



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **EPA/CWA §404(g) Assumption**

On December 10, Environmental Protection Agency (EPA) Administrator Michael Regan signed the final rule on Clean Water Act (CWA) Section 404 Tribal and State Program Regulation. The rule primarily revises 40 CFR part 233 to clarify the procedures and requirements for states and authorized Treatment-as-States (TAS) tribes to assume CWA Section 404 permitting authority, and is EPA's first comprehensive revisions to the regulation since 1988. The rule will go into effect 30 days after publication in the *Federal Register*.

Several western states commented on the proposed rule (WSW #2579). One concern States raised was the need for clarification regarding which waters may be assumed by States and Tribes, or a list of waters retained by the Corps, and the timing for the Corps to prepare that list and provide it to a State. In response to these comments, EPA provided a list of documents that would show "concrete and substantial steps toward assumption" that could accompany a State's pre-application request for a list of retained waters, including: (1) state legislation authorizing funding to prepare for assumption, or authorizing assumption; (2) a directive from a Governor; (3) a letter from the head of a state agency; or (4) a letter awarding a grant or other funding to investigate and pursue assumption.

The Corps would still have 180 days to provide the list of retained waters to the State, but the Corps must provide confirmation within 30 days that it will provide the list. If the Corps fails to meet either the 30-day or the 180-day deadline, the State may develop the retained waters description. EPA noted that since States "typically spend at least several years preparing their submissions" the 180-day timeframe would not impede state efforts.

The preamble (IV.B.2) provided parameters for the list: "The most recently published list of [Rivers and Harbors Act (RHA)] section 10 waters (see 33 CFR 329.16) would be the starting point for the retained waters description." Waters of the United States would be added "if they are known to be presently used or susceptible to use in their natural condition or by

reasonable improvement as a means to transport interstate or foreign commerce." This would exclude waters that were historically used to transport commerce but are no longer susceptible to such use. "The description would also describe retained wetlands. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands 'adjacent' to retained waters, as that term is defined in 40 CFR 120.2(c). A Tribe or State may choose to negotiate an agreement with the Corps to establish an administrative boundary through jurisdictional adjacent wetlands, landward of which the Tribe or State would assume administrative authority. If the Tribe or State and the Corps reach agreement on such a boundary, EPA may consider it when it is submitted with the program submission." The Corps would also continue to administer the program in Indian country (40 CFR 233.1(b)). The final rule changes the scope of what is considered a substantial revision to the list of retained waters. It also modifies the program description requirements to provide that the state program "will encompass all waters of the United States not retained by the Corps at all times."

Some States expressed concerns about proposed rule provisions regarding the heightened standards for judicial review and rights of appeal for permits issued by States. EPA retained the provision that States must provide for judicial review of state-issued permits or permit denials, and expanded the requirement to include Tribes. EPA removed the "examples of unacceptable barriers to judicial review" to avoid either being under-inclusive or intruding into state court operations and procedures.

Several States also expressed concerns about allowing Tribes without TAS authority to recommend state permit conditions to protect off-reservation treaty resources. EPA noted that: (1) allowing potentially-affected States and Tribes the opportunity to comment is a statutory requirement and is not limited to TAS Tribes with approved water quality standards (33 U.S.C. 1344(h)(1)(E)); (2) CWA Section 518 authorizes EPA to treat eligible federally-recognized Tribes in a similar manner as a State for purposes of implementing and managing various environmental functions, and of

the 574 federally-recognized tribes, over 285 have been granted TAS status for one or more CWA provisions (Preamble IV.F); (3) the rule does not specify the off-reservation rights, merely facilitates tribal notifications to EPA of their rights or interests for EPA to assess; and (4) as States or TAS Tribes seek 404 assumption, EPA will work with potentially-affected Tribes to identify EPA's trust responsibilities.

