



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION

Bureau of Land Management

On June 26, President Trump announced his intent to nominate William Perry Pendley to be the Director of the Bureau of Land Management (BLM), currently serving as the BLM's Acting Director and Deputy Director for Policy and Programs. Pendley is from Wyoming, and has degrees in economics and political science and law. He served as a House Interior and Insular Affairs Committee attorney, and as the Department of the Interior Deputy Assistant Secretary for Energy and Minerals. He presided over the Mountain States Legal Foundation for nearly 30 years.

ADMINISTRATION/WATER RESOURCES

WIFIA/Infrastructure

On June 30, the Environmental Protection Agency (EPA), Office of Management and Budget (OMB), and the Department of the Treasury (Treasury) jointly filed a *Federal Register* notice regarding updated criteria for Water Infrastructure Finance and Innovation Act (WIFIA) loans (85 FR 39189).

When Congress passed the Further Consolidated Appropriations Act (H.R. 1865, PL 116-94) in December 2019, the appropriation of \$55M for WIFIA included provisions prohibiting the use of loan funds for federal projects. Congress directed EPA, OMB and Treasury to "jointly develop criteria for project eligibility for direct loans and loan guarantees authorized by the Water Infrastructure Finance and Innovation Act of 2014 that limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of the Federal Credit Reform Act [FRCA] of 1990 and based on the recommendations contained in the 1967 Report of the President's Commission on Budget Concepts; and the Administrator, the Director, and the Secretary, shall, not later than 120 days after the date of enactment of this Act, publish such criteria in the Federal Register." (Division D, Title II, Water Infrastructure Finance and Innovation Program Account).

The notice provides background on how the federal budget is presented on a cash basis (with the exception of FRCA §504), and how federal obligations are

recorded differently based on whether the project or asset in question is federal or non-federal. The notice establishes sixteen screening criteria - addressing the structure, financing, and liabilities of the project - to determine whether an application for a WIFIA loan involves a federal or non-federal project. The criteria will only apply to future WIFIA applications responding to new Notices of Funding Availability (NOFA). "Prospective projects will be evaluated by EPA based on the selection process articulated in each NOFA. EPA will then engage with OMB to review how the criteria in this notice were applied to the potential projects. EPA and OMB must reach preliminary agreement that each of the projects is non-Federal before EPA formally invites such projects to apply for WIFIA financing."

Footnote three makes the following observation: "A project authorized by an Act of Congress to be built by the Army Corps of Engineers or Bureau of Reclamation is ineligible for WIFIA financing. However, a project that may connect to, or be tangentially related to, such a project, may be eligible depending on the factual circumstances (e.g., a project to upgrade a water distribution system that is connected to an Army Corps of Engineers- or Bureau of Reclamation-constructed water source may be eligible for WIFIA financing in some circumstances). Furthermore, a project at a local municipal facility might not be deemed ineligible simply because it was originally built by the Army Corps of Engineers or Bureau of Reclamation. Such questions will need to be resolved on a case-by-case basis."

LITIGATION/WATER QUALITY

Montana and Wyoming v. Washington/CWA § 401/

On June 8, the State of Washington submitted its opposition to Montana and Wyoming's motion for leave to file an original jurisdiction complaint with the U.S. Supreme Court (#22O152). Montana and Wyoming objected to Washington's denial of Clean Water Act §401 certification of the Millennium Bulk Terminal Project on Commerce Clause grounds (WSW #2389). In its motion in opposition, Washington argued that: (1) the §401 certification was denied for reasons other than greenhouse gas emissions; (2) the company seeking to build the project was unable to obtain the necessary lease and county permits, meaning the project could not

be built even if the §401 certification was approved; (3) the issues raised by Montana and Wyoming are already being litigated by the private company in state and federal courts; and (4) millions of tons of Montana and Wyoming coal already pass through Washington for export at west coast ports, and this one §401 certification denial is not protectionist or discriminatory. Washington pointed out that there is a diminishing market for coal and unused coal export capacity along the West Coast.

