



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / [www.westernstateswater.org](http://www.westernstateswater.org)

Chairwoman - Jeanine Jones; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

### **WESTERN GOVERNORS/WATER RESOURCES Corps – Water Supply Rule**

On August 22, the Western Governors' Association (WGA) sent a coalition letter to the Director of the Office of Management and Budget, Mick Mulvaney, regarding the review and finalization of the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects (Water Supply Rule). Other members of the coalition included the Conference of Western Attorneys General, National Water Supply Alliance, and Western States Water Council.

The coalition notes continued concerns with the Corps' proposed Water Supply Rule, including: (1) the federalism implications that trigger expanded state consultation requirements under Executive Order 13132, despite the Corps' unsupported assertion to the contrary; (2) the preemptive effects on and interference with state laws and regulations governing the management, allocation, and protection of water resources; and (3) natural flows-waters that would have existed within the state without the Corps reservoirs-must be excluded from any Corps definition of "surplus water," as such waters remain under the states' authority.

The letter concludes: "We urge you to consider our substantive and procedural concerns as you analyze the Proposed Rule before its finalization.... We are ready to assist the Administration to ensure that all Corps reservoirs are operated in compliance with federal and state law."

### **ADMINISTRATION/WATER QUALITY EPA/CWA 401**

On August 22, EPA published its proposed rule, "Updating Regulations on Water Quality Certification" (84 Fed Reg 44080), relating to section 401 of the Clean Water Act (CWA). The agency proposes to revise the Code of Federal Regulations, 40 CFR part 121 to include definitions of various terms to provide greater clarity. "While the EPA recognizes that states and tribes have broad authority to implement state and tribal law to protect their water quality...section 401 is a federal regulatory program that contains explicit limitations on

when and how states and tribes may exercise this particular authority."

The proposed rule contains 75 requests for input on issues related to the rulemaking, including examples from states, tribes, and project proponents on how §401 certifications have been implemented, and alternatives to the provisions EPA has proposed. Comments are due no later than October 21.

A CWA §401 certification is required when a proposed project requires a federal license or permit, and the project may result in a discharge. Under 121.1(g), "Discharge for purposes of this part means a discharge from a point source into navigable waters." EPA notes that this would only apply to waters of the United States, not to waters of the state or the tribe. EPA also notes that when the term "discharge" is used in the CWA without qualification that it includes discharge of pollutants, but that it is proposing CWA §401 "be triggered by any unqualified discharge, rather than by a discharge of pollutants," consistent with the Supreme Court's decision in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). However, to trigger CWA §401, the discharge must be from a point source.

EPA also addresses the holding in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994), stating: "Although this decision has been interpreted by some to broadly expand state authority under section 401 – beyond assessing water quality impacts from the discharge and allowing conditions beyond the enumerated CWA provisions – the Court did not stray from the bedrock principles that a section 401 certification must address water quality and that appropriate conditions include those necessary to assure compliance with the state's water quality standards."

The proposed rule limits the scope of a certification "to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Section 121.1 (p) defines "water quality requirements" as the "applicable provisions of §§301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory

program provisions.” This includes state and tribal provisions of law under EPA-approved CWA regulatory programs, even if they are more stringent than federal requirements, but does not include non-water quality related state or local laws.

A nationally-applicable “certification request” would replace the previous guidance that required a “complete application,” which varied according to state laws and regulations. Receipt of the certification request would trigger the statutory clock to complete the certification process. The certification request would identify the applicant, the project, the applicable federal license or permit, the location of the project and any potential discharge sites, a description of the proposed methods or means to monitor or control the discharge, a list of all other authorizations required for the project, and a statement: “The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable timeframe.”

Any conditions imposed on licenses or permits would have to include (1) a statement explaining why the condition is necessary to assure that the discharge from the project will comply with water quality requirements; (2) a citation to federal, state, or tribal law that authorizes the condition; and (3) a statement whether and to what extent a less stringent condition could satisfy applicable water quality requirements. EPA acknowledges that these proposed requirements might create new obligations for some states and tribes, but anticipates that the value of including this information for greater transparency and certainty “will far outweigh the minimal additional administrative burden of including this information in a certification.”

The conditions may not include concerns about environmental media other than water, or state laws or policies unrelated to the regulation of point source discharges to waters of the United States. “The EPA recognizes that the majority of certification actions reflect an appropriately limited interpretation of the purpose and scope of section 401. However, the Agency is also aware that some certifications have included conditions that may be unrelated to water quality, including requirements for biking and hiking trails to be constructed, one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and public access for fishing and other activities along waters of the United States. The EPA is also aware of certification conditions that purport to require project proponents to address pollutants that are not discharged from the construction or operation of [the project]. Using the certification process to yield facility improvements or payments from project proponents that are unrelated to water quality impacts from [the project] is inconsistent with the authority provided by Congress.”

In the alternative, a state may waive the requirement either expressly or by failing or refusing to act in a reasonable period of time not to exceed one year, or it may grant or deny the certification. “A certifying authority may choose to deny certification if it is unable to certify that the proposed activity would be consistent with applicable water quality requirements. If a certification is denied, the federal agency may not issue a license or permit for the proposed activity.”

EPA recommends, once a final rule is established, that states update their regulations to ensure consistency with EPA's regulations. “Additionally, the EPA encourages certifying authorities to work with neighboring jurisdictions to develop regulations that are consistent from state to state. This may be particularly useful for interstate projects, like pipelines and transmission lines, requiring certification in more than one state.”

## **MEETINGS**

### **Water Information Management Systems Workshop**

The Western States Water Council (WSWC), in cooperation with the U.S. Geological Survey (USGS) are cosponsoring a Water Information Management Systems (WIMS) Workshop/USGS National Water Use Data Collaboration on September 16-19, 2019 at the Fort Collins Science Center in Fort Collins, Colorado. The focus of the workshop will be on the status of water use data science, state agency strategies for getting to high-quality water use information, including online reporting, automated data checking, and remote-sensing tools. The workshop and collaboration meetings will serve as a forum for states and other attendees to exchange information on this highly specialized and important category of water data. See: <http://www.westernstateswater.org/2019-wims/>.

### **2019 Business H2O Water Innovation Summit**

On September 12, the Salt Lake Chamber and U.S. Chamber of Commerce will host the 2019 Business H2O: Water Innovation Summit. The Summit will bring together business leaders, government stakeholders, international guests from Israel, and water management experts. Special guests include Utah Lieutenant Governor Spencer J. Cox, EPA Assistant Administrator for Water Dave Ross, and Hillel Newman, Consul General, State of Israel.

Topics of discussion include cutting edge innovations in corporate water stewardship, technology solutions for efficient water management, and public policies to address the changing and growing demand for water across the world. For more information, see [slchamber.com/h2osummit](http://slchamber.com/h2osummit). There is a \$85 registration fee. Use code WATER20 for \$20.00 off. Sponsorship opportunities are available.

**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.**