



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS

Clean Water Act

On September 18, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held a hearing titled, "The Administration's Priorities and Policy Initiatives Under the Clean Water Act (CWA)," to examine the actions of the Environmental Protection Agency (EPA) and their effects.

In advance of the hearing, Committee Chair Peter De Fazio (D-OR) and Subcommittee Chair Grace Napolitano (D-CA) issued a report titled, "Clean Water Under Attack: How Actions of the Trump EPA Hasten the Return of Polluted Rivers, Lakes, and Streams." The report asserts that the EPA is rolling back historic clean water protections under the waters of the United States (WOTUS) rule, groundwater pollutants, and CWA §401, and weakening joint federal-state implementation of the CWA; that the Administration is failing to invest in critical wastewater infrastructure upgrades and planning to increase discharges of human sewage; and that EPA is restarting projects found to have unacceptable environmental impacts and overturning previously approved state water standards.

Witnesses at the hearing included: Assistant Administrator Dave Ross, EPA's Office of Water; Director Maia Bellon, Washington Department of Ecology; Secretary Becky Keogh, Department of Arkansas Energy and Environment; Associate Professor Ken Kopocis, American University College of Law; Michael Hickey, Hoosick Falls, NY and former EPA Assistant Administrator; President Pam Nixon, People Concerned about Chemical Safety; and Senior Attorney Geoffrey Gisler, Southern Environmental Law Center.

Ross noted that America's drinking and surface water quality is much better today than at any point in EPA's history, but new challenges have emerged, such as aging infrastructure, managing excess nutrients in water, and emerging contaminants. He spoke of: (1) the agency's grant and loan programs; (2) reusing water for beneficial purposes instead of treating it as waste; (3) ensuring a sustainable workforce in the face of retirements and technology advances that outpace training; and (4) prioritizing innovative approaches to

reduce excess nutrients from urbanization, population growth, wastewater discharge, stormwater runoff, and agriculture. He also addressed two priority rulemaking efforts EPA has focused on to restore the rule of law and provide regulatory certainty: revising the WOTUS rule, and CWA §401. He noted that EPA's existing rules on state certification "have not been updated in nearly 50 years and are inconsistent with the text of [the CWA], leading to confusion and unnecessary delays for infrastructure projects."

Bellon said the EPA was attempting to fundamentally restructure the CWA, ignoring the rule of law, imperiling the health of our waters, threatening economic injury to recreation and tourism, and ignoring federal obligations to tribal nations. Regarding EPA's CWA §401 proposed rule, Bellon said it would "dramatically narrow the scope of federally permitted projects that states have the authority to certify within our borders; severely restrict the amount of time states have to certify or condition a federally permitted project; and grant themselves ultimate veto authority over state decisions." She said this represents a massive overreach that improperly constrains state authority, and "could result in Ecology being forced to issue more denials or have its authority deemed waived. In short, it would make protecting water quality more difficult and result in more delays for projects."

Bellon explained Ecology's decision to deny certification for the Millennium coal export terminal project, which has been upheld by multiple court rulings, but has been used by the Administration to accuse states of abusing their CWA §401 authority. "The fact is that states have been conducting this process for nearly half a century without issue."

Bellon said that EPA's repeal of the 2015 WOTUS rule has thrown the law into chaos, and the proposed rule to replace it "will leave vast portions of our nation's waters unprotected," including one county in Washington that would lose CWA protection for over 50% of its streams and wetlands. "Waters such as ephemeral streams and adjacent wetlands, which have a significant nexus to a traditionally navigable water, should be Waters of the United States."

Kopocis said: "Clean water in adequate supply is essential to our existence." Regarding the new proposed WOTUS rule, he said eliminating protections for intermittent and ephemeral streams will remove CWA protection for a significant number of waters, up to 80-90% in arid areas. "These waters would no longer be protected by water quality standards, no [CWA] permits would be required for discharges of pollutants, funding to address municipal wastewater, stormwater, and nonpoint source pollution would be less available, and Federal authority to respond to oil spills would be curtailed. While some argue that States can and will fill this void, since the scope of the [CWA] was first limited in 2001 and further limited in 2006, there is little evidence that the States have done so."

