



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION UPDATE/WATER QUALITY** **Energy/Infrastructure/Clean Water Act – Section 401**

According to *Politico*, in an article on January 23, “Senior White House officials met last week to discuss a strategy for moving a broad infrastructure initiative...” that includes proposals related to energy projects. The Trump Administration is focusing efforts to expedite oil and gas pipelines, through executive action that includes changing Environmental Protection Agency (EPA) guidance related to States’ Clean Water Act (CWA) Section 401 water quality certification authority. A “pipeline” executive order would be similar to the President’s earlier efforts to streamline regulatory approvals and “drive U.S. energy dominance abroad.” A second proposed EO would address CWA Section 401 guidance in light of some States’ denial of state water quality certification, required for any related federal permit. In recent years, the State of New York has denied Section 401 certification for the Constitution natural gas pipeline, and the State of Washington denied certification for the Millennium coal export terminal.

Secretary of Energy Rick Perry has criticized New York for blocking the Constitution pipeline that would deliver natural gas to the Northeast from Pennsylvania. Under a Federal Energy Regulatory Commission (FERC) order the company has until 2020 to build and place the pipeline in service. Wyoming Senator John Barrasso (R) in the last Congress introduced legislation that would have limited the State of Washington’s exercise of its authority under Section 401 to deny certification for the Millennium project, which would export coal from Montana and Wyoming (see WSW #2309). *Politico* reported the Administration’s move “...is intended to rein in mostly Democratic state governors, such as Gov. Cuomo [New York], who have used the law to block energy projects.... The White House also has been calling friendly Republican governors to assure them any alterations to the guidance won’t infringe on state sovereignty, as many western lawmakers have raised alarms about that possibility.” Changing CWA 401 state certification authority would require Congress to act, and any change in EPA guidance may lead to a legal challenge. (White House Eyes Energy Push, *Politico*, 1/23/2019)

In a December 3 letter to EPA Assistant Administrator David Ross, the Western Governors’ Association, Council of State Governments, National Conference of State Legislatures, Conference of Western Attorneys General, Association of Clean Water Administrators, Association of State Wetland Managers, Association of Fish and Wildlife Agencies, Western Interstate Energy Board and Western States Water Council all urged EPA in “considering any regulatory action related to the interpretation of state statutory authority under CWA Section 401...to reject any changes to agency rules, guidance, and/or policy that may diminish, impair, or subordinate states’ well-established sovereign and statutory authorities to protect water quality within their boundaries.” (See WSW #2325).

### **ADMINISTRATION UPDATE/WATER RESOURCES** **Corps/Surplus Water Rule**

North Dakota received a memo on November 16, issued by Assistant Secretary of the Army (Civil Works) R.D. James, rescinding delegation of authority to Army Corps of Engineers (Corps) Division commanders for the reallocation/additional storage for water supply purposes. It directs the Corps to update Engineering Regulations 1105-2-100 (April 2000) to reflect this rescission of authority. The Engineering Regulations document notes that the Corps “is authorized to carry out Civil Works water resources projects for navigation, flood damage reduction and ecosystem restoration, as well as for storm damage prevention, hydroelectric power, recreation, and water supply.” Within certain criteria contained in Section VIII, E-57, 15% of a reservoir’s total storage capacity or up to 50,000 acre feet “may be allocated from storage authorized for other purposes or may be added to the project to serve as storage for municipal and industrial water supply at the discretion of the Commander, USACE.” Until now, the Commander had delegated authority to division commanders for approved reallocations or additions of storage up to 499 acre-feet to serve immediate needs.

James wrote: “I have significant concerns regarding the growing demand for water supply across the nation and a corresponding increase in requests for additional water supply from our reservoirs. My primary objective and concern is preserving the flood storage capacity of

our reservoirs and ensuring that there is not an increase in risk and loss of life from flood events. This recession of delegation ensures visibility of the potential reduction in the flood risk management pool through reallocation or additional storage by my office.”

