



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **CONGRESSIONAL UPDATE** **Farm Bill 2018**

On August 1, the Senate appointed conferees to the House-Senate conference committee on the different versions of the 2018 Farm Bill, H.R. 2. Members from the House were appointed to the committee in July.

The Western States Water Council (WSWC) supports the role of conservation title programs in the Farm Bill in providing solutions to resolve water supply reliability, water quality impairments, groundwater recharge, and other water resource concerns facing agricultural producers and water users. WSWC also supports the continued efforts of rural development title programs to provide financial assistance for drinking water, wastewater facilities, and other services to rural communities.

Within the conservation title of the Farm Bill, both the House and Senate versions of H.R. 2 would reauthorize nearly all of the agricultural conservation programs, with the exception of the Conservation Stewardship Program (CSP), which the House version would repeal. CSP provides financial and technical assistance to producers to maintain and improve existing conservation systems and adopt comprehensive conservation activities. In the absence of funding and reauthorization, the current contracts for the enrolled 70 million acres would expire in FY2023. The Senate version reduces annual enrollment from 10 million acres down to 8.8 million acres a year, and provides other program amendments aimed at environmental improvements.

Both versions would increase funding for conservation in the short term. The House would increase funding by \$656M for the first five years, but over the long term would shift funding out of the conservation title, reducing funding by \$800M over ten years. The Senate version would increase funding by \$185M over five years, but would reallocate funding within the conservation title among the larger programs, and would be budget neutral over ten years.

Both versions of H.R. 2 would reauthorize the Conservation Reserve Program (CRP). The program

provides annual rental payments for retiring environmentally sensitive land and replacing crops with long-term resource-conserving plants. Both bills would raise the acreage for enrollment from the current limit of 24 million acres; the House version offers incremental annual increases up to 29 million acres in FY2023, while the Senate version would increase to 25 million acres through FY2023. Both bills would reduce payments to participants to offset the increased enrollment level.

The Environmental Quality Incentives Program (EQIP) would receive annual incremental increases in funding under the House version, from the current level of \$1.7B in FY2018 to \$3B in FY2023. The Senate bill reduces EQIP funding to \$1.5B, with annual incremental increases up to \$1.6B in FY2023. The House bill adds a stewardship contract and expands options for irrigation and drainage entities. The Senate version contains several amendments that focus on water quality and quantity-related practices. The EQIP Conservation Innovation Grants program would receive reduced funding under the House version, while the Senate bill would add eligible projects to the program.

The Regional Conservation Partnership Program (RCPP) would receive increased funding from the current level of \$100M; the Senate would provide \$200M annually, and the House would provide \$250M annually. The covered conservation programs would expand under both bills, with the ability to renew partnership agreements. The Senate version provides additional funding and flexibilities for partners.

The rural development title makes several provisions for water projects and technical assistance. The House version would raise the maximum loan amount for water and wastewater projects. It would also increase funding for water and wastewater technical assistance. It would change the rural population eligibility criteria, including how military personnel and incarcerated individuals are counted toward the population for a community to qualify below the defined rural threshold of 10,000 people.

Both versions authorize funding for the Rural Water and Waste Water Circuit Rider Program at \$25M a year through FY2023. Both versions would raise the maximum amount of project financing for water, waste

disposal, and wastewater facility grants from \$100,000 to \$200,000; however, the Senate would authorize \$30M for the program, while the House version only authorizes \$15M.

### **CONGRESSIONAL UPDATE/WATER QUALITY** **Senate Environment and Public Works/CWA - 401**

On August 16, the Senate Environment and Public Works Committee, Chaired by Senator John Barrasso, held a hearing on S. 3303, the Water Quality Certification Improvement Act of 2018, which he introduced on July 31, in response to perceived abuses by some States of their certification authority. The Clean Water Act (CWA) Section 401 requires that States certify within one year that any proposed project or activity requiring federal permit or license will comply with Sections 301, 301, 303, 306 and 307 and any related State water quality requirements, including but not limited to State designated uses, water quality standards or Total Maximum Daily Loads and minimum flow requirements. S. 3303 would strike existing language assuring that “applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated,” and replace it with “any discharge made by the applicant into the navigable waters as described in paragraph (1) will not violate the applicable provisions of section 301, 302, 303, 306, and 307.” The intent is to limit review only to water quality considerations directly related to discharges by the applicant’s project or activity.

Senator Barrasso declared, “Recently, a few states have hijacked the water quality certification process in order to delay important projects.” He specifically mentioned natural gas pipelines in New York and the proposed Millennium coal export terminal denied 401 certification “with prejudice” by the Washington Department of Ecology. He referred to the “weaponized” use of Section 401. Witness CJ Stewart National Tribal Energy Association Board Director and a member of the Crow tribe addressed the impact of declining coal production in Montana on communities and families.

Brent Booker, North America’s Building Trades Unions testified on the job-related impacts of project delays and denials. Barrasso said, “The lack of pipeline capacity is causing real harm to the environment as well as energy security...,” similarly decrying denial of the coal export terminal certification. Both he said limit access to cleaner burning fuels domestically and abroad. Senator Deb Fisher (R-NE) noting the importance of foreign markets to the State’s agricultural economy declared, “Today it’s coal, tomorrow it could be corn or soybeans.”

Senators Kirsten Gillibrand (D-NY) and Chris Van Hollen (D-MD) questioned the intent. “This is not cooperative federalism. We should be working with our states and not against them,” said Gillibrand. Van Hollen

observed the changes to 401 would prevent states from addressing water flow, sedimentation and turbidity, which also impact water quality. He also mentioned fish passage requirements.

WSWC Executive Director Tony Willardson emphasized the WSWC’s support for streamlining regulations, but questioned the impact of S. 3303 on States and their ability to mandate and control minimum by pass flows for private hydropower projects to protect minimum instreamflows, water quality and aquatic species. He also outlined a 2014 WSWC survey that concluded most certifications are issues or waived within 40-90 days (the CWA allows up to one year). Most delays are related to incomplete applications, failure to provide required information, and substantive changes to project plans. Responding to Van Hollen, he said, “There are other components [of projects] other than discharges that impact water quality.” Senator Benjamin Cardin (D-MD) asked if it was realistic for states to ask for all information needed to review and make determinations in 90 days. Willardson replied that could depend on the timing of the certification request (before or after completion of an Environment Impact Statement), but with large complex projects it could be difficult. Senator Jeff Merkley inquired about any 401 project delays in Oregon, but none were mentioned. The WSWC testimony is posted online at [westernstateswater.org](http://westernstateswater.org).

### **WATER QUALITY/LITIGATION** **Clean Water Act/WOTUS**

On August 16, the South Carolina District Court issued an injunction that vacated the February 6, 2018 “Suspension Rule” (83 Fed. Reg. 5200) suspending the effective date of the 2015 WOTUS Rule until 2020. The Court determined that the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) violated the Administrative Procedures Act by: (1) taking action with inadequate public notice and meaningful opportunity to comment on the substance of either the 2015 WOTUS Rule or the 1980s regulation; (2) failing to consider and articulate the substantive implications of suspending the 2015 WOTUS Rule; and (3) failure to restore the legal effect of the language of the 1980s regulation by publication in the *Federal Register*.

The Court rejected the agencies’ argument that the Suspension Rule is not a repeal or rescission, and that it maintains the status quo. “As administrations change, so do regulatory priorities. But the requirements of the APA remain the same.”

The Court declined to geographically limit the scope of the injunction, making it applicable nationwide. However, only 26 states will be affected by the ruling, as the remaining states are currently under court-ordered stays of the Rule.

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