



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS/WATER RESOURCES **Texas/Border Water Issues/Rio Grande**

On October 22, Governor Greg Abbott announced an agreement had been reached with Mexico to fulfill its obligations to Texas under the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, which was signed on February 3, 1944. The 1944 Water Treaty obligates Mexico to deliver to the United States 1,750,000 acre-feet (af) of water over five years (about 350,000 af/yr), but for the cycle that ended on October 24, Mexico owed about 105,000 af (down from 418,829 af at the end of July). However, after Governor Abbott appealed to Secretary of State Mike Pompeo for help, following months of discussion, the US/Mexico Boundary Water Commission adopted Minute No. 235 on October 21. Under the Minute, Mexico will meet its Treaty obligations by transferring water to the United States at Amistad and Falcon International Reservoirs. U.S. Commissioner Jane Harkins noted that, in light of Mexico's actions, the United States, for humanitarian reasons, is willing to negotiate terms for potential temporary use of U.S. water if Mexico needs the water for municipal, but not agricultural uses downstream from Amistad Dam. Mexico would subsequently provide the United States with an equal amount of Mexican water as described in the agreement (<https://ibwc.gov/Files/Minutes/Min325.pdf>).

"This agreement helps ensure that water obligations will be met before the end of this cycle, providing a much-needed resource to communities in the region," said Governor Abbott. "We would like to thank Gov. Abbott for his support and quick response in bringing this very important issue for Texans along the Rio Grande to the U.S. Secretary of State's attention," said Emily Lindley, Commissioner, Texas Commission on Environmental Quality (TCEQ). "Texans in the Rio Grande Valley rely on the water that is guaranteed in this treaty to grow crops, provide food, operate municipalities, and to guarantee businesses can continue operations.... Fulfilling the current 5-year cycle without a deficit is imperative for U.S. water users along the Rio Grande. I am pleased that we were able to come to an agreement that enables Texans to receive the water they are guaranteed under the terms of the treaty."

ADMINISTRATION/WATER RESOURCES **USDA/EQIP**

On October 26, the U.S. Department of Agriculture (USDA) released the final rule for Natural Resources Conservation Service's (NRCS) Environmental Quality Incentives Program (EQIP) (85 FR 67637). The press release notes that: "NRCS provides producers with financial resources and one-on-one help to plan and implement conservation practices through EQIP. Popular EQIP practices include cover crops, nutrient management, forest stand improvement, prescribed grazing, irrigation efficiency improvement, and water quality improvement practices. Implementing conservation practices can lead to cleaner water and air, healthier soil, and better wildlife habitat while improving agricultural operations." The 2018 Farm Bill "created incentive contracts" lasting up to ten years "which address up to three priority resource concerns within targeted watersheds and other high priority landscapes." It also "enabled increased payments for priority practices, through which NRCS can designate up to 10 practices in each state to receive higher rates."

The changes were made for consistency with the 2018 Farm Bill and took public comments into consideration. The following changes were incorporated into the final rule: (1) the purpose statement was revised to expressly include addressing resource concerns for organic producers, avoiding the need for more regulatory programs, and helping producers transition from the Conservation Reserve Program (CRP); (2) the ranking protocols were revised to expressly include consideration of an applicant's status under CRP; (3) the definition for a "comprehensive nutrient management plan" was adjusted to ensure only applicable natural resources need to be considered; (4) the requirements were modified for an EQIP plan of operations that includes the progressive implementation of a comprehensive nutrient management plan; (5) language in the national priorities was modified to specifically include soil health and weather and drought resilience in the national priorities; (6) the purpose and scope of Conservation Innovation Grants were modified to expressly include field research; and (7) reduced matching requirements were authorized for Conservation Innovation Grant projects aimed at helping historically underserved producers.

