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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS/WATER QUALITY
Federal-State Relations/Clean Water Act

On October 10, the Western Governors' Association (WGA) sent a letter to the Trump Administration regarding plans and goals for infrastructure permitting, environmental reviews, and opportunities for expanded state delegation.

The Administration recently provided a webinar presentation to WGA staff regarding the One Federal Decision policy (Executive Order 13807) and states' assumption of primary permitting authority under Clean Water Act (CWA) §404.

In the letter, WGA expressed appreciation for federal efforts to work collaboratively with states to improve environmental regulatory processes. "Western Governors would like to build on this positive momentum and begin to discuss concrete, definable actions we can jointly take to improve these processes."

To that end, the letter includes several observations and questions to better understand and prepare for future opportunities, including: (1) how the Administration intends to complete all federal environmental and authorization decisions for major infrastructure projects within two years while respecting delegated state authority, such as CWA §401; and (2) processes and funding available to states interested in assuming CWA §404 authority, and the anticipated impact of a new WOTUS rule on state permitting authority if assumed. See http://westgov.org/news/.

CONGRESS/WATER QUALITY
Senate Environment & Public Works/CWA - 401

On October 4, five members of the Senate Environmental and Public Works (EPW) Committee sent a letter to U.S. Environmental Protection Agency (EPA) Acting Administrator Andrew Wheeler, requesting a review of EPA's implementation of CWA §401. "We ask that you work with other federal agencies to determine whether new clarifying guidance or regulations are needed in light of recent abuses of the Section 401 process by certain states." The letter asserts that some states have "…hijacked Section 401 to delay or block the development of natural gas pipelines and a coal export terminal." The Senators called the obstruction of energy infrastructure projects a threat to national security.

The letter cites "clear misstatements of law" in EPA's 2010 interim handbook on Section 401, a document developed without public comment. "For example, the handbook suggests that a state's 'reasonable period' of time to act on a request for a water quality certification begins to run when an application is complete. This is incorrect. That period begins to run when the state receives the application. We ask that you take immediate steps to review this handbook and other EPA materials."

Although the Senators emphasized that they are "…firmly committed to states' and tribes' central role in protecting water resources…" they pointed to instances where §401 "…is currently being used inappropriately to 'fight' projects rather than protect water quality." Noting that EPA is the primary agency responsible for implementation of the CWA, the Senators requested that EPA work with other agencies, including the Federal Energy Regulatory Commission (FERC) and the U.S. Army Corps of Engineers (Corps) to determine what government-wide direction is needed to ensure fair, coordinated, and uniform application of the law.

EPW Chair John Barrasso (R-WY) and Senators Steve Daines (R-MT), Michael Enzi (R-WY), James Inhofe (R-OK), and Shelley Capito (R-WV) signed the letter.

CONGRESS/WATER RESOURCES
Infrastructure/WRDA

On October 10, the Senate passed the America's Water Infrastructure Act (S. 3021) by a vote of 99-1. The House unanimously passed the bill on September 13, and the Senate made no changes. See WSW #2314.

Senate Environment and Public Works Chairman John Barrasso (R-WY) said: "America's Water Infrastructure Act will cut Washington red tape, grow the nation's economy, and help keep communities safe. It will create jobs, reduce the deficit, and give local stakeholders more control of projects. This bipartisan

legislation will help communities in Wyoming by increasing water storage, fixing irrigation systems, addressing the maintenance needs of older dams, and by finding a permanent solution for flooding caused by ice jams."

Ranking Member Tom Carper (D-DE) said: "This legislation invests in the critical water infrastructure we don't see every day, but that American families in every state rely on, such as drinking water systems, dams, reservoirs, levees, and ports. It...incentivizes businesses to buy and use American products, and authorizes and expands programs for clean drinking water for the first time in more than two decades. And when it comes to local infrastructure projects, it ensures the voices of our country's local governments are being heard by the federal government to ensure needs are being met and taxpayer dollars are being used efficiently."

