



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chairman - Jerry Rigby; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/ENVIRONMENT **EPA/Hardrock Mines**

On December 1, the Environmental Protection Agency (EPA) made its decision not to issue final regulations on the proposed financial responsibility requirements for hardrock mining facilities under CERCLA §108(b). "This decision is based on EPA's interpretation of the statute and analysis of its record developed for this rulemaking."

EPA also examined existing federal and state regulatory controls, analyzed the risk of taxpayer-funded cleanups under modern management practices and environmental regulations, and determined that the degree and duration of risk doesn't warrant additional regulatory and financial responsibility requirements for the hardrock mining industry (see WSW #2220, 2205).

Jim Ogsbury, Executive Director of the Western Governors' Association, said: "States have developed comprehensive financial responsibility programs for hardrock mining in the 30 years since the passage of CERCLA 108(b). These programs require operators to comply with state regulations, implement reclamation and post-closure plans, and post financial assurance to minimize risks to public health and the environment. Western Governors appreciate EPA's decision regarding its proposed financial assurance requirements under CERCLA 108(b), which would have duplicated or supplanted existing and proven state financial assurance regulations." See <http://westgov.org/news/>

CONGRESS **Department of Interior/Water Infrastructure**

On November 30, the House Committee on Natural Resources, Subcommittee on Water, Power, and Oceans, held a legislative hearing on the Bureau of Reclamation and Bureau of Indian Affairs Water Project Streamlining Act (H.R. 4419). The bill applies "...the same streamlined water project development process for the [Bureaus] that the Water Resources Reform and Development Act (WRRDA) of 2014 (P.L. 113-121) provided for the U.S. Army Corps of Engineers. The goal of the legislation is to reform the current cumbersome,

lengthy process so that there is a mechanism to build new water projects in the West." See https://naturalresources.house.gov/uploadedfiles/hearing_memo_-_leg_hrg_on_h.r._4419_11.30.17.pdf.

The bill requires expedited completion of ongoing feasibility studies for surface water projects, Title XVI water reclamation and reuse program projects (P.L. 102-575), rural water supply projects (P.L. 109-451), or the federal portion of integrated water resource management plans. For future projects, it limits the review period to three years, with extensions for a maximum of seven years for more complex projects with detailed justifications to Congress and any non-federal project sponsor. It directs Interior to develop a coordinated and expedited environmental review process, and to establish a completion schedule with financial penalties for Interior if timelines are not met.

Similar to Corps feasibility studies, Interior is directed to develop and submit an annual report to the relevant Congressional committees of proposed water development projects, with cost estimates and proposed modifications. Interior would publish an annual *Federal Register* request for proposals from non-federal interests for project studies and modifications to authorized projects, which Interior would include in its annual report.

H.R. 4419 lists four projects that meet the criteria of the bill that would be carried out: (1) Phase III of the Yakima River Basin Water Enhancement Project in Washington; (2) the Equus Beds Division of the Wichita Project in Kansas; (3) the Musselshell-Judith Rural Water System in Montana; and (4) the Shasta Lake Water Resources Investigation in California.

Rep. Dan Newhouse (R-WA) introduced the bill on November 16, and noted in his press release about the legislation that the Phase III Yakima Project "ran into an earmark issue in the House" during the last session of Congress, and that the revisions in H.R. 4419 would allow authorization consistent with House rules.

The bill directs Interior to identify \$369M in Reclamation projects that are no longer feasible due to lack of local support, lack of federal resources, or

irrelevance, and develop a deauthorization list to offset federal costs for water development projects.

The Subcommittee hearing memorandum illustrates the difficulties addressed by the bill, pointing to the North-of-the-Delta Offstream Storage Investigation, a project study for the proposed Sites Reservoir began in 2002 by Reclamation and the California Department of Water Resources. “As of 2012, Reclamation spent \$12.7M conducting this study, and in 2017 it still has yet to be completed.”