EPA retained the provision allowing an optional delay to the default 30-day effective date of program assumption once approved, up to 120 days upon request and a sufficient explanation of the need for additional time. "Several States that have contemplated assumption of the section 404 program indicated that a transition period between EPA's approval decision and the date of transfer of responsibility from the Corps to the State would enable them to more effectively prepare for the transition, including securing and allocating the necessary resources to successfully implement the assumed section 404 permitting program if their program is approved."

CONGRESS/WATER QUALITY **Abandoned Mines/Good Samaritan**

On December 10, the House passed the Good Samaritan Remediation of Abandoned Hardrock Mines Act (S.2781) by voice vote, without amendments. The bill, introduced by Senators Martin Heinrich (D-NM) and Jim Risch (R-ID), offers limited legal protections under the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for Good Samaritan groups willing to cleanup abandoned mines (WSW #2577, #2591, #2628.) The Senate unanimously passed the legislation in July.

Representative Celeste Maloy (R-UT), who introduced the House companion bill (H.R. 7779) said before the vote: "[S.2781] is the right step forward. There is a clear irony here that the [CWA] and CERCLA are unintentionally standing in the way of sensible low-risk mine cleanup.... The strong bipartisan nature of this bill can't be overstated...." Representative Mary Peltola (D-AK) said: "This bipartisan bill...would address the significant environmental challenge posed by tens of thousands of abandoned hardrock mine sites by creating a pathway for Good Samaritan entities to receive the legal assurances they need to move ahead with remediation of historic mine pollution."

Representative Susie Lee (D-NV), who co-sponsored H.R. 7779, said: "Abandoned hardrock mines are scattered across the American West, including in my own district, which is home to some of the oldest mines in Nevada. Their pollutants are poisoning our waters, threatening tribal lands and resources, and creating

hazardous landscapes that have injured and killed Americans. A range of highly qualified partners...stand ready to work with the federal government to clean up these sites with today's bipartisan, bicameral legislation that will safely and responsibly cut through red tape currently preventing these good Samaritans from doing so. It has taken 25 years of consensus building to craft this version of the Good Sam bill now on the floor. That's a quarter century of collaboration that has earned this version of the bill the support of every member of the U.S. Senate, our Transportation and Infrastructure Committee, a bipartisan coalition of lawmakers, myself included, who have led the charge to get this legislation across the finish line in this Congress, and stakeholders from the Nature Conservancy, to the National Congress of American Indians, and the Western Governors' Association.... This Good Sam bill is a good bill. The [CWA] and [CERCLA] both aim to restore and maintain the integrity of America's waters, and this bill moves us closer to that objective."

Salinity Control Fix Act

On December 10, the Colorado River Salinity Control Fix Act (H.R.7872), introduced by Representative John Curtis (R-UT), passed the Senate by unanimous vote without amendment. The bill would address excessive salt in the Colorado River by bolstering funding for existing salinity control programs (WSW #2610). The bill passed the House on December 3.

Curtis said: "The Colorado River is the lifeblood of the West, and its health is crucial for our communities, our economy, and our environment. The Colorado River Salinity Control Fix Act builds on decades of collaborative efforts to reduce salinity levels, which have greatly improved water quality across the Basin. I'm grateful for the bipartisan support for this legislation and for the dedicated work of my colleagues, including Senators Mitt Romney (R-UT) and Michael Bennet (D-CO), the Seven Basin States, and all the partners who have contributed to this important step forward for water users across the West."

Bennet, who introduced identical legislation in the Senate (S. 2514), said: "The Colorado River is a precious resource for communities in Colorado and the industries that drive our economy. As our population grows and as we face a hotter and drier future, the federal government needs to step up and support state and local leaders to better protect our water supply. I'm glad we were able to pass this bill that will support ongoing efforts to keep water from the Colorado River safe for communities, farmers and ranchers, and water users throughout the entire Basin." S. 2514 had ten bipartisan cosponsors, and similarly H.R. 7872 had ten bipartisan cosponsors.

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