



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **Clean Water Act/EPA/Water Quality Trading**

On September 5, the Environmental Protection Agency (EPA) released a pre-publication notice on Water Quality Trading under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). The notice and request for comment builds on EPA's February 2019 Memorandum on Updating the EPA Water Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality. The agency is proposing to update and clarify its 2003 Water Quality Trading Policy and 2009 Toolkit for Permit Writers. The updates will modernize information about technology, mapping and modeling efforts, and the performance of many best management practices. It also clarifies that the 2003 Policy and 2009 Toolkit do not mandate specific actions, but provide non-binding and non-mandatory recommendations and guidance for permitting authorities to consider when establishing and implementing trading programs for NPDES permit compliance.

The recommendations are intended to encourage simplicity and flexibility in defining and implementing baseline concepts in watersheds where Total Maximum Daily Loads (TMDLs) have been approved or established. "The baseline portions of the 2003 Policy were seen by some stakeholders as confusing, complex and restrictive, creating a barrier to entry for point source-nonpoint source trading in watersheds where a TMDL has been approved by the EPA. Another concern is that expecting a nonpoint source to meet a pollutant reduction baseline derived from a TMDL load allocation before the nonpoint source can generate tradable credits may be inconsistent with the definition of baseline in the 2003 Policy."

EPA is proposing a revision to the baseline definition, allowing nonpoint sources to generate credits immediately available for use by point sources for any pollutant reductions that are not already included in the assumptions that support the EPA-approved TMDL load allocation. EPA notes that for increased certainty that the overall load allocation will be met, states and tribes may want to provide greater levels of detail in their implementation plans, including prioritizing specific areas of a watershed for reduction.

EPA also made alternative recommendations for incremental baselines, discretionary compliance schedules, water quality standard (WQS) variances, disaggregation of load allocations, and in-lieu fee programs. The incremental baseline approach would divide nonpoint source reductions into some ratio of immediately tradeable credits and reductions assigned toward meeting the load allocation. The state would identify the appropriate ratio to align with anticipated reductions or policy goals. The point source could meet its reduction requirements through onsite controls or purchasing credits, or a combination of the two. This could be combined with a compliance schedule to account for the time it would take for a nonpoint partner to generate sufficient pollutant reduction credits or offsets to achieve compliance.

WQS variances could also be designed to support a market-based program where it is not clearly known whether the point source will be able to buy enough pollutant reduction credits from nonpoint sources to meet its water quality-based effluent limitations. States might collect funds from point sources to pay for nonpoint source reductions, including an in-lieu fee program, or point sources may enter into binding agreements with nonpoint sources directly. States and tribes could consider whether it is appropriate to apply broad load allocations across the watershed or apply it differentially to nonpoint sources on a geographic or other basis to maximize water quality improvements.

EPA is requesting comments on these various approaches, preferences between approaches, mechanisms to implement these approaches, other policy ideas or enhancements to promote or facilitate market-based programs, and other clarifications that would be beneficial, including potential conflicting or ambiguous policy advice. The request for comment will be open for 30 days once published in the Federal Register. EPA will also hold a public listening session to hear feedback from interested members of the public on issues and concerns.

The pre-publication version is available at: https://www.epa.gov/sites/production/files/2019-09/documents/water_quality_trading_under_the_npdes_program-signed_pre-pub.pdf.

ADMINISTRATION/WATER RESOURCES **CWAG/Corps – Water Supply Rule**

On August 22, members of the Conference of Western Attorneys General (CWAG) sent a letter to President Trump and Director Mick Mulvaney, Office of Management and Budget, requesting them to direct the Army Corps of Engineers (Corps) to: “(1) withdraw its proposed ‘Water Supply Rule’; and (2) comply with federal statutes that expressly require the Corps to abide by state law in allocating water from Corps reservoirs for consumptive uses.” The Water Supply Rule is the Corps’ 2016 proposed rule, “Use of U.S. Army Corps of Engineers, Reservoir Projects for Domestic, Municipal and Industrial Water Supply” (81 Fed. Reg. 91556). The Water Supply Rule has not been finalized, but is on the regulatory agenda, currently anticipated to be completed at the beginning of 2020.

