



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS/WATER RIGHTS **Drought/Infrastructure/Water Transfers**

On February 18, the Western Governors' Association (WGA) sent a letter to the Senate Committee on Energy and Natural Resources in support of the Drought Resiliency and Water Supply Infrastructure Act (S. 1932). In particular, WGA supports provisions that would authorize and fund: (1) new surface and groundwater storage projects; (2) new recycling, reuse, and desalination projects; and (3) new restoration and environmental compliance projects for forests, meadows, and watersheds. WGA supports the Reclamation Infrastructure Finance and Innovation (RIFIA) pilot project and similar water infrastructure financing mechanisms, as well as requirements that federal entities comply with applicable state water laws.

WGA noted that a prior iteration of this legislation in 2018 included language to codify the U.S. Environmental Protection Agency's (EPA) Water Transfer Rule (40 CFR 122.3(i)), and asked that similar language be added to S. 1932. "The rule exempts certain trans-basin water transfers from National Pollutant Discharge Elimination System permitting requirements of the Clean Water Act and is critical to satisfy domestic, agricultural, environmental, and industrial water supply needs of the arid West." The rule has been challenged in federal court and ultimately affirmed by the 2nd Circuit, but WGA pointed out that codifying the rule "would add a needed measure of stability and certainty to western water planning and drought mitigation efforts." WSWC Position #424 supports Congressional codification of the rule.

"Western Governors recognize that the conservation and delivery of clean and reliable water supplies are critical for communities, industries, habitat conservation and agriculture throughout the nation, but particularly in the arid West. Robust federal investment in water infrastructure is essential to our nation's continued economic prosperity and environmental protection, and to assist states in developing drought resilient communities." See <https://westgov.org/images/editor/S EN ENR S 1932 Drought and Water Infrastructure FINAL.pdf>.

ADMINISTRATION **NRCS/Regional Conservation Partnership Program**

On February 13, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) published an interim rule (85 FR 8131) on the Regional Conservation Partnership Program (RCPP), reflecting changes to the program made by the 2018 Farm Bill in Subtitle G Title II (PL 115-334). The RCPP "enhances conservation and promotes coordination between NRCS and its partners to help producers and landowners increase the restoration and sustainable use of soil, water, and wildlife on a regional or watershed scale." The 2018 bill increased funding to \$300M for each fiscal year (FY2019-23) and allocates 50% of those funds to state/multi-state pools. The other 50% of the annual funding will go to the Critical Conservation Area (CCA) pool. A third national pool has been eliminated, increasing the funds available to the other two categories. Financial assistance activities include land management contracts, land rental contracts, conservation easements held by the United States, or by an eligible entity, and public works contracts.

The RCPP's purpose has been expanded to include the protection of drinking water and groundwater on eligible land, and eligible partners now include acequias and conservation districts. Partnership agreements may be longer than 5 years under certain circumstances to further the purposes of the program. It establishes conservation milestones to achieve and a timeline for carrying out duties under the program, requires guidance for partners, updates reporting requirements, and clarifies eligible partner contributions. State program coordinators will be identified to assist partners with the program, and gives a high priority placed on building new partnerships with state, local, and private entities, as well as projects consistent with existing watershed, habitat, or other area restoration plans.

NRCS is particularly interested in obtaining public comment on: (1) CCAs and their associated priority resource concerns; (2) how best to develop and report project outcomes; (3) ideas on how to implement RCPP easements; (4) how to incorporate land rental authorities into program implementation; (5) alternative funding arrangements; and (6) project renewal criteria.

Comments are due by April 13, and may be submitted on www.regulations.gov, docket NRCS-2019-0012.