Reclamation Deputy Commissioner Alan Mikkelsen testified in support of H.R. 4419. He noted common points of interest between the proposed legislation and Executive Order 13807, “...aimed at identifying and addressing inefficiencies in the environmental review and permitting process for infrastructure projects...to curtail construction delays and increased costs, and expedite infrastructure benefits to our Nation’s economy, society, and environment.” He described the Council on Environmental Quality’s (CEQ) subsequent action to develop a “One Federal Decision” framework for coordinated environmental reviews and more timely infrastructure project approval.

Mikkelsen also discussed Interior’s related Secretarial Order 3355 to streamline and expedite environmental reviews, aiming “...to eliminate unnecessary detail and paperwork, and replace it with sound decision-making on an informed understanding of environmental consequences.” The environmental review process and related litigation delay and increase the costs of “well-justified, highly merited projects,” but other factors can also slow down progress, Mikkelsen said, including “...identifying local cost-share partners and markets for water, risks associated with project geology, downstream impacts...” He discussed the various sections of the bill and current project authorizations, noting a few technical corrections, but otherwise expressing optimism in working with the Subcommittee and other agencies to streamline project studies and reduce unnecessary analysis and litigation.

EPA/WIFIA

On November 30, Representative Brian Mast (R-FL) introduced the Water Infrastructure Finance and Innovation Reauthorization Act (WIFIA) (H.R. 4492). The bill would extend authorization for EPA’s water infrastructure federal loan guarantee pilot program five years, through 2024. It would double authorization for appropriations to \$90M, with incremental annual increases. The bill shifts primary administration of the WIFIA program to EPA rather than sharing the responsibility with the U.S. Army Corps of Engineers (Corps). Projects under the jurisdiction of the Corps must submit concurrent applications to the Corps.

The bill is designed to accelerate water structure investments. Rep. Mast said: “Strengthening this bipartisan program will make more resources available for ecosystem restoration, non-point source pollution management projects, estuary conservation projects and more.” Co-sponsor Rep. Bob Gibbs (R-OH) added: “EPA can utilize WIFIA and help supplement state revolving funds to assist local governments in providing safe and affordable water utilities and make necessary repairs to their aging water infrastructure.” See <https://mast.house.gov/2017/11/mast-introduces-bill-to-accelerate-investment-in-water-infrastructure>.

LITIGATION/WATER QUALITY

Clean Water Act

On November 27, the 9th Circuit Court of Appeals upheld the criminal conviction of a Montana man, Joseph Robertson, 77, for digging ponds on his land and diverting water from a creek on the neighboring Beaverhead-Deerlodge National Forest. An initial trial ended in a hung jury. Robertson’s defense argued the government didn’t own the forestland affected and the creek was not a water of the United States, but on retrial Robertson was convicted and sentenced to 18 months in prison, three years supervised release, and ordered to pay \$130,000 in restitution. The District Court relied on Justice Kennedy’s “significant nexus” test in finding the creek to which Robertson “discharged,” though not “navigable,” was tributary to the Jefferson River.

The 9th Circuit panel recognized the “contest” between Justice Kennedy’s “significant nexus” test and the late Justice Scalia’s application only to “navigable waters” with a surface connection, then concluded: “Here, jurisdiction was determined to exist under the ‘significant nexus’ test set forth in Justice Kennedy’s concurrence in *Rapanos*. We hold that there was no error in this.” Justice Ronald Gould added, “It would not make sense, to conclude that the CWA protects only clean waters from pollution from their non-navigable tributaries, because that would disregard the CWA’s restoration purpose.” (*E&E NEWS PM*, November 27)

PEOPLE

On November 16, the U.S. Senate voted to confirm **Brenda Burman** as Commissioner of the Bureau of Reclamation. Burman previously served as Reclamation’s Deputy Commissioner for External and Intergovernmental Affairs and Deputy Assistant Secretary. She was also the Director of Water Policy for Arizona’s Salt River Project, and worked for the Metropolitan Water District of Southern California. Secretary of the Interior Ryan Zinke said that “...her extensive experience on water projects across the country will be an incredible asset for the Department.”

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.