Additionally, the following updates in the interim EQIP rule (published December 2019) were retained: (1) creating incentive contracts and payments for practices to better support locally led conservation needs; (2) requiring NRCS to offer an advance payment option for historically underserved producers; (3) raising the payment cap for producers participating in the Organic Initiative to \$140,000 for contracts entered into for FY2019-2023 (previously, it was \$20,000 per year and \$80,000 for any six-year period); and (4) expanding the Conservation Innovation Grant program, which is funded through EQIP, to include opportunities for On-Farm Conservation Innovation Trials and Soil Health Demonstration Trials. See <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/newsroom/releases/?cid=NRCSEPRD1678017>.

LITIGATION/WATER QUALITY EPA/WOTUS

On October 5, the U.S. District Court for the Northern District of California ruled that the Environmental Protection Agency (EPA) misapplied 9th Circuit law in making a jurisdictional determination (JD) that a tidal salt marsh converted into a salt plant was not waters of the United States (WOTUS) (*San Francisco Baykeeper et al. v. EPA et al.*, #19-cv-05941). The tidal lands have been used to harvest salt for centuries, and EPA's JD was "based on a supposed transformation of the site into 'fast land' prior to the passage of the Clean Water Act (CWA) in 1972." Fast land was defined in other cases as former tidal marshland that has been filled and converted into improved solid upland that supports streets and houses. While the salt plant has constructed improvements, the court noted that most of the salt ponds have not been filled and converted into solid land.

The construction of dams, levees, and pipelines in the 1940s and 1950s occurred under "three major permits from the War Department and the Army Corps of Engineers." Current permits pertain to improvement and maintenance activities, although the salt plant owner has "reserve[d] its right to argue that the type and location of work described in the permits and work plans remained outside Corps jurisdiction and/or remained exempt from Section 404 permit requirements." In 2012 the salt plant owner requested that EPA make a JD. The determination was made in March 2019, when the 2015 WOTUS Rule still applied to the decision. The court noted that the water at the salt plant is still hydrologically connected to the navigable waters of the San Francisco Bay by tide gates and intake pipes.

The court vacated the JD and remanded it back to EPA to "evaluate the extent of nexus between the salt ponds and the Bay and the extent to which they significantly affect the chemical, physical, and biological

integrity of the Bay and take into account all other factors required by law..."

The court held: "The agency anchored its jurisdictional determination solely in its finding that the salt ponds had been transformed into fast land prior to passage of the CWA. Since this finding was contrary to law, it must be set aside under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). A good argument could be made that the very salt ponds at issue remain subject to the CWA because that issue was squarely decided by our court of appeals in [*Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978)] and, that, for the sake of stability and reliance on matters already adjudicated, judgment should be entered now in favor of plaintiffs as a matter of law. This order also recognizes, however, that since *Leslie Salt*, the Supreme Court has issued three major decisions on CWA jurisdiction. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). These decisions had nothing to do with fast land, but instead concerned the necessary nexus between the sites there in question and the navigable waters. The better course is to request the agency, on remand, to evaluate the salt ponds in light of these holdings of the United States Supreme Court, our circuit law and, of course, in light of any applicable interpretative regulations."

MEETINGS

Internet of Water Webinar/Metadata

The WSWC Water Data Exchange (WaDE) Program Manager and Data Analyst are presenting at the Internet of Water (IoW) "*That's So Meta!*" webinar on November 17-18. The webinar's objective is to increase participants' understanding of water-related metadata and the application of water metadata tools. This workshop will offer a short introduction to metadata and why metadata are important, followed by an in-depth conversation and hands-on exercises on water-related metadata. This workshop is a partnership among the IoW, WaDE, and the Consortium of Universities for the Advancement of Hydrologic Sciences, Inc. (CUAHSI). For further information on the webinars, including how to register, see <https://internetofwater.org/events/thats-so-metadata-technical-workshop/>.

PEOPLE

Colorado Governor Jared Polis has appointed **Jeremy Neustifter**, Policy Advisor, Water Quality Control Commission, Department of Public Health and Environment, to the WSWC as an alternate member. He replaces former WSWC member **Patrick Pfaltzgraff**, who accepted a new position with a law firm in Arizona.

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.