



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION**

#### **Clean Water Act/401 State Certifications**

On April 15, the Environmental Protection Agency (EPA) held a webinar for states and tribes to discuss the President's Executive Order (EO) Promoting Energy Infrastructure and Economic Growth. The EO directs EPA to review existing regulations and guidance in coordination with states and tribes, and to initiate rulemaking to clarify Clean Water Act (CWA) §401 for increased certainty and efficient permitting processes. Concerns with the existing process include: (1) the length of time for state certifications; (2) the scope of issues appropriately considered by states, including water quality and discharges; (3) the availability of information necessary to make certification decisions, and coordination of information among involved parties; and (4) federal agency enforcement of state conditions.

EPA is soliciting pre-proposal comments and recommendations from the states and tribes on its forthcoming rulemaking and guidance efforts through June 10 at [www.regulations.gov](http://www.regulations.gov), docket EPA-HQ-OW-2018-0855. In particular, the agency would like to know: (1) whether any states/tribes have processes to facilitate information sharing; (2) suggestions on how to increase coordination between states, federal agencies, and project applicants; (3) what factors slow down or expedite certifications; and (4) what federal permits or licenses are subject to §401 certification besides CWA §402, §404, Federal Energy Regulatory Commission (FERC) licenses, and Rivers and Harbors Act permits.

Over 200 state and tribal representatives participated on the call, and over 100 written questions were submitted. Some raised concerns about the short review deadline and whether states and tribes would have an opportunity to comment on new guidance or rulemaking. Others questioned whether EPA or other agencies had tracked certifications to have an idea of how many were denied or delayed. Some raised the likelihood of more denials if states do not have time for information gathering, environmental reviews, public comment, or other state regulatory/statutory actions. Others suggested the utility of pre-application meetings, and completing environmental reviews before filing.

A second webinar for states and tribes is tentatively scheduled for May 8. EPA indicated that they will engage in further outreach to states and tribes over the next two months. Further details will be posted at [epa.gov/cwa-401](http://epa.gov/cwa-401) as they become available.

### **ADMINISTRATION/CONGRESS**

#### **Interior/Senate Confirmation**

On April 11, David Bernhardt was confirmed by a Senate vote of 56-41 to serve as the new Secretary of the Department of the Interior. Bernhardt is a Colorado native. He served as the Deputy Secretary for the past two years, as Acting Secretary since January, and previously served in Interior as Solicitor, Deputy Solicitor, Deputy Chief of Staff and Counselor to the Secretary. He also served as Director of Congressional and Legislative Affairs. He supports the President's recent efforts to promote energy infrastructure, streamline permitting processes, and remove barriers to responsible development and growth.

Senate Energy and Natural Resources Chair, Lisa Murkowski (R-AK) said: "He has what it takes to lead this Department—coming from the West, he understands our public lands, has more experience at the Department than all but one of his predecessors, and has extensive knowledge of the issues that will come before him. David Bernhardt has proven to be a strong partner not only for Alaska, but states all across the country. I'm pleased to continue working with him and his team on a wide range of energy, lands, and water-related issues."

Ranking Member Joe Machin (D-WV) said: "Based on my extensive discussions with him and my review of his record, I believe Mr. Bernhardt is clearly qualified to serve as Secretary.... He knows the Interior Department inside and out, and he is well versed on all of the issues that come before it. He clearly has the knowledge and experience to serve as Secretary. The opposition to Mr. Bernhardt's nomination comes not from any lack of knowledge or experience, but from questions about appearances of conflicts of interest arising from his law practice prior to being confirmed as Deputy Secretary. I had extensive conversations with Mr. Bernhardt about these potential conflict of interests and his compliance with ethics laws and regulations.... Mr. Bernhardt must

work to ensure a commitment to ethical and scientific integrity and I intend to work with him and his staff persistently to ensure that is the case.”

