



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION

White House/Tribal Nations Summit

On November 30 and December 1, the White House and Department of the Interior (DOI) hosted a Tribal Nations Summit to foster Nation-to-Nation relationships. In his remarks, President Biden talked about a \$13B investment in Indian country infrastructure, including clean drinking water and wastewater systems, restoring waterways blocked by roads and highways impacting salmon migration, and repairing two dams in South Dakota.

The summit featured several announcements and policy initiatives supporting tribal communities. A new Presidential Memorandum established uniform standards for tribal consultation across all federal agencies, and subsequently, nine agencies will implement new or updated tribal consultation policies. A new best-practices report was released to integrate tribal treaty and reserved rights into agency decision-making processes. Various agencies will establish new Tribal Advisory Committees, advisors, liaisons, coordinators, and other positions to improve engagement with tribes.

Following a U.S. Department of Agriculture (USDA) and DOI Joint Secretarial Order 3403 in 2021, the two agencies signed more than 20 new co-stewardship agreements with tribes to increase tribal participation in the management and stewardship of federal lands and waters. At the Summit, the Department of Commerce formally signed the Joint Secretarial Order, ensuring that the National Oceanic and Atmospheric Administration (NOAA) will support co-stewardship goals in the management of waters, fisheries, and other resources of significance to tribes.

New rulemakings at EPA include revisions to the Water Quality Standards (WQS) regulation to ensure that States evaluate tribal reserved rights to aquatic resources in developing new and revised WQS. EPA is also developing a proposed rule to establish baseline WQS for Indian reservations that have not yet obtained CWA §518 Treatment as States authority. The Army Corps of Engineers will establish new agency procedures to consider a wider range of tribal and public benefits of

water resource development projects, including social and environmental benefits beyond the current focus on achieving national economic development benefits. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/>

ADMINISTRATION/WATER QUALITY

EPA/Infrastructure Projects

On November 18, the EPA and the U.S. Section of the International Boundary and Water Commission (USIBWC), released the Final Programmatic Environmental Impact Statement (Final PEIS) for a set of proposed projects that comprise the Comprehensive Infrastructure Solution to mitigate transborder water pollution. The infrastructure projects aim to reduce flows from Tijuana, Mexico that carry untreated wastewater, trash, and sediments into the U.S. impacting public health especially coastal areas in southern San Diego County, California.

The project (summarized in the PEIS Alternative 2) includes the following specific components and are projected to reduce the number of days of transborder flow by 76% and eliminate raw sewage discharges into the Pacific Ocean through: (1) expansion of the South Bay International Wastewater Treatment Plant capacity from 25 million gallons per day (MGD) to 60 MGD; (2) new infrastructure to divert additional flows from the Tijuana River; (3) construction of a new advanced primary treatment plant in San Diego to treat up to 60 MGD of river flows; (4) one or more trash booms in the Tijuana River to capture solid waste; (5) rehabilitation of sewer pipelines in Tijuana; (6) construction of a new wastewater treatment plant in Mexico at San Antonio de los Buenos to address untreated wastewater discharges at that site that currently contaminate U.S. beaches, depending on the direction of marine currents; and (7) infrastructure for effluent reuse in Mexico.

The EPA and USIBWC public comment period closes on December 19. Further information is available at: <https://www.epa.gov/newsreleases/environmental-stu>

dy-released-projects-mitigate-san-diego-tijuana-transborder-water.

ADMINISTRATION/WATER QUALITY

EPA/Water Quality Standards

On November 28, EPA Administrator Michael Regan submitted a proposed rule to the *Federal Register*, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights. The proposed rule would revise provisions of the WQS regulations (40 CFR part 131) under the authority of Clean Water Act (CWA) §303c, “to establish a transparent and consistent process by which states and EPA can set WQS that protect applicable reserved rights.”

The proposed rule offered the following definition of reserved rights: “For the purposes of this proposed rulemaking, ‘tribal reserved rights’ means any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law. Tribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of Winters rights.” The proposed rule also notes that this definition would not apply to unratified treaties, reserved rights that have been abrogated or superseded, or legal agreements and compacts between tribes and states that are not federal law and not within the scope of this rulemaking. “Examples of tribal reserved rights as defined in this proposed rulemaking include but are not limited to the rights to fish; gather aquatic plants; and to hunt for aquatic-dependent animals. EPA requests comment on whether there are additional types of tribal reserved rights that it should consider.”

The Fact Sheet on EPA’s website offered the following summary: “EPA’s proposed regulation clarifies that where tribal reserved rights exist, states must account for those rights in revising their designated uses, criteria, and/or antidegradation provisions. The proposal further specifies that WQS must protect unsuppressed use of any reserved resources. Determining the unsuppressed level requires considering past, present, and future use of the resource, along with what is currently reasonably to achieve for the waterbody. The proposal would also require that WQS protect the health of the tribal members exercising reserved rights to at least the same risk level at which the general population of the state would otherwise be protected. EPA anticipates the primary application of this provision to be in determining the appropriate cancer risk level when deriving criteria to protect human health. EPA is proposing that state WQS submissions must include documentation of the state’s efforts to obtain information about the existence of any applicable tribal reserved

rights, their current and past use, scope, and nature, as well as the level of water quality that protects those rights. Additionally, the rule would require states to re-evaluate whether WQS need to be revised to protect any applicable tribal reserved rights at each triennial WQS review. Finally, the proposed rule would require EPA to initiate tribal consultation with the right holders when reviewing WQS submissions to determine whether state WQS protect applicable reserved rights.”

Notably, the proposed rule said: “EPA is not proposing to require WQS to be established for every waterbody subject to a reserved right to protect the waterbody condition that existed at the time a reserved right was established.... [T]he regulation is intended to result in WQS that protect reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody.”

The 90-day comment period will begin when the Federal Register publishes the proposed rule, and comments may be submitted at www.regulations.gov on Docket # EPA-HQ-OW-2021-0791. EPA will host two public hearings on January 24 and 31, for interested parties to provide oral comments on the proposed rule. Registration and further information on the proposed rule is available at <https://www.epa.gov/wqs-tech/revising-federal-water-quality-standards-regulations-protect-tribal-reserved-rights>.

EPA/WOTUS

On November 28, InsideEPA reported on the WSWC work exploring regional approaches for WOTUS rules and their implementation. The article included links to the technical whitepaper that was developed following a summer workshop series that involved representatives from multiple state and federal agencies. The article also referenced the recent meeting between the Office of Management and Budget (OMB) officials and WSWC members. For a copy of the article, contact the WSWC.

MEETINGS

The 2022 Winter Meeting of the Western Governors’ Association (WGA) will be held in Phoenix, Arizona on December 6-7, under the direction of WGA Chair Colorado Governor Jared Polis. Interior Secretary Deb Haaland will talk about state-federal collaborations and leveraging funds from the Infrastructure Investment and Jobs Act and the Inflation Reduction Act. John Leshy will discuss his book, *Our Common Ground: A History of America’s Public Lands*. There will be a roundtable exploring water desalination and reuse, given two decades of drought and depleted reservoirs, restrictions on water usage, and concerns about future hydropower production. See westgov.org.

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