



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS

House Appropriations/Agriculture/EPA/Interior

On July 24, the House Appropriations Committee passed H.R. 7608, which included appropriations for Interior-Environment, Agriculture-Rural Development-Food and Drug Administration, State-Foreign Operations, and Military Construction and Veterans Affairs. Appropriations for the U.S. Department of Agriculture (USDA) totaled \$23.98B in discretionary funding, \$487M above the FY2020 enacted level. Included were \$4.2B for rural development and infrastructure programs, with \$1.45B for rural water and wastewater program loans and \$610M for water and wastewater grants for clean drinking water systems; \$1B for conservation programs, with \$167M for watershed and flood prevention and watershed rehabilitation projects; \$1.84B for farm programs; and \$3.3B for agricultural research, including funding for water quality research and investments in U.S. land-grant colleges and universities. It also included \$1.03B for rural broadband development, a priority issue for the Western Governors' Association.

Interior-Environment appropriations totaled \$36.76B, \$771M above the FY2020 enacted level and \$5.11B over the President's FY2021 budget request. The bill provides the Department of Interior (DOI) \$13.83B in discretionary funding, including \$1.3B for the U.S. Geological Survey (USGS) with \$84.3M provided for satellite operations. The Bureau of Indian Affairs appropriation totaled \$1.6B, with \$128M for water and power infrastructure, farming, and engineering services and \$45.6M for Indian land and water claim settlements.

The Environmental Protection Agency (EPA) appropriation totaled \$9.38B, an increase of \$318M above FY2020 enacted levels and \$2.67B above the President's budget request. The appropriation included \$4.36B for State and Tribal Assistance Grants, with \$1.6B for the Clean Water State Revolving Fund (CWSRF) and \$1.1B for the Drinking Water State Revolving Fund (DWSRF); \$189M for targeted grants to address drinking water contaminants and wastewater treatment for lead, nitrates and other health hazards; \$90M for Brownfields cleanups; and \$90M for Diesel Emissions Reduction (DERA) grants. The bill

appropriated an additional \$13B for emergency infrastructure investments to help spur the economy, including \$6.3B for the CWSRF and \$3.85B for the DWSRF for projects that can commence within 18 months, and \$950M in targeted water infrastructure grants for lead pipe replacement, sewer overflow control and for small and disadvantaged communities, with the remaining balance for the Superfund program (\$1B), Brownfield grants (\$350M) and DERA grants (\$450M). It also permanently rescinds all unobligated balances appropriated to the Water Infrastructure Finance and Innovation (WIFIA) Program Account in fiscal years preceding 2020 and reassigns the total to the current WIFIA Program Account to be used for direct loans and the cost of guaranteed loans for water and wastewater infrastructure projects.

WATER QUALITY/LITIGATION

CWA §401/EPA

On July 14, two separate lawsuits were filed challenging the new Clean Water Act (CWA) §401 Certification rule recently published by EPA (85 FR 42210, WSW #2403). One lawsuit was filed on behalf of the organizations American Rivers, American Whitewater, California Trout and Idaho Rivers United (#20-cv-04636, U.S. District Court for the Northern District of California) and the other on behalf of the Delaware Riverkeeper Network and the Delaware Riverkeeper (#20-cv-03412, U.S. District Court for the Eastern District of Pennsylvania). The lawsuits argue that the new rule is arbitrary and capricious under the Administrative Procedures Act (APA).

American Rivers et al. stated: "...EPA unlawfully narrows the applicability of §401; circumscribes the scope of review of the certifying state or tribe; limits the information on the proposed federal project made available to states, tribes, and the public to inform the certification determination; restricts the conditions the state or tribe may impose to ensure state or tribal laws are met; and empowers the federal licensing or permitting agency to effectively overrule a state or tribal determination of whether such laws are met."

