



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **WESTERN GOVERNORS**

#### **Montana**

On May 1, Montana Governor Steve Bullock issued an Executive Order declaring a statewide flooding emergency. The state's snowfall has been well-above normal since October, and seven counties have been in a state of flooding emergency since April 18. Governor Bullock said: "Recent rainfall and rapid snowmelt is causing rivers, streams and tributaries to rise out of their banks across most of Montana. As Montanans deal with the impacts of flooding, the state stands ready and is in constant communication with local and tribal officials about ways we can protect folks' health, safety and property."

### **ADMINISTRATION/WATER QUALITY**

#### **EPA/Produced Water/Water Reuse**

On May 2, the Environmental Protection Agency (EPA) announced plans for a study of how EPA, states, and stakeholders regulate and manage wastewater from the oil and gas industry. Large volumes of produced water are currently managed by disposing of it through underground injection, a process that has limitations in some areas. Some states and stakeholders are asking whether it makes sense to treat and reuse the water for other purposes, including discharge of treated produced water to surface water. EPA's study would address how existing Clean Water Act approaches to produced water can interact more effectively with state regulations, requirements, or policy needs. EPA plans to reach out to states in the coming months to identify whether future agency actions are appropriate to further address oil and gas extraction wastewater.

Ken McQueen, New Mexico Energy, Minerals and Natural Resources Department Cabinet Secretary said: "In New Mexico's arid environment, conserving our resources by recycling produced water for more beneficial uses presents a significant economic development and water supply opportunity. For years New Mexico has advocated recycling of produced water in oil and gas completion activities. Continued collaboration with EPA on this issue will no doubt encourage even greater recycling and additional reuse opportunities."

EPA Administrator Scott Pruitt said: "I am pleased that this study will take into consideration the expertise of states and stakeholders in developing effective options and alternatives to better manage wastewater from the oil and gas sector. It's important the Agency works cooperatively with local officials and energy providers to protect the environment and provide affordable, reliable energy to the American people."

#### **EPA/Regulatory Science**

On April 30, EPA published a proposed rule on Strengthening Transparency in Regulatory Science (83 FR 18768). The notice states: "When EPA develops significant regulations using public resources, including regulations for which the public is likely to bear the cost of compliance, EPA should ensure that the data and models underlying scientific studies that are pivotal to the regulatory action are available to the public."

Much of the science that informs regulatory actions is developed by non-government parties outside the agency. The proposed rule notes that standards of independence, objectivity, transparency, clarity, and reproducibility are important in all scientific endeavors, but they are also "of paramount importance when the government relies on science to inform its significant" regulatory and policymaking decisions.

The proposed rule would include regulatory actions under the Clean Water Act, the Safe Drinking Water Act, and various other statutes the agency administers. It is intended to be consistent with the President's Executive Orders 13777 and 13783 on transparency and reproducibility, and OMB's Guidelines Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information (67 FR 8453).

"EPA has not previously implemented these policies and guidance in a robust and consistent manner. This proposal will help ensure that EPA is pursuing its mission of protecting public health and the environment in a manner that the public can trust and understand."

Comments are due by May 30, and may be submitted at [www.regulations.gov](http://www.regulations.gov) under Docket ID No. EPA-HQ-OA-2018-0259

## **ADMINISTRATION/WATER RESOURCES** **Corps/Texas/Hurricane Harvey**

On April 30, the U.S. Army Corps of Engineers announced an initial allocation of \$360M to address short-term repair work for a list of 32 projects damaged by recent natural disasters, including the damage caused by Hurricane Harvey to Corps projects in Texas. The funding comes as part of the Bipartisan Budget Act (P.L. 115-123) signed into law in February. Assistant Secretary of the Army for Civil Works, R.D. James, said: "The short-term repair work will alleviate the impacts of the project damages and shoaling on human safety, flood-prone property, commercial navigation costs, ecosystem values, and other project outputs such as recreation, hydropower and water supply."