Kopocis said that the CWA has resulted in great improvements in water quality, but the work is far from finished. "State generated water quality reports indicate hundreds of impaired waters need reduced pollution and increased protection. Abandoning upstream waters and continuing the confusion on how to protect water quality, eliminating or reducing regulatory requirements to eliminate toxic discharges...restricting the rights of states to protect their waters, and other steps of the Trump EPA do not advances these joint efforts at the State and Federal level."

Corps - Water Supply Rule

On September 16, a bipartisan group of 19 Western Senators sent a letter to the Office of Management and Budget (OMB) to express strong opposition to the Army Corps of Engineers' (Corps) proposed rulemaking regarding the use of Corps reservoir projects for domestic, municipal, and industrial water supply (81 FR 91556). They urged respect for state and tribal authority, and reiterated the shared concerns recently expressed by the Western Governors' Association, the Conference of Western Attorneys General, the National Water Supply Alliance, the Western States Water Council, and the National Water Resources Association.

The Senators wrote: "As it relates to the arid Western states, Congress and the Courts have given clear and consistent deference to states for water allocation from statehood through the 1944 Flood Control Act (FCA) and the Water Supply Act (WSA) of 1958. In the Corps' proposed regulation, it assumes water appropriation authority for all the waters surrounded by Corps property. In fact, this has been the practice since 2010 with the implementation of Real Estate Policy Letter 26 requiring water supply agreements. Prior to the 2010 policy and the current proposed rulemaking, all that was required in making a water withdrawal across Corps property was obtaining a real estate easement."

The letter continues: "The Corps' preferred alternative ignores both precedent and statute that the

natural flows of the river remain squarely under the State's jurisdiction, despite construction of Corps dams and reservoirs. Using the Missouri River as an example, as long as its flows continue to be greater than the overall use granted by the states, water users are not benefitting from storage in Corps reservoirs. Therefore, water users should not be required to obtain water supply agreements with the Corps or pay any fees. If flows are less than appropriated, the states take measures accordingly to reduce water use. Ultimately, the states are responsible and will take the appropriate action. It was never the intention of Congress to federalize all the water in our country's major rivers. That should not change." The Senators requested that the rule be withdrawn or at least revised to accommodate state and tribal input.

Water Resources Development Act

On September 18, the Senate Committee on Environment and Public Works held a hearing titled, "Improving American Economic Competitiveness through Water Resources Infrastructure." Witnesses included Patrick O'Toole, President of the Family Farm Alliance; Jamey Sanders, Board Member of the Associated General Contractors of America and Vice President of the Choctaw Transportation Company; and Derek Brockbank, Executive Director of the American Shore and Beach Preservation Association.

Chairman John Barasso (R-WY) noted that America's water infrastructure helps move goods across the country, prevents catastrophic floods and disasters, and provides clean and abundant water to communities, farms, ranches, and small businesses. "This is why we must continue the tradition of passing water resources legislation every two years." He noted the need for drinking water, flood control, and water supply, as well as problems with aging infrastructure. "Congress no longer authorizes the construction of giant storage reservoirs due in large part to their high cost and the lengthy permitting process. However, working with the states, I believe we can help build smaller scale storage reservoirs, which can give relief to our ranching and farming families."

Ranking Member Tom Carper (D-DE) noted that during the drafting process of the last Water Resources Development Act (WRDA), the Committee heard repeatedly of OMB's micromanagement and lack of transparency in evaluating, selecting, and budgeting projects. He said OMB's 'Benefit to Cost' ratio method of prioritizing projects considers only a project's national benefits, without considering important local and regional economic benefits that address critical needs in smaller rural and tribal communities. "Last Congress, we made strides in improving transparency with the Corps Budgeting process, and it is my hope that we can continue to build on that important progress."

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.