Delaware Riverkeeper et al. stated that EPA "...failed to analyze or even consider the on-the-ground impact the

Certification Rule would have on water quality. This flies directly in the face of the [CWA] objective....” They argue that the new rule is so narrow that it “...renders §401 superfluous because it covers the same regulatory ground as the National Pollutant Discharge Elimination System program in §402.” They also argue that the reasons for promulgating the new rule were based on: (1) a “paucity of data pertaining to how §401 certifications are handled nationwide, instead relying on a few high-profile projects” whose outcomes were unfavorable to the energy industry; (2) “imposes new substantive requirements beyond what is required by the statute to define what constitutes an adequate action on a certification request;” (3) deprives certifying authorities of their jurisdiction to enforce the water quality requirements they put into place; and (4) strips neighboring jurisdictions of protection by making discretionary the previous requirement that the Administrator determine whether a project subject to Section 401 may affect the water quality in a neighboring jurisdiction.

California v. EPA

On July 21, twenty states, including California, Colorado, Nevada, New Mexico, Oregon and Washington, filed a complaint for declaratory and injunctive relief, challenging the CWA §401 Certification Rule (#20-v-04869, *California et al. v. EPA*, Northern California). The complaint alleged APA deficiencies and argued that the new rule “upends fifty years of cooperative federalism by arbitrarily re-writing EPA’s existing water quality certification regulations to unlawfully curtail state authority under the [CWA].”

The complaint outlined three main limitations of concern: (1) limits on the scope of §401 certification review to “impacts from specific, point sources discharges to waters of the United States, thus prohibiting States from conditioning water quality certifications to assure the effects of the project as a whole do not violate water quality standards;” (2) limits on appropriate requirements of state law, citing that “EPA fail[ed] to provide a rational explanation for its complete departure from its longstanding interpretation of §401...[and] failed to consider the interests of states that have developed §401 certification procedures and water quality control programs in reliance on EPA’s prior, longstanding interpretation of §401;” and (3) restrictions on the certification request process, including a list of minimal required information, limiting action to a maximum of one year under any circumstances, prohibiting states from requesting an application resubmission with additional information and prescribing a broad range of circumstances under which states will have their review authority deemed waived.

The complaint argued that the new rule imposes harm on “the sovereign, environmental, economic and proprietary interests of Plaintiff States” and “significantly

impairs Plaintiff States’ abilities to protect the quality of waters [within their borders],” including groundwater that is not federally regulated.

“The final Rule is a radical departure from prior EPA policy and practice regarding §401, drastically curtailing state authority under §401 in a way that is contrary to: (1) the plain language, structure, purpose, and legislative history of the CWA; (2) binding Supreme Court precedent interpreting §401; and (3) EPA’s own guidance on §401, which spans decades and multiple administrations, resulting in significant reliance by the States. Moreover, the Rule unlawfully limits States’ §401 authority.”

WATER RESOURCES/ENERGY Klamath Basin/Dam Removal/FERC

On July 18, the Federal Energy Regulatory Commission (FERC) approved a partial transfer of the four dams on the Lower Klamath River (known as the Lower Klamath Project) from PacifiCorp to the Klamath River Renewal Corporation (KRRRC), provided that PacifiCorp maintains status as a co-licensee. The transfer of the dams is necessary for KRRRC to begin dam removal, a process that has been in the works since 2016 (see WSW #2396). The FERC ruling changes the nature of the original agreement between the two entities, as full legal transfer of the facilities was one of the key requirements of PacifiCorp and state regulators in order to protect its customers from the removal project’s costs.

The FERC Order (172 FERC 61062) stated: “We recognize that the intent of the parties to the Amended Settlement Agreement was for PacifiCorp to wholly relinquish its interest in the Lower Klamath Project to [KRRRC], with PacifiCorp continuing to provide management and operations services, but having no responsibility or liability as a licensee. While we have yet to address the surrender application, because of the magnitude of the proposed decommissioning, the uncertainties attendant on final design and project execution, and the potential impacts of dam removal on public safety and the environment, we conclude that, should we ultimately approve a surrender and decommissioning plan, it would not be in the public interest for the entire burden of these efforts to rest with the [KRRRC] should we approve the surrender application.... If PacifiCorp and [KRRRC] accept their status of co-licensees, we will deem the surrender application to be jointly filed and will process it accordingly.”

The order also cites concerns of potential unanticipated cost overruns, lack of KRRRC’s experience in hydropower dam operation and dam removal, and PacifiCorp’s resources and experience in operating and removing a major project.

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.