



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES

Corps/Water Supply Rule

On September 24, Senator Kevin Cramer (R-ND), Chair, Fisheries, Water, and Wildlife Subcommittee, Environmental on Public Works Committee, announced that R.D. James, Assistant Secretary of the Army (Civil Works) had ordered a halt on issuing a final Water Supply Rule (Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply), to better integrate input from stakeholders. James' September 23 memorandum directed the Commanding General, U.S. Army Corps of Engineers (Corps), to "...continue the ongoing consultation and coordination with the appropriate States, Tribes, stakeholders, etc. Following a minimum six-month delay for further coordination, I require a brief to include a summary of the comments received and the responses to comments."

Senator Cramer said: "This is a major victory. The Corps' preferred rule ignores both precedent and statute. It was never the intention of Congress to federalize the water in our country's major rivers, and the final rule should reflect that. Now that the Corps has reluctantly given this reprieve and expanded the process, it is critical every stakeholder express their concerns and stand up for their rights in order to make the Corps better understand this issue and give us a better product."

On September 16, Cramer and 18 other western senators sent a letter to OMB requesting the rule be delayed or withdrawn (WSW #2366). The bipartisan letter was signed by Senators Martha McSally (R-AZ), Kyrsten Sinema (D-AZ), Michael Bennet (D-CO), Cory Gardner (R-CO), Mike Crapo (R-ID), James Rish (R-ID), Steve Daines (R-MT), John Hoeven (R-ND), John Thune (R-ND), James Inhofe (R-OK), James Lankford (R-OK), Jeff Merkley (D-OR), Ron Wyden (D-OR), Michael Rounds (R-SD), Ted Cruz (R-TX), John Cornyn (R-TX), John Barrasso (R-WY) and Michael Enzi (R-WY).

DOE/Water-Energy Nexus/Desalination

On September 23, the Department of Energy (DOE) announced the selection of the National Alliance for Water Innovation (NAWI) to lead the Energy-Water Desalination Hub as part of DOE's Water Security Grand

Challenge. Over the next five years, the Hub will focus on the development of reliable, cost-effective technologies to treat seawater, brackish waters, and produced waters to improve quality and increase water supply to meet municipal, industrial, agricultural, utility, oil and gas, and other water supply needs. The goals include advancements in energy-efficient desalination system components and a circular water economy to treat water locally in a cost-competitive way using modular or large-scale systems.

NAWI is a public-private partnership that was formed two years ago to support DOE's goal of establishing a desalination hub, and is a research alliance that includes the Lawrence Berkeley, National Energy Technology, National Renewable Energy, and Oak Ridge National Labs, as well as several university and industry partners. There is also a larger NAWI Alliance that includes over a hundred organizations and has an open membership. The collaborative national research program will invite broad participation using a series of research proposal calls, with the first call anticipated in June 2020. Congress has appropriated \$40M for the hub so far, and has authorized additional funds. Public and private stakeholders are expected to contribute a \$34M cost-share.

DOE Secretary Rick Perry said: "I'm excited by the incredible possibilities we have focused on the energy-water nexus today to create a secure and prosperous tomorrow, including the Energy-Water Desalination Hub. The Hub will spur technological advancements in the treatment of non-traditional water sources. I'm proud that the DOE is already a leader in this area, not simply in energy and water security, but in energy and water innovation." DOE also announced plans for two prize competitions later this year for technological and design advancements in: (1) wastewater resource recovery from small to medium-sized treatment plants; and (2) solar-powered desalination systems.

LITIGATION/WATER QUALITY

California/Clean Water Act/Agriculture

On September 6, the 9th Circuit reversed and remanded *Pacific Coast Federation of Fishermen's Associations, et al., v. Glaser, et al.* (17-17130) to the

Eastern District Court of California. The case dealt with discharges of pollutants into navigable waters, and whether the discharges fell under the Clean Water Act (CWA) agricultural exception (33 U.S.C. §1342(1)(1)), or were a violation of the National Pollutant Discharge Elimination System (NPDES) permitting requirements.

The Grasslands Bypass Project – jointly administered by the defendants Bureau of Reclamation and the Delta Mendota Water Authority as part of the Central Valley Project – is a drainage system of perforated drain laterals underlying farmlands to catch irrigation water and redirect it to the San Luis Drain toward the Mud Slough, the San Joaquin River, and the Bay-Delta Estuary. The project was created as a result of a previous lawsuit for the purpose of preventing irrigation water from leaching selenium and salt from the agricultural soil into the groundwater.

