



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/WATER RESOURCES** **NRCS/Drought**

On April 16, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) reported persistent drought in the Four Corners area of Arizona, Colorado, New Mexico and Utah, across the middle of Nevada, and in northern California, up through much of Oregon and into parts of central Washington. Southern California experienced record-breaking rains in April, and portions of the Sierra Nevada, Cascades, Northern Rockies, Northern Plains and Midwest received additional snow. In early April, Texas received significant rainfall, improving drought-related conditions in some areas. As of April 1, reservoirs in California, New Mexico, Oregon and Washington were below average.

In March, the National Weather Service (NWS) projected "normal to slightly above normal April-September runoff volumes for the mountainous west." Dry soil moisture conditions from previous droughts are soaking up runoff, leaving low flow streams in the Colorado River system, despite near or above normal snowpack. In New Mexico, spring flows in the Rio Grande are expected to be less than half of average, impacting reservoir levels, irrigation districts and endangered species. Although 2019 started off very wet, the monsoon season was dry, and snowpack accumulation started later than normal, leaving the Four Corners region dry. (*Salt Lake Tribune*, 4/17; *E&E Climatewire* 4/16; *NWS* 3/5 and 3/11)

On April 17, the journal *Science* published a report titled, "Large contribution from anthropogenic warming to an emerging North American megadrought." Using summer soil moisture measurements, tree-ring reconstructions, and hydrologic modeling, the researchers compared multi-decadal droughts over 1,200 years from Oregon and Wyoming down to California and New Mexico. They concluded that the Southwest drought from 2000-2018 was more severe than all but one of the megadroughts during that time. The article said climate models indicate that anthropogenic contributions affecting temperature, humidity, and precipitation account for 47% of the drought severity, "pushing an otherwise moderate drought onto a trajectory comparable" to the

megadrought of the late 1500s. Although 2019 was a relatively wet year, the researchers noted that climate change is likely to cause the long-term drought to continue.

### **LITIGATION/WATER QUALITY** **EPA/Corps/WOTUS**

On April 27, the New Mexico Cattle Growers Association (NMCGA) filed an amended complaint in its lawsuit against the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) updating the complaint with references to the Navigable Waters Protection Rule (U.S. District Court of New Mexico, 1:19-cv-988). The lawsuit initially challenged the October 2019 readoption of the 1986 regulations, when the agencies repealed the 2015 Clean Water Rule defining "waters of the United States" (WOTUS) and "recodified" the guidance in place prior to the 2015 rule. The amended complaint expands that challenge to the 2020 Navigable Waters Protection Rule.

NMCGA argues that the agencies' interpretation of the term "navigable waters" exceeds "...the agencies' statutory authority under the Clean Water Act and the Congressional Review Act, or Congress' authority under the Commerce Clause, the Due Process Clause, the Non-Delegation Doctrine, and the Tenth Amendment. Plaintiff asks this Court to declare that several provisions of the Clean Water Act, the 1986 Regulations, and related guidance, and/or the Navigable Waters Protection Rule, are statutorily and constitutionally invalid, and to enjoin their enforcement."

The complaint alleges that, even under the Navigable Waters Protection Rule, many of the waters included within the four categories – e.g., territorial seas and waters used for commerce, tributaries, lakes and ponds, and adjacent wetlands – "do not stand or flow year-round, and many of these non-perennial waters are only present for days or weeks before they dry up. EPA and the Army regulate discharges to the locations of these waters even though the 'waters' only occupy those locations for a few days or weeks in any given year."

Pacific Legal Foundation attorney Tony Francois, who represents NMCGA, said: "Over the years, EPA has

changed the definition of ‘navigable waters’ to increase its regulatory authority at the expense of property owners’ rights. Despite the improvements of the new rules, its regulations are still unconstitutionally broad. Specifically, the new rules let federal agencies control ponds, wetlands, and other property far removed from navigable waterways. These were never intended by Congress to be covered by the Clean Water Act.” See WSW #2372; <https://pacificlegal.org/press-release/epas-new-navigable-waters-rule-challenged>.

On April 29, two lawsuits led by environmental groups were filed challenging the Navigable Waters Protection Rule. The first suit, *Conservation Law Foundation et al. v. EPA* (#20-cv-10820), was filed in the U.S. District Court of Massachusetts. The second suit, *South Carolina Coastal Conservation League et al. v. Wheeler et al.* (#20-cv-01687), was filed in the U.S. District Court of South Carolina. The complaints allege that the new rule adopts an “unreasonably narrow” interpretation of WOTUS that is not based on current scientific understanding. The Massachusetts case also alleges that the EPA and Corps are changing the definition based on “political winds and currents.” “Rather than merely revoking the Clean Water Rule, this latest regulation abandons multiple decades of agency practice, and in its place adopts unintelligible and inconsistent definitions detached from science and wholly unmoored from the Clean Water Act’s explicit objective: to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” The South Carolina plaintiffs allege that the rule arbitrarily delineates protected and unprotected waters with little reasonable explanation, and “is filled with unclear terms and will be nearly impossible to implement.”

#### **LITIGATION/WATER RESOURCES/ENVIRONMENT** **California/Endangered Species Act**

On April 21, California’s Attorney General Xavier Becerra and state agencies filed a motion in *California Natural Resources Agency et al. v. Ross et al.* for declaratory and injunctive relief under the Administrative Procedure Act, challenging the Trump Administration’s expansion of federal water export operations in the Central Valley (U.S. District Court for the Northern District of California, #20-cv-1299). The lawsuit, filed in February 2020, challenges the biological opinions that enable additional water exports from the San Joaquin Delta without providing adequate safeguards for endangered species (see WSW #2388).

The recent motion states that the biological opinions for Endangered Species Act (ESA) listed species, adopted in October 2019, are not based on current knowledge and science of the species, are “heavily caveated,” and rely on unreasonable assumptions of how the system is operated, making it “difficult to know how project operations will avoid harm to the species.”

In addition, the motion states that “[U.S. Bureau of Reclamation (USBR)] violated and continues to violate the [California Endangered Species Act (CESA)] by taking CESA-listed species without authorization.” Thus, the diversion of water in accordance with the revised biological opinions will “cause imminent and irreparable harm to species protected under [the CESA] and federal [ESA].” The motion also stated that the agencies violated their responsibilities under ESA, CESA and the National Environmental Protection Act (NEPA). The state is asking that the biological opinions, USBR’s final environmental impact statement, and Record of Decision be deemed “arbitrary and capricious;” that USBR reinstate consultation with respect to the Central Valley Project (CVP); and that the agencies comply with ESA, NEPA, and CESA before taking any action in regards to changing or expanding CVP operations.

Becerra said: “The Trump Administration is recklessly endangering California’s ecosystem and depleting irreplaceable natural resources. As we speak, some of California’s most endangered species are being pushed closer to extinction – and there is no way to turn back the clock once the damage is done. We are fighting to prevent the Trump Administration’s blatant disregard for science and the law before it permanently alters California’s environmental landscape.”

USBR Commissioner Brenda Burman said: “At no other time in modern history has the State of California taken such ill-founded actions to directly hurt more than 25 million Californians by unnecessarily jeopardizing their water supply. Now, more than ever, it is critical that water be reliably delivered to Americans, and we are taking actions to do that.”

On April 29, California State Water Contractors (SWC) and the Kern County Water Agency sued the California Department of Fish and Wildlife (CDFW) and Department of Water Resources (CDWR) over the state-issued incidental take permit (ITP) for the State Water Project. SWC stated that the recently-revised ITP imposes “significant new conditions that far exceed CESA requirements and legal standards and is not based on the best available science.” General Manager Jennifer Pierre said, “In maintaining overly restrictive criteria specific to the SWP despite objections of the [SWC] and other public water agencies – increasing SWP costs by \$22M annually – the ITP approval has left us with no other choice than to file litigation that could and should have been avoided.” SWC said the ITP will limit water supplies to 27M Californians, make climate change adaptation and implementation of the Sustainable Groundwater Management Act more difficult, create operational conflicts between the CVP and SWP, give CDFW – rather than CDWR – authority to make wholesale flow decisions beyond the permit, and increase costs to ratepayers.