## **CONGRESS**

### **EPA/Confirmation Hearing**

On January 16, the Senate Environment and Public Works (EPW) Committee held a hearing on the nomination of Andrew Wheeler to be the Administrator of the Environmental Protection Agency (EPA). Wheeler was confirmed as Deputy Director of EPA in April 2018. He has served as the Acting Administrator since July 2018, and was formally nominated by President Trump to be the Administrator on January 9. [epw.senate.gov](http://epw.senate.gov)

Senator Jim Inhofe (R-OK) introduced Wheeler at the hearing. He described Wheeler’s past positions with EPA, the Senate EPW Committee, and as a consultant for energy and environmental consultants. Inhofe said: “He knows what it takes to ensure that our environment is cared for within the laws passed by Congress, he will ensure that all stakeholders are heard, and he will provide certainty and stability for the regulated community.” [www.inhofe.senate.gov](http://www.inhofe.senate.gov)

EPW Chair John Barrasso (R-WY) highlighted positive bipartisan remarks made about Wheeler’s qualifications, including praise for his fairness and respect for the environment and the law. Barrasso said in an Op-Ed: “Since July, Mr. Wheeler has served as acting administrator. Under his leadership, EPA has issued commonsense policy regulations to protect our environment, while still allowing America’s economy to grow. Overreaching regulations such as the...Waters of the United States rule would have damaged our economy and cost Americans jobs with minimal benefit to the environment.... With Andrew Wheeler in charge, the agency has worked with states to draft commonsense replacement rules that protect the environment, follow the law and are simpler to understand.” (1/16/19, *USA Today*)

Ranking Member Tom Carper (D-DE) expressed displeasure in Wheeler’s “forgotten promises” since becoming Acting Administrator in July. After acknowledging Wheeler’s frequent and substantive engagement with Congress, he said: “I knew that Mr. Wheeler and I would not always agree. But I hoped that he would moderate some of Scott Pruitt’s most environmentally destructive policies, specifically where industry and the environmental community are in agreement. Regrettably, my hopes have not been realized. In fact, upon examination, Mr. Wheeler’s environmental policies appear to be just as extreme as his predecessor’s despite the promises that Mr. Wheeler made when he first appeared before our Committee.”

## **MEETINGS**

### **Dividing the Waters**

Registration has opened for the next Dividing the Waters Conference for educating judges on resolving water conflicts. It will be held at Stanford Law School on April 10-13. “The Stanford conference will address one of the most difficult problems a water court is likely to confront: How should water be allocated among competing users during a drought?”

The keynote lecture will address emerging water management issues. Other topics will include: (1) California’s regulatory and legislative responses to the 2011-2015 drought; (2) the importance of measuring, monitoring, and forecasting to sustainable water management; (3) conjunctive management of groundwater and surface water in California, Colorado, Idaho, and New Mexico; (4) protecting environmental flows; and (5) judicial decisionmaking in an era of sustainable water rights management. A field trip will take judges to a desalination facility, a dam removal site, and a groundwater storage injection site.

Notably, tuition, travel and lodging scholarships are available for judges whose states will not reimburse them for the costs of attending the conference. Registration and agenda are available at [www.judges.org/dtw/](http://www.judges.org/dtw/).

## **MEETINGS**

### **Western States Water Council - Spring Meetings**

The WSWC Spring (189<sup>th</sup>) Council Meetings will be held in Chandler, Arizona on March 19-22, 2019 at the Wild Horse Pass – Gila River Hotel & Casino. A March 19 workshop on State Financing Programs is currently under development. For information as it becomes available see: <http://www.westernstateswater.org/upcoming-meetings/>.

#### **Schedule of Meetings**

##### **Tuesday, March 19**

TBD Financing Strategies Workshop

##### **Wednesday, March 20**

10:00 am Field Trip

##### **Thursday, March 21**

8:00 am Arizona Host State Presentation  
9:00 am Water Resources Committee  
11:45 am Executive Committee (over lunch)  
1:30 pm Water Quality Committee  
3:45 pm Legal Committee  
6:00 pm WSWC Reception

##### **Friday, March 22**

8:00 am Full Council Meeting

**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.**