



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **WESTERN GOVERNORS' ASSOCIATION Regulatory Reform**

On October 17, the Western Governors' Association (WGA) submitted comments on the U.S. Army Corps of Engineers' (Corps) request to review regulations that may be appropriate for repeal, replacement, or modification (82 FR 33470). (See WSW #2263, #2257, #2244, #2241). WGA notes that states possess sovereign authorities under the U.S. Constitution, as well as delegated authorities under federal statute. It cites WGA's Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*. The federal agencies "should be required to have a clear and accountable process to provide each state – through the Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications." The letter recommends that the Corps require agency officials "to conduct pre-decisional government-to-government state consultation," particularly where water resources are concerned.

WGA emphasizes respect for the states' primary authority over water resources and water supply planning. "State water laws have developed over the course of decades to reflect local customs and necessities. Accordingly, these state laws – and the regulatory frameworks within which they operate – are complex and diverse." Deference to these state laws, the letter continues, is a well-established principle in both federal case law and statutory authority.

The letter describes two recent examples where the Corps failed to substantively consult with the states on rulemaking efforts with federalism implications: (1) defining "waters of the United States" in the development of the 2015 Clean Water Rule; and (2) policies governing the use of Corps reservoir projects and "surplus water" within the Upper Missouri River Basin. Both have various potential preemptive effects on the states' primary and delegated authorities over their water resources.

The governors are encouraged by early outreach and direct communications with individual states on the development of a new rule affecting the scope of the

Clean Water Act. However, they remain concerned with the procedural, legal, and technical issues that have arisen under the surplus water rule, with an overly-broad definition "to include natural, historic river flows over which states possess primary legal authority."

The letter concludes: "Western Governors are excited to work in true partnership with federal administrative agencies toward positive and productive outcomes. By operating as authentic collaborators on the development and execution of agency rules and policy, states and federal agencies can demonstrably improve their service to the public."

### **CONGRESS/ENERGY Hydropower**

On October 26, the House Energy and Commerce Committee's Subcommittee on Energy and Power forwarded H.R. 2872, the Promoting Hydropower Development at Existing Non-powered Dams Act. The bill would allow the Federal Energy Regulatory Commission to exempt qualifying facilities, in whole or in part, from any license requirements in consultation with relevant state and federal agencies (including the U.S. Fish and Wildlife and National Marine Fisheries Services, state fish and wildlife agencies, federal public land agencies), and any affected Indian tribe.

The Commission may impose conditions "necessary to protect public safety," and to prevent or mitigate direct adverse effects on fish and wildlife resources caused by construction and operation. However, the Commission may not require any "material change to the storage, control, withdrawal, diversion, release or flow operations of the qualifying Non-powered dam."

The bill requires only an environmental assessment under the National Environmental Protection Act (NEPA), unless the Commission determines a categorical exclusion is appropriate.

For any facility at a non-federal dam, exemptees shall pay to the U.S. reasonable annual charges fixed by the Commission for the "purpose of funding environmental enhancement projects in watersheds in which facilities...are located...equivalent to annual

charges for use of a Government dam under section 10(e) [of the Federal Power Act], unless the Commission determines...a lower charge is appropriate to protect exemptees' investment in the project or avoid increasing the price to consumers of power due to such charges." These miscellaneous receipts would be available through annual appropriations acts to state and federal fish and wildlife agencies.

The Commission's jurisdiction is limited to any "qualifying facility exempted and any associated primary transmission line, and shall not extend to any conduit, dam, impoundment, shoreline or other land, or any other project work associated with the qualifying facility..." Qualifying non-powered dams may include any dam completed before enactment, and operated for "agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, or flood control purposes." Non-federal dams must be independently certified to comply with dam safety requirements.

## **ENVIRONMENT** **Forest Management**

On November 1, the House passed the Resilient Federal Forests Act (H.R. 2936) by a vote of 232-188. The bill is intended to shift resources away from paralyzing litigation and redundant planning and analysis, and toward active and collaborative management of federal forests.

During the debate on the House floor, bill sponsor Rep. Bruce Westerman (R-AR) said: "This bill simply allows sound, scientific-based forestry practices like the ones I learned at Yale's Forestry School to be implemented on our federal forests. It will result in clearer air, cleaner water, better wildlife habitat, better recreational opportunities, more plant and animal biodiversity, stronger economies, and fewer fires resulting in lower firefighting costs."

Title I creates several statutory categorical exclusions (CEs) – actions requiring no environmental assessment or environmental impact statement under NEPA – to expedite forest management activities for areas up to 10,000 acres. Section 111 authorizes CEs for critical response actions, including to protect municipal watersheds and to increase water yield, among other purposes. If a project under §111 is developed through a collaborative process, the CE acreage can be increased to 30,000. Other CEs include §112, salvage operations; §113, meeting forest plan goals for early successional forests; §114, road side projects; and §115, improvements to reduce the risk of wildfire.

This title also expedites consultation requirements under the Endangered Species Act and the National

Historic Preservation Act. When analyzing a forest management project proposed by a collaborative group, the Forest Service is limited to a choice of approval or no action. The no-action alternative must consider future impacts, including wildfire and its impacts on municipal watersheds.

Title II expedites salvage and reforestation projects, in compliance with forest plans, following catastrophic wildfires. Title III prohibits attorneys' fees for plaintiffs challenging relevant forest management activities, and requires courts to weigh the potential long-term harm of inaction, such as wildfires, before granting injunctive relief. It establishes a pilot project to resolve lawsuits on forest management activities through arbitration.

Title VI establishes a State-Supported Forest Management Fund, which allows state and other entities to contribute funds for forest management activities. Expenditures from the Fund are authorized to plan, carry out, or monitor forest management activities developed through collaborative processes. Title VIII makes clear that the development, maintenance, and revision of forest plans are not considered major federal actions and are not subject to NEPA. Title X would prohibit the transfer of funds between the wildfire suppression operations accounts and other non-wildfire accounts.

## **WATER RESOURCES** **California/Dam Safety**

A celebration on October 17, marked completion of the \$900M Folsom Dam Auxiliary Spillway Joint Federal Project (JFP), a flood risk reduction feature in Folsom, California. Begun in 2008, the project is the result of a unique collaboration among the U.S. Bureau of Reclamation, the Corps of Engineers, and state and local agencies. It's essentially a secondary dam and auxiliary spillway that works in conjunction with Reclamation's main Folsom Dam, managing flood flows from Folsom Lake into the American River.

Austin Ewell, Deputy Assistant Secretary for Water and Science, represented the Department of the Interior at the event, joined by Lieutenant General Todd Semonite, Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers.

Rep. Tom McClintock (R-CA) stated: "The Folsom Dam auxiliary gates will help the Sacramento region achieve 200-year flood protection, taking the chance of flooding to one half of one percent per year. Those are better odds than we've ever had against the kind of flooding that once plagued our Capitol region. This year, we've seen the damage flooding can do on a massive scale, and this project will help defend against such a fate here." Rep. Doris Matsui (D-CA) told the crowd that the project was "... completed five years earlier than expected and under budget."

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**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.**