



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS

Alaska

December 3, Governor Mike Dunleavy took the oath of office in Kotzebue, becoming the 12th Governor of the State of Alaska. He was joined by First Lady Rose Dunleavy and daughters Catherine and Ceil Ann. The Governor's press release noted: "The swearing-in was originally planned to take place in Noorvik but, in classic Alaska fashion, thick fog over Noorvik diverted the flight to Kotzebue." Governor Dunleavy's core priorities are "to make Alaska safe again, preserve the Permanent Fund Dividend program on behalf of every Alaskan, reduce states spending, get the economy moving again, champion rural schools, and uphold constitutional rights."

Clean Water Act/Section 401 Certifications

On December 3, the Western Governors' Association (WGA) and nine associations of state officials sent a letter to the Environmental Protection Agency's (EPA) Office of Water Assistant Administrator David Ross, requesting EPA to engage in meaningful and substantive consultation with state officials before making any changes to agency rules, guidance, or policies regarding state authority under Clean Water Act (CWA) §401. It also urges EPA to reject any changes that would "diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries."

WGA and the other associations question the need for any agency action to amend or clarify EPA's policies or regulations. "Instances of delays or denials of state water quality certifications are extremely limited. Where parties wish to contend that a state has exceeded its authority under Section 401, the CWA provides avenues for challenging state certification determinations." The letter calls on EPA to ensure that the CWA continues to protect water quality while maintaining the balance of authorities between the state and federal governments.

Signatories to the letter also include: the WSWC; the Council of State Governments and CSG-West; the Association of Clean Water Administrators; the Association of State Wetland Managers; the Western Interstate Energy Board; the Conference of Western

Attorneys General; the National Conference of State Legislators; and the Association of Fish and Wildlife Agencies. See WSW #2308, #2317, #2320.

ADMINISTRATION/WATER QUALITY

Nonpoint Source Nutrients

On December 4, David Ross, EPA Assistant Administrator for the Office of Water, and Bill Northey, Under Secretary, U.S. Department of Agriculture (USDA), Farm Production and Conservation, sent a letter to state environmental and agricultural agencies. The federal agencies are seeking opportunities to work together in partnership with states, tribes, and stakeholders toward meaningful reductions in nutrient losses from agricultural lands, including excess nitrogen and phosphorus, and improvements to water quality. Although significant progress has been made over the past decades, the federal agencies point to national water quality data which indicate that nutrient pollution is still a widespread problem. The letter invites the state agencies to reach out to EPA and USDA, for regional or individual meetings to discuss collaborative opportunities.

"The EPA and the USDA recognize that making progress in nutrient management depends largely, if not entirely, on the efforts of state, tribal, and local programs working in partnership with stakeholders. The EPA and the USDA can provide technical and financial support, including mobilizing federal research and implementation dollars, and participating in creative problem solving; however, at the end of the day reducing excess nutrients in watersheds will require local solutions. To that end, the agencies are committed to engaging with local stakeholders, leveraging our collective resources, and helping to remove regulatory or other barriers that impede progress in this space."

LITIGATION/WATER RESOURCES

Levees/Liability/Corps

On December 3, the Louisiana St. Bernard Parish filed its reply brief in its petition for certiorari to the U.S. Supreme Court. *St. Bernard Parish v. United States*, #18-359. The petitioners' properties were flooded during Hurricane Katrina when the levees of the Lake Pontchartrain and Vicinity Hurricane Protection Project

(LVP) were breached. The petitioners assert that the breaches and flooding were foreseeably caused by the Corps' construction of another project, the Mississippi River-Gulf Outlet (MGRO), a 76-mile deep draft navigation channel designed to provide a shorter shipping route between the Port of New Orleans and the Gulf of Mexico. The MGRO allowed salt-water intrusion that destroyed thousands of acres of forest and marsh lands that protected the area from storm surges, petitioners claim, and the Corps' decision not to armor the MGRO banks allowed steady erosion and maintenance dredging that widened the channel from 650 feet to as much as 3,000 feet, amplifying the size and force of the storm surge.