ENVIRONMENT

Infrastructure/Oregon/Washington

On February 11, Oregon Governor Kate Brown (D) called for the removal of the earthen portions of four dams on the lower Snake River in a letter to Washington Governor Jay Inslee (D), saying that she believes it is the best, scientifically-supported way to increase populations of endangered Chinook salmon runs. Chinook also support the orca populations living off the coasts of Oregon and Washington, which have declined in recent years, partially due to starvation. The dams on this part of the river are used primarily for hydroelectricity and navigation, though they also support flood control and irrigation. Several small electric cooperatives buy power from the Bonneville Power Administration (BPA), which operates the dams. Washington's Republican Congressional Representatives Dan Newhouse, Cathy McMorris Rodgers and Jaime Herrera Beutler criticized Brown's proposal.

In 2019, Inslee called for a stakeholder engagement report on the lower Snake River Dams to better understand public sentiment about the dams and what steps could be taken to "move the process out of a cycle of study, legal action, and court decisions to one of greater benefit to the communities affected across Washington, and the salmon and orca." The report was published in December 2019. Recommendations are expected in the coming weeks. Simultaneously, the U.S. Army Corps of Engineers (Corps), the U.S. Bureau of Reclamation (USBR), and BPA are conducting an environmental impact statement (EIS) to evaluate the operations, maintenance and configurations of the four dams. The U.S. District Court for Oregon ordered the EIS in 2016, scheduled to be finalized by June 2020.

On February 24, in response to Brown's letter and to take advantage of the opportunity presented by the pending EIS, 17 leaders of energy companies, utilities and conservation organizations sent a letter to the governors of Oregon, Washington, Montana and Idaho expressing their desire for a collaborative effort to "develop a long-term vision and strategic plan that will identify investments needed to recover and conserve salmon, steelhead and other fish and wildlife populations, ensure tribal needs are honored and sustained, and strengthen the electricity and agricultural services that communities depend on from the river." For a copy of the letter, contact the Council's office.

LITIGATION

Commerce Clause/CWA §401

On January 21, the States of Montana and Wyoming petitioned the U.S. Supreme Court for leave to file a

complaint against the State of Washington (#22O152) on Commerce Clause grounds, for Washington's denial of Clean Water Act §401 certification of the Millennium Bulk Terminal Project. The complaint and supporting motion allege that Washington has intentionally discriminated against the landlocked Montana and Wyoming by blocking port access for one of their most important commodities, low-sulfur coal.

Although domestic demand has decreased, demand in foreign markets is increasing, and the Governors of Montana and Wyoming have engaged in discussions and agreements to export their coal to Asian countries. These coal exports have an impact on revenue generated from severance taxes, royalties and fees that fund state infrastructure and education, as well as providing many high paying jobs.

The complaint alleges: "Washington's denial of a Section 401 Water Quality certification was based on protecting the state's own agricultural interests, the political concerns and aspirations of its Governor, and because of extraterritorial and unfounded concerns that coal exports from Wyoming and Montana would increase greenhouse gas emissions in Asia." The complaint alleges violations of the Dormant and Foreign Commerce clauses of the U.S. Constitution which prohibit states from: (1) engaging in discriminatory or protectionist actions against other states; (2) regulating conduct outside its borders or placing an undue burden on interstate commerce; and (3) regulating foreign commerce, especially when it is at odds with the foreign policy of the U.S. Government.

Montana and Wyoming seek injunctions against Washington preventing it from: (1) denying the CWA §401 certification on grounds unrelated to water quality; and (2) engaging in protectionist and discriminatory actions in its permitting decisions for the Millennium Bulk Terminal and from basing its permitting decisions on extraterritorial factors. They also seek a declaration that Washington's discrimination against their coal exports violates the Dormant Commerce Clause.

MEETINGS

Washington DC Roundtable

The Western States Water Council, Interstate Council on Water Policy and National Water Supply Association, are co-hosting a Washington DC Roundtable on March 31- April 2. The meetings will be held at the Doubletree Crystal City located at 300 Army Navy Drive in Arlington, Virginia. We anticipate about 60-70 leaders representing state and interstate interests, as well as congressional staff and federal agency senior leadership. **Please note the hotel room block deadline and early registration closes on Friday, February 28.** For further information, please see: <https://www.westernstateswater.org/>.

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.