Signatories to the letter included attorneys general (AGs) from Alaska, Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. Although the proposed rule purports to update its policies pursuant to the Flood Control Act (FCA) and Water Supply Act (WSA), the AGs note that the policies in the rule are directly contrary to express congressional policy declarations in those statutes. “If allowed to take effect, the Rule would effectively override these express congressional declarations, usurp the States’ exclusive authority to guide their water allocation and development, and eviscerate cooperative federalism principles that Congress has expressly and repeatedly affirmed.”

The AGs describe various provisions of the two statutes and subsequent court cases, noting that States have the right to appropriate their waters, and the United States may not question such appropriation unless it disturbs the navigability – and even then, the navigation servitude west of the 98th Meridian may not conflict with any beneficial consumptive use, present or future, of waters for domestic, municipal, stock water, irrigation, or mining purposes. The AG’s note that these principles are acknowledged to some degree in the supplementary information provided with the proposed rule – but this information would not be controlling. “The language of the Rule itself is what matters.”

The letter provides six illustrative examples of ways the proposed rule exceeds the Corps’ authority and seeks to usurp state power to control the allocation and distribution of their waters: First, the Corps “unilaterally” declares that domestic, municipal, and industrial uses of water include any beneficial use and all uses of water, other than irrigation. The Corps’ reasoning is that states have different definitions for these uses of water, and the AGs point out that this is precisely the reason Congress has consistently required federal agencies to defer to state water law, to avoid the legal confusion of having

state and federal water laws side by side. Second, the Corps’ limited definition of water rights to already-existing rights would impermissibly allow the Corps to preclude future water development or uses of water resources pursuant to state law. Third, the Corps’ blanket provision that the Corps may not become a party to any water rights dispute by virtue of a FCA or WSA contract is contrary to the provisions of the McCarran Amendment, which waives sovereign immunity for the adjudication or administration of rights on a river system. “The Rule cannot override the unambiguous language and intent of the McCarran Amendment, and the Corps cannot unilaterally immunize itself from a McCarran lawsuit;” Fourth, under the water laws of most western states, reservoir operators must usually obtain water rights even if they do not actually use the stored water but allocate or contract to those who do. The Rule’s declaration that the Corps shall not obtain water rights would unilaterally excuse the Corps from complying with any state law requirements. The AGs note that non-consumptive flood control, hydropower, and navigation operations are not the same things as storing water in Corps reservoirs for consumptive beneficial uses, Fifth, the Rule’s accounting of inflows and losses for water supply storage are contrary to state laws defining how available water supply is to be distributed according to state water rights. Sixth, the distinction between “natural flows” and “stored water” is often crucial to distributing water under state water rights and state law. By ignoring this distinction, the Rule presumes the Corps has legal authority to allocate and distribute all the water that happens to flow through a Corps reservoir. This disregards private property rights and downstream senior water rights duly established under state law, and would result in a “taking” of those rights. “All the above conflicts, and more, are documented in attached comments submitted by the Western Governors’ Association and the Western States Water Council, on behalf of the governors of the 18 western states.”

The AGs note that they are willing to engage with the Corps in a collaborative government-to-government discussion on how to address respective state and federal interests.

MEETINGS **WSWC Fall Meetings**

The WSWC Fall (191st) Meetings will be held in Breckenridge, Colorado on October 15-18, 2019. The meetings will be held at the Beaver Run Resort and Conference Center. Registration is required for all WSWC members and meeting attendees. There is no fee associated with meeting attendance, with the exception of the field trip. The field trip is an optional activity. For information as it becomes available, see: <http://www.westernstateswater.org/wswc-fall-2019-191st-meetings/>.

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.