Washington argued against the characterization of its §401 certification denial as a Commerce Clause violation. “Congress expressly and unambiguously authorized States to deny certification under Section 401 of the Clean Water Act where state water quality standards are not met. Congress also specifically allowed the States to enact and enforce state water quality standards that are more stringent than federal standards. In this case, the State Department of Ecology did just what Congress authorized it to do: it denied certification based in part on Millennium’s failure to demonstrate compliance with state water quality standards, including its failure to submit an adequate wetlands mitigation plan; failure to submit adequate wastewater characterization and treatment data; failure to demonstrate compliance with necessary methods of wastewater treatment; failure to demonstrate compliance with state antidegradation requirements; and failure to provide sufficient information regarding potential toxic discharges to the Columbia River. A denial on these grounds implements the Clean Water Act, and implementation of federal law does not violate the dormant Commerce Clause” (internal citations omitted).

On June 23, Montana and Wyoming filed their reply. They argued that the §401 certification was denied with prejudice, while the other permit and lease issues could still be addressed in other ways. “Montana and Wyoming ask only that Washington evaluate the project without political bias and protectionist motivations, exactly as career staff was prepared to do before the Governor’s office intervened. If this Court so orders, the project can move through the permitting process like any other.”

Montana and Wyoming also argued that the private lawsuits could not address the significant loss of States’ severance taxes and revenue, an issue addressed in other original Supreme Court jurisdiction cases, and pointed out that the availability of West Coast ports in Canada is not “...a legitimate answer to the Commerce Clause violation...” which protects interstate commerce, not intra-country commerce. They said: “Washington’s claim that Montana and Wyoming are not harmed because there is no booming international coal market is simply wrong. As Montana and Wyoming have alleged, they have developed Asian trading partners ready, willing, and able to buy Powder River Basin coal, if only they can get it.”

WATER QUALITY/ADMINISTRATION **EPA/Water Reuse/WestFAST**

On July 8, Jeff Lape, National Program Leader for Water Reuse from the Environmental Protection Agency’s (EPA) Office of Water, presented a WestFAST webinar on the National Water Reuse Action Plan (WRAP). The WRAP is a “grand collaborative effort” amongst federal agencies, states and the water user community to enhance the security, sustainability and resilience of our nation’s water resources. It is hosted as an online platform and comprised of 44 big ideas and actions that together create a holistic framework. It addresses issues related to water reuse, which spans work across both water resources and water quality. The actions belong to eleven strategic themes: integrated watershed planning, policy, science, technology development, water information availability, financial support, research, outreach, workforce development, metrics for success, and international collaboration. Each action item identifies action leaders responsible for ensuring completion, with implementation milestones, outputs and references. It was developed in this way to ensure clear commitments, accountability, and timetables. So far, 28 different action leaders and more than 80 partners are working on 37 of the 44 actions. Of the 256 milestones, 69 have been accomplished since WRAP was launched in February 2020.

In a discussion following the presentation, Lape highlighted how different agencies were embracing WRAP and integrating water reuse into various programs. For example, the U.S. Department of Agriculture’s National Resource Conservation Service recently included water reuse as a key funding opportunity within their Conservation Innovation Grant program. Lape also discussed the importance of state primacy in addressing sustainable water issues and encouraged States to reach out to their regional EPA office as needed for assistance in figuring out site-specific reuse issues. He mentioned that it would be helpful to identify a water reuse point-of-contact within each State to facilitate discussions about WRAP action items and ways to move the practice forward. Roger Gorke, EPA Senior Policy Advisor, Office of Water and WestFAST Liaison, also reiterated that an underlying purpose of the WRAP was to figure out how the federal agencies can work better with States and tribes as partners, and determine how things can be done differently to ensure a secure water future.

To support the implementation of the developed WRAP action items, it is best to reach out to action leaders to learn about the status and next steps. To scope out and develop new action items, share your idea with the WRAP team and begin to compile information. The next suite of action items will be considered this fall. Details can be found at <https://www.epa.gov/waterreuse/water-reuse-action-plan>.

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.