Senator Mike Lee (R-UT) voted against the bill, saying that it is a continuation of a failing status quo rather than providing the reform that national water infrastructure needs. He also noted that the bill spends federal dollars on local projects that should be funded and maintained by state and local governments (*Salt Lake Tribune*, 10/10/18).

LITIGATION/WATER QUALITY

Clean Water Act/WOTUS

On September 12, the U.S. District Court for the Southern District of Texas issued an injunction on implementation of the 2015 Waters of the United States (WOTUS) Rule for the States of Texas, Louisiana, and Mississippi (*Texas, et al. v. EPA*, 3:15-cv-162). The Court noted that it did not want to overstate the strength of the States' case, but the public interest in governmental, administrative, and economic stability overwhelmingly tipped the balance of factors in favor of an injunction. "Determining which governmental bodies have jurisdiction over our nation's waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter."

The Court also said that "…clarification of what is, and what is not, a navigable water under the Clean Water Act is long overdue." Post-*Rapanos* cases have inconsistently used Justice Kennedy's concurrence or Justice Scalia's plurality opinion as the controlling test for determining what is navigable water, the Court said, or even applied "pre-*Rapanos* Circuit precedent because it could not discern clear direction from Rapanos."

On September 18, the U.S. District Court for the District of North Dakota issued a clarifying order that its previous injunction on August 27, 2015, also applied to the State of Iowa as a subsequent intervenor-plaintiff *(North Dakota, et al. v. EPA*, 3:15-cv-59). Iowa filed a motion to intervene in the *North Dakota* case in November 2015, which was granted the following month.

At the time, the 6th Circuit had issued a nationwide stay, making the applicability of the *North Dakota* injunction for Iowa moot. The EPA's subsequent publication of the Suspension Rule delaying the effective date of the 2015 WOTUS Rule on February 6, 2018, continued to render the *North Dakota* injunction moot, until the Suspension Rule was invalidated by the South Carolina federal district court on August 16, 2018. At that point, the 2015 WOTUS Rule became effective in the State of Iowa. Governor Kimberly Reynolds (R-IA) filed a motion seeking clarification that the *North Dakota* injunction applied to Iowa. The federal agencies and intervenor-defendant Sierra Club did not oppose expanding the scope of the injunction to include Iowa, and the Court granted the request.

With Texas, Louisiana, Mississippi, and Iowa now under court injunctions, the 2015 WOTUS Rule is effective in only 22 of the 50 states.

On September 26, a motion was filed in *Georgia et al. v. Wheeler*, 2:215-cv-79, seeking to expand the injunction from the U.S. District Court for the Southern District of Georgia to the remaining 22 states. "This is a deeply troubling state of affairs," the business intervenor-plaintiffs argued. "A rule this fundamental to the CWA's regulatory scheme should not apply in a patchwork manner. Nor, indeed, should it apply *at all*: As this Court and three other federal courts have now concluded, the WOTUS Rule is almost certainly unlawful." The motion lays out the changed circumstances since the narrow 11-state *Georgia* injunction was issued, including the subsequent addition to the *Georgia* case of the business intervenor-plaintiffs with members in those 22 states.

On October 2, EPA Acting Administrator Andrew Wheeler said that EPA would announce a new WOTUS Rule in approximately 30 days. During his opening remarks at the EPA's Third Smart Sectors Roundtable Summit, Wheeler said: "The previous Administration's Waters of the U.S. definition would have dramatically expanded federal power over the private sector. Our proposal will restore the rule of law and end years of uncertainty over where federal jurisdiction begins and ends. Our definition will be clear and straightforward and easy for landowners to understand…. As we are moving forward on Waters of the U.S., we hope to have something out over the next 30 days or so for a proposal. Our guiding principle there is to follow the Clean Water Act and the Supreme Court cases so we develop a rule that will stand the course of time and provide regulatory certainty for American businesses, for environmental organizations, and more importantly, the American people, so that everybody knows exactly what is a water of the U.S. and what is not." See www.youtube.com/watch?v=esNpcMnpyuA