The petitioners argue that this intentional failure to act resulted in a Fifth Amendment taking of private property. The Court of Federal Claims agreed and held the Corps liable for the temporary taking, but the decision was reversed by the Federal Circuit on appeal, exempting the Corps from takings liability (though perhaps not from tort liability). The petitioners characterize this as a "categorical exemption," contrary to the Supreme Court's ruling in *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23 (2012).

The Corps argued that damage caused by natural disasters has never been grounds for a governmental taking of property, mandating payment from the public. The federal government had no obligation to build the LVP, at significant taxpayer expense, the Corps contends, and absent the LVP, the petitioners' properties would have experienced the same or greater damage from the hurricane surge. Pointing to Congressional language in the Flood Control Act of 1928, the Corps notes that there is no constitutional right to government protection from flooding. Moreover, the Corps distinguished the sort of flooding that occurs from a routine, scheduled release of water from a Corps dam, at issue in the *Arkansas* case, and flooding caused by a catastrophic storm. The Corps characterized the Supreme Court's *Arkansas* holding to mean that a temporary, government-induced flooding does not gain an automatic exemption from Takings Clause inspection, and the Corps maintains that the Federal Circuit Court of Appeals did not create new "categorical" exemptions.

Groundwater/*Mississippi v. Tennessee*

On November 29, the Special Master in *Mississippi v. Tennessee* (#220143) rejected Tennessee's motion for summary judgment in favor of holding an evidentiary hearing. The two states have focused their arguments on four theories to prove whether the groundwater at issue is an interstate (Tennessee's position) or intrastate (Mississippi's position) resource: (1) The Aquifer Theory; (2) The Pumping Effects Theory; (3) The Natural Flow Theory; and (4) The Surface Connection Theory. The Special Master noted that the aquifer appears interstate

in nature, but given the complexity of the aquifer and the lack of clarity in past references to the aquifer for other purposes, there is a genuine dispute to be resolved.

Although the Special Master is still unconvinced by Mississippi's novel arguments sidestepping the traditional equitable apportionment of water, and acknowledged that Tennessee presents strong evidence that the aquifer and groundwater are an interstate resource, he decided to err on the side of over-inclusiveness to fully develop the record for the U.S. Supreme Court.

Mississippi, interested in conserving its groundwater for future use, is concerned that traditional equitable apportionment is not an appropriate tool to apply to complex subsurface resources that may not be fully understood. Pre-hearing briefs are due by December 20, 2018, and Mississippi invites other states with an interest in state groundwater resources to file amicus briefs. The hearing is scheduled for January 15, 2019. See WSW #2306, 2305, 2301.

WATER RESOURCES

Data/National Water Extension Program

A partnership between the National Oceanic and Atmospheric Administration (NOAA), the University of Alabama, and the Mississippi-Alabama Sea Grant Consortium (MASGC) has led to the creation of a new National Water Extension Program (NWEP). The NWEP is based at the National Water Center in Tuscaloosa, Alabama, and was created to foster collaboration between organizations, communities, and stakeholders who need water data and related tools to support decision-making processes.

On December 4, WSWC Senior Program Manager Sara Larsen accepted an invitation to participate on the NWEP Stakeholder Committee. The Committee will provide program input on the data, products, and services that will meet end-user needs, as well as identify potential partnerships to help meet those needs and leverage existing resources. They will meet annually to discuss emerging issues and develop collaborative opportunities and projects to benefit the NWEP, water users, and water managers.

NOAA has been working toward better access to water information through its NOAA Water Initiative, and the National Water Center's research facilities are key to realizing that goal. The National Water Center supports the National Weather Service Hydrology Program and River Forecast Centers, the evolution of a short-range Hydrologic Ensemble Forecast Service, and the National Water Model. The University of Alabama hosts the interdisciplinary Alabama Water Institute for applied research. MASGC provides a link to Great Lakes stakeholder groups and the nation's Sea Grant programs.