## **ADMINISTRATION/WATER QUALITY**

### **Clean Water Act/Groundwater**

On April 15, the EPA issued an Interpretive Statement to clarify the application of the Clean Water Act (CWA) permitting requirements to groundwater. In the press release, EPA states that they considered over 50,000 comments to their February 2018 request, and undertook a comprehensive review of prior agency statements as well as the text and legislative history of the CWA. “EPA concluded that releases of pollutants to groundwater are categorically excluded from the Act’s permitting requirements because Congress explicitly left regulation of discharges to groundwater to the states and to EPA under other statutory authorities.”

The Interpretive Statement is intended to guide states and EPA regions in future permitting decisions outside the 9<sup>th</sup> and 4<sup>th</sup> Circuits, where court decisions have applied an interpretation of the CWA that differs from EPA’s guidance. The agency is soliciting additional public input on what may be needed to provide further clarity and regulatory certainty, with a 45-day comment period once the Interpretive Statement is published in the *Federal Register*.

EPA’s press release notes: “States are the primary regulators of discharges to groundwater within their jurisdictions, as provided in state law and envisioned under the CWA. EPA will continue fulfilling its role in protecting groundwater and hydrologically connected surface waters as authorized by Congress through the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.” A pre-publication version of the Interpretive Statement is available at <https://www.epa.gov/npdcs/releases-point-source-groundwater>.

## **CONGRESS/WATER RIGHTS**

### **Utah/Indian Water Rights**

On April 11, Senator Mitt Romney (R-UT) introduced S. 1207, a bill to approve the Navajo-Utah water rights settlement. Senators Kyrsten Sinema (D-AZ) and Martha McSally (R-AZ) co-sponsored the bill. The settlement quantifies 81,500 acre-feet of water per year for the Navajo Nation from Utah’s Colorado River Basin apportionment. The bill would authorize \$210M in federal funding for infrastructure for the Utah portion of the Navajo Nation to access water. Utah has already approved its \$8M contribution toward the settlement.

Romney noted the longstanding conflict over who has the right to water that flows through Utah and the

northern Navajo Nation. “This conflict could have been resolved through a lengthy court process that would have cost millions of dollars and accomplished very little. Instead, we have come together to introduce legislation that will resolve this conflict by providing additional water for the Navajo Nation and for the people of Utah in a way that is good for everybody. At the same time it will provide needed infrastructure to the Navajo Nation for nearly half of the 5,000 citizens there that don’t have running water. I’m proud to be joined by Senators McSally and Sinema, and I hope the Senate will take this up and pass it without delay so that we can keep the longstanding promise by the federal government to the Navajo Nation in Utah.”

Navajo Nation President Jonathan Nez said, “Once approved, this will bring much needed water infrastructure into the communities of the Navajo Nation, within the state of Utah.... We thank you all for your advocacy for the Navajo Nation as well as the entire state of Utah.” Navajo Nation Vice President Myron Lizer said, “We have a lot of our citizens in Southeastern Utah on the Navajo Reservation that are without water, and they are so close to the San Juan River, they’re so close to all the water in the Colorado Lower Basin, and yet we are without running water and the infrastructure. Water is very important, it’s one of society’s basic needs, and now in 2019 some of our people are getting water for the first time.”

## **WATER RESOURCES**

### **California/Oroville Dam**

On April 2, the California Department of Water Resources (CDWR) released flows from the Oroville main spillway for the first time since it was reconstructed. The water released will make room for flood storage in the reservoir for additional forecasted storms and growing snowpack. After federal and state regulators determined that the spillway was performing as designed, CDWR increased the releases later in the week. The spillway was damaged in 2017 after a series of winter storms and major atmospheric river events produced precipitation that exceeded Lake Oroville’s storage capacity for the first time in its 50-year history.

CDWR State Water Project Deputy Director Joel Ledesma said: “DWR has restored full functionality to the Oroville main spillway and is operating the reservoir to ensure public safety of those downstream. The Oroville main spillway was designed and constructed using 21st century engineering practices and under the oversight and guidance from state and federal regulators and independent experts.” CDWR Director Karla Nemeth said, “Protecting communities from flooding is a vital part of the Department’s mission. Today we inaugurate the reconstructed spillway to serve that essential purpose and to prepare us for the future.”

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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.**