipitation-forecasting/>.

Summaries of our 2015 and 2016 S2S Workshops may be found under publications on our website. See <http://www.westernstateswater.org/publications/>.

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.