



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **Clean Water Act/WOTUS**

On September 12, U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler and Department of the Army Assistant Secretary of the Army for Civil Works R.D. James announced the repeal of the Obama Administration's 2015 rule regarding the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). EPA and the Army Corps of Engineers are recodifying the regulatory text that existed prior to the 2015 Rule and "ending a regulatory patchwork that required implementing two competing Clean Water Act regulations, which has created regulatory uncertainty across the United States." (*EPA News Release 9/12/2019*)

"Today, EPA and the Department of the Army finalized a rule to repeal the previous administration's overreach in the federal regulation of U.S. waters and recodify the longstanding and familiar regulatory text that previously existed," said Wheeler. "Today's Step 1 action fulfills a key promise of President Trump and sets the stage for Step 2 – a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders, and developers nationwide."

"Today, Administrator Wheeler and I signed a final rule that repeals the 2015 Rule and restores the previous regulatory regime exactly how it existed prior to finalization of the 2015 Rule," said James. "Before this final rule, a patchwork of regulations existed across the country as a result of various judicial decisions enjoining the 2015 Rule. This final rule reestablishes national consistency across the country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of 'waters of the United States.'"

Two federal district courts have reviewed and remanded the 2015 Rule back to the agencies. Multiple other federal district courts have preliminarily enjoined the 2015 Rule pending a decision on the merits. By this action, EPA and the Army jointly concluded that multiple substantive and procedural errors warranted repeal, as

the rule stretched the limits of the agencies' constitutional and statutory CWA authority absent a clear statement from Congress and as reflected in Supreme Court cases. The 2015 Rule also failed to adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources. Further, it suffered from certain procedural errors and a lack of an adequate record to support it as it relates to the 2015 Rule's distance-based limitations.

With this final repeal, the agencies will implement the pre-2015 regulations, which are currently in place in more than half of the states, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. The final repeal takes effect 60 days after publication in the Federal Register.

In December 2018, EPA and the Army proposed a new definition – Step 2 – that would clearly define where federal jurisdiction begins and ends, including the difference between federally regulated waterways and those waters that rightfully remain solely under state authority. See: <http://www.epa.gov/wotus-rule>.

President Trump issued Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Executive Order states that "...[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States under the Constitution." The Executive Order directed the agencies to review the 2015 Rule for consistency with this policy.

EPA/Water Reuse Action Plan

On September 10, David Ross, Assistant Administrator for the EPA announced the release of the National Water Reuse Action Plan (WRAP). Water reuse presents an opportunity to provide additional water supplies to communities across the nation. Ross said: "Forty states anticipate experiencing fresh water shortages in certain regions within their borders over the next decade. Diversifying our nation's water portfolio must be a nationwide priority, and water reuse has the

potential to ensure the viability of our water economy for generations to come.”

The WRAP was developed through extensive outreach to governmental and non-governmental organizations, and identifies actions, leadership, and collaboration that is needed between federal, state, tribal, and local governments and governmental organizations, as well as all stakeholders across the water sector. EPA is releasing the draft plan for 60 days of comment, and the agency’s goal is to issue a final plan that will include clear commitments and milestones for actions that will further water reuse to bolster the sustainability, security, and resilience of the nation’s water resources. See <https://www.epa.gov/waterreuse/water-reuse-action-plan>.

WATER QUALITY/WATER RESOURCES **Water Reuse/Water Conservation/Israel**

On September 12, the U.S. Chamber of Commerce and the Salt Lake Chamber hosted Business H2O, at Snowbird, Utah against a backdrop of high mountain snows. The summit on water and technological innovation drew scores of business and industry leaders, state and local agencies, and invited representatives of Israeli businesses and government. Derek Miller, Salt Lake Chamber President and CEO, noted Utah and Israel as arid states have a lot in common geographically and culturally. Both have survived and thrived in a harsh environment with limited water resources. Water touches every aspect of our lives, Miller observed, saying water is an essential resource for agriculture and industry, as well as recreation. Despite the challenges Utah and Israel continue to flourish, and “make the desert blossom as a rose.”

Josh Kram, the U.S. Chamber’s Executive Director for Middle East Affairs, focused his remarks on the water-related challenges the world faces, and the role technology and policy play in addressing those challenges. In many areas, the current demand for water is not sustainable, leading the Chamber to initiate a series of Business H2O Summits, as well as its U.S.-Israel Business Initiative. The Sea of Galilee and Jordan River are Israel’s primary surface water resources. As 60% of the country is desert, every Israeli treats water as a very precious natural resource. Given a general lack of natural resources, Israel has become a “Start Up Nation,” focused on research, development and innovation – leading the world in water conservation and reuse innovations.

Hillel Newman, Israel’s Consul General to Los Angeles, declared that water policy affects all of us. In Israel, water is a public asset and the central government controlled water allocation and use. A water use revolution has happened over the last 20 years. The region is one of the hottest and driest in the world, and wars have been fought over water. In the 1990s, Israel was using fresh water for agriculture and drinking water,

when drought and immigration led to a water crisis. Israel was exporting fresh water in the form of cotton and oranges, while watching the levels of the Sea of Galilee drop. Importing water was considered but was strategically unacceptable. Politics and water are intensely connected in Israel. In the early 2000s, political leaders realized there was a need for changes in water policy and use.

Subsequently, the Israeli Water Authority was created as an independent entity with full power to make decisions on water. This led to more professional management and greater investments in infrastructure. Water and sewer rates have increased by 40%-50%. Rates now better reflect the true cost of water, but it “only happened when it was evident that we were on the edge.” Several desalination plants were built and 25-30% of the water supply now comes from the sea, and 85% of Israel’s water is reused. Most drinking water comes from desalination, and agriculture depends on reuse for its water supply. Israel is flourishing again.

Dave Ross, EPA Assistant Administrator for Water was a keynote speaker. He addressed EPA’s newly released National Water Reuse Action Plan, which he described as one of his personal passions. He began his career in San Diego working on water purification systems. Coming to EPA, he was pleased to see how the technology had developed over the last 20 years, but disappointed that more was not done to promote reuse. EPA’s Action Plan is designed to make changes before we are in a crisis – 20 years down the road. The Plan is part of our national security.

One major change is focusing on “fit for purpose” water treatment with the end use in mind.

Rural communities in particular face challenges with limited financial and personnel resources, struggling to meet their water needs. Innovative water sources, including desalination and reuse of produced waters, will provide new opportunities to diversify water supplies. EPA is also partnering with other federal agencies in an effort to improve membrane technology and use less power for treatment using reverse osmosis.

A lot of produced water comes with oil and gas development, and there is a potential to reclaim up to two million acre-feet/year. This is real water that industry can market. EPA has generally required reinjection but is looking at alternative uses.

We can learn from Israel and change our water culture, but we won’t nationalize our water, water policy and distribution systems! He emphasized the National Water Reuse Action Plan is not just a federal plan, but a plan developed through engagement with States, tribes and the water industry. Ross also emphasized efforts within EPA to institutionalize state engagement as partners and coregulators.

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.