The Texas projects include: Buffalo Bayou and Tributaries; Corpus Christi Ship Channel; Galveston Harbor and Channel; Channel to Victoria; Gulf Intracoastal Waterway; Houston Ship Channel; Matagorda Ship Channel; Sabine Neches Waterway; and Wallisville Lake. Governor Greg Abbot said: "As Texas continues on the road to recovery, our shipping channels and bayous are among the highest priorities for investment and repair. These projects and improvements will address concerns in a number of local communities affected by Harvey and help combat future flood events. I thank the Army Corps of Engineers for their commitment to these initial projects...as Texas continues to recover and rebuild."

### **LITIGATION**

#### **EPA/2015 WOTUS Rule**

On May 1, the U.S. District Court for North Dakota entered an order affirming that *North Dakota et al. v. EPA* will proceed rather than wait for the outcome of the federal agency's new rulemaking efforts to define "waters of the U.S." The case was turned over to a magistrate judge following the Supreme Court's reversal of the Sixth Circuit, holding that challenges to the WOTUS Rule belong in the federal district courts. EPA objected to the magistrate judge's decision in March to proceed with the case, and the District Court Judge denied the motion. "While additional rulemaking may make this case moot, such a possibility does not insulate the Defendants from challenges to the original rule while the original rule remains in place. The 2015 WOTUS Rule remains in effect. Additional delay is unwarranted."

#### **New Mexico/Navajo Water Rights**

The New Mexico Court of Appeals rejected the San Juan Acequias' challenges to the Navajo Nation water rights settlement in *State of New Mexico ex rel. State Engineer v. United States of America and Navajo Nation*. The state, tribal, and federal governments reached the settlement in 2005, with Congressional approval in 2009

as part of the Omnibus Public Land Management Act (P.L. 111-11). The District Court subsequently heard evidence on various water rights previously allocated in the San Juan River Basin, and ultimately rejected the objections to the Settlement Agreement and entered the decree of water rights. The San Juan Acequias appealed, challenging more than fifty aspects of the District Court's conclusions.

The Court of Appeals rejected the notion that the Governor lacked the power to sign the settlement without prior legislative approval. The New Mexico Legislature has given the Attorney General the authority to prosecute and settle civil litigation to which the State is a party. The State Engineer also has delegated legislative authority to supervise the apportionment of water in court adjudications, with express authority to specifically engage in this litigation. Additionally, the Legislature appropriated over \$50M for the State's share of the cost of the Settlement.

The Court rejected any requirement for the Nation to show immediate beneficial use, distinguishing reserved water rights under the *Winters* doctrine from requirements under the New Mexico Constitution, the Reclamation Act, the Pueblo Water Rights doctrine, and the Colorado River Compact.

Regarding the calculation of "practicable irrigable acreage" (PIA), reservations in less agricultural settings have "required judicial resourcefulness" to calculate quantities of water sufficient to make the reservations livable, to promote survival and success of the reservations, to create a sustainable homeland, to allow the Indians to change to new ways of life, and secure a moderate living.

Finally, the Court noted the Acequias' misunderstanding of the inter se water rights proceeding, which differs from typical civil claims. The pattern of adjudicating senior water rights before junior rights is efficient and not a due process violation of property rights. The equitable arguments regarding global warming, shrinking Navajo population, endangered species, exclusion of other reserved federal water uses, and exclusion of the Acequias from the settlement negotiations "all miscomprehend the scope and legal effect of the congressional approvals in this case."

### **WATER QUALITY**

#### **Washington**

The Washington Department of Ecology announced that it is awarding nearly \$220M in grants and loans to help pay for 230 projects to upgrade wastewater treatment systems, manage polluted stormwater runoff, and address nonpoint pollution from widespread, difficult-to-trace activities. The funding comes through the State's capital budget, passed earlier this year.

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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.**