Issue #2651
March 7, 2025

Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION
Nominations

On February 12, President Trump nominated Jessica Kramer as the Environmental Protection Agency's (EPA) Assistant Administrator for Water. Kramer previously served as the Deputy Secretary of Regulator Programs for the Florida Department of Environmental Protection and as water counsel for Senate Environment and Public Works Chair Shelly Moore Capito (R-WV) when the Infrastructure Investment and Jