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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY
CWA/Section 401

On June 1, the Environmental Protection Agency (EPA) finalized the "Clean Water Act Section 401 Certification Rule" to "…implement the water quality certification process consistent with the text and structure of the Clean Water Act (CWA)." The new rule fully replaces the 1971 certification regulations at 40 CFR part 121, which were issued prior to amendments to the CWA that included material revisions to §401.

EPA states: "Under this final rule, the requirement for a section 401 certification is triggered based on the potential for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States…. This provision is modified from the proposal to provide greater clarity regarding when a certification is required, but [EPA] does not intend for this change to alter the meaning of the provision from the proposal. [The] final rule preamble also clarifies…that certification also is required before a federal agency issues a general license or permit which may result in a discharge…. [T]he term "discharge" is defined to mean a point source discharge into a water of the United States, and the term "license or permit" is defined to mean a license or permit issued by a federal agency to conduct any activity which may result in a discharge. The final rule reflects that section 401 is triggered by the potential for a discharge to occur, rather than an actual discharge."

In addition, the final rule: (1) requires that applicants request a pre-filing meeting with the certifying authority 30 days prior to submitting a certification request; (2) requires that applicants submit a certification request to a certifying authority to initiate action under §401, and that the date of the receipt of this request begins the statutory clock for the certifying authority to act; (3) limits the statutory clock to a maximum of one year; (4) provides the certifying authority the ability to either grant certification, grant certification with conditions, deny certification, or waive its opportunity to provide a certification; (5) focuses the use of §401 on addressing water quality impacts from potential or actual discharges from federal projects; (6) requires EPA to notify neighboring jurisdictions if they may be affected by a proposed discharge; (7) reserves enforcement to the federal agency issuing the federal permit or license, though it allows the certifying agency to inspect the facility prior to operations to determine whether discharge will violate the certification; (8) does not allow modifications after the certification is issued; and (9) includes general required licensing information.

Notably, the final rule omitted language from the proposed rule that would have required federal agencies to review and determine whether certifications, conditions, and denials are "within the scope of certification." The final rule will become effective 60 days after the date of publication in the *Federal Register*.

LITIGATION/WATER QUALITY
WA/WOTUS

On June 1, a group of 23 states including Alaska, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming filed a motion to intervene as defendants in *California et al. v. Wheeler et al.* (U.S. District Court, Northern California, #20-cv-03005). The lawsuit, filed by thirteen states, including California, New Mexico, Oregon and Washington, challenges the Navigable Waters Protection Rule (see WSW #2104).

The intervening States assert that sovereign lands and waters within state borders are potentially subject to federal jurisdiction and that the ability to "regulate and protect intrastate waters is an important element of state sovereignty." They add that "the scope of the term 'waters of the United States' does not just set federal jurisdiction over waters within the State; it sets the scope of the States' responsibilities under the [Clean Water Act (CWA)]." In addition, the intervening States "…believe the 2020 Rule strikes a reasonable balance between the roles of the federal regulators and the States in protecting land and water resources…and view [it] as a substantial improvement over the prior rule."

The intervening States assert their voice will have a distinct role in the lawsuit, given their "interests could differ from those of the agencies when it comes to proper interpretation of the CWA's cooperative federalism framework…. The defendants also cannot respond to the plaintiffs' arguments in the same manner that the State Intervenors can: as same-level sovereigns in our

federal form of government. Further, the State Intervenors will be able to explain their own regulatory programs better than other litigants."

The States also requested that if the Court does not allow them to intervene as a "matter of right" that they be allowed to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), which reads: "On timely motion, the court may permit anyone to intervene who…has a claim or defense with the main action a common question of law or fact."

Also on June 1, a group of fifteen industry trade groups, led by the American Farm Bureau Federation, submitted a motion in this case as Intervenor-Defendants, opposing the plaintiff States' motion to preliminarily enjoin or stay the Navigable Waters Protection Rule. The trade groups assert that: (1) the agencies provided a reasoned explanation for the 2020 rule; (2) the 2020 rule is permissible under the CWA; and (3) the balance of harms precludes issuance of a preliminary injunction.

Specifically, the motion in opposition says: "The 2020 Rule does not violate the [Administrative Procedures Act] because the agencies provided a reasoned explanation of their new policy and their reasons for departing from past regulations…. The agencies' explanation for the rule change was thorough, the 2020 Rule gives effect to the main purposes of the CWA of preventing pollution and preserving the states' primary authority over pollution control, the 2020 Rule provides greater regulatory certainty, and the agencies did not ignore prior inconsistent findings."

The trade groups are "intensely interested in the regulatory definition of WOTUS" due to the nature of their businesses that "often requires determining if property includes waters of the United States that [are] subject to CWA jurisdiction and hence to CWA permitting requirements and the threat of criminal and civil sanctions if activity occurs in WOTUS without a permit." They argue that "the extraordinary relief plaintiffs seek would substantially harm intervenors' members. It would increase the likelihood that their property includes WOTUS, and with that would increase their permitting and compliance costs and risk of violations and reduce their ability to use their land for productive purposes. It would also make it harder for intervenors' members to determine whether their property contains WOTUS by eliminating the bright jurisdictional lines that the 2020 Rule defines."

WATER RESOURCES

Wyoming

Wyoming passed several water-related bills during its 2020 legislative session. HB97 authorized and funded several water development projects, including: nine construction projects (municipal and rural domestic water supply); ten rehabilitation projects (agricultural irrigation, watershed improvement); two cloud seeding projects to enhance winter snowpack; and amendments to projects previously approved, increasing funding and extending deadlines.

HB81 creates a fund for emergency water projects, to be used for repair, replacement, or maintenance of irrigation projects impacted by fires, earthquakes, hurricanes, storms, or other unforeseen disasters.

SF61 authorizes eight reconnaissance (Level I) studies ($1.35M) and three feasibility (Level II) studies ($294,000) for new water development projects, as well as reconnaissance and feasibility studies for rehabilitation projects. The bill also provides $175,000 for the Office of Water Programs (OWP) within the University of Wyoming. The OWP "is charged with identifying research needs of State and Federal agencies regarding Wyoming's water resources and serving as a point of coordination to encourage water-related research activities by the University of Wyoming. The OWP works in conjunction with and reports to the Wyoming Water Development Commission (WWDC) and the Select Water Committee and provides the University's advisor to the Wyoming Water Development Commission." See http://www.uwyo.edu/owp/.

SF22 expands the authority of cities and towns to regulate water systems for supplying water to its inhabitants, to include diverting surface water runoff from the property of its inhabitants and to prescribe and regulate rates for the diversion or management of surface water runoff.

SF60 increases the fee for National Pollutant Discharge Elimination System (NPDES) permits and other permits related to water quality from $100 to $200. The bill includes a fiscal note that permit renewals are on a five-year cycle and the Department of Environmental Quality expects a shortfall in fees generated to cover the actual expenses associated with the program until FY2023.

HB212 codifies the Select Committee on Tribal Relations, which already existed, but was not authorized by statute. Bipartisan members are appointed from the Wyoming Senate and House of Representatives. The Committee is directed to: (i) develop knowledge and expertise regarding tribal services and needs on the Wind River Indian Reservation, including water, infrastructure, land and resources, and various other topics that "…are a concern to the residents on and near the Wind River Indian Reservation as approved by the management council;" (ii) facilitate and foster communication and working relationships among state, tribal, federal, and local entities; and (iii) develop and introduce legislation as necessary.