The plaintiffs argued that because some of the discharges came from land underlying the Vega Solar Project, seepage from highways and residences, and farmland that was fallowed or retired, the agricultural exception did not apply. The District Court held that because the majority of the water came from agricultural lands, the exception applied. The 9th Circuit disagreed. The exception language is “for discharges composed entirely of return flows from irrigated agriculture.” The 9th Circuit also noted that the defendants bore the burden of proof to demonstrate that the discharges fit the exception, rather than the plaintiffs. The case was remanded to consider the Vega and seepage claims under the corrected exemption standard.

The 9th Circuit held, however, that the fallowed and retired land fell within the definition of irrigated agriculture in this case. “We have ordered Defendants, in separate litigation, to provide drainage ‘to lands receiving water through the San Luis Unit.’ The retirement of farmlands was a component of that drainage plan. To hold that drainage from retired lands does not fall under the CWA’s statutory exception for discharges from agriculture would lead to contradictory and illogical results. We decline to require Defendants to provide a drainage plan that includes the retirement of farmland, on the one hand, and hold that those activities violate the CWA absent a permit, on the other.”

County of Maui/Clean Water Act/Groundwater

On September 20, the Maui County Council voted 5-4 to settle *County of Maui, Hawaii v. Hawaii Wildlife Fund* and avoid a decision by the U.S. Supreme Court that could affect the future jurisdictional scope of the CWA. The case is scheduled to be heard by the Supreme Court on November 6. Mayor Michael Victorino questioned the authority of the Council to settle the case. In a letter to the Council in August, the Mayor said that the County cannot abandon its case without the

lower courts abandoning their orders, and that the decision to settle is costly and not a responsible choice for the County’s property owners and residents. The settlement approved by the Council requires the County to pay a \$100,000 fine, make good faith efforts to decrease the use of injection wells, invest in wastewater reuse, and seek NPDES permits. (*Maui News*, 8/30; *E&E News*, 9/23)

WATER RESOURCES

Bureau of Reclamation/Infrastructure

On September 25, the Senate Energy and Natural Resources Committee, Chaired by Senator Lisa Murkowski (R-AK), approved a number of energy and water bills during a business meeting to consider pending legislation. Among those bills approved by voice vote were: (1) **S. 334**, a bill to authorize the construction of the Musselshell-Judith Rural Water System and study of the Dry-Redwater Regional Water Authority System in the States of Montana and North Dakota (Senator Daines R-MT); (2) **S. 860**, a bill to amend the Omnibus Public Land Management Act of 2009 to modify the terms of the Jackson Gulch rehabilitation project in Colorado (Sen. Gardner R-CO); (3) **S. 990**, a bill to authorize the Secretary of the Interior to participate in the implementation of the Platte River Recovery Implementation Program First Increment Extension for threatened and endangered species in the Central and Lower Platte River Basin (Sen. Barrasso R-WY); (4) **S. 1570**, a bill to provide flexibility to allow greater aquifer recharge, and for other purposes (Sen. Risch R-ID); (5) **S. 1751**, a bill to amend the Reclamation Project Act of 1939 to authorize pumped storage hydropower development utilizing multiple Bureau of Reclamation reservoirs (Sen. Cantwell D-WA); (6) **S. 1882**, a bill to make available the continued use of Pick-Sloan Missouri Basin Program project use power by the Kinsey Irrigation Company and the Sidney Water Users Irrigation District, and for other purposes (Sen. Daines R-MT); and (7) **S. 2044**, a bill to amend the Omnibus Public Land Management Act of 2009 to establish an Aging Infrastructure Account, to amend the Reclamation Safety of Dams Act of 1978 to provide additional funds under that Act, to establish a review of flood control rule curves pilot project within the Bureau of Reclamation, and for other purposes (Sen. McCally R-AZ). Senator Mike Lee voted “no” on S. 2044 and S. 334.

MEETINGS

Western States Water Council

The WSWC Fall meetings will be held in Breckenridge, Colorado on October 15-18, at the Beaver Run Resort. See www.westernstateswater.org for details. The cut-off date for rooms has passed, but reservations will be accepted based on availability. Please also note the resort’s 72-hour cancellation policy (and \$35 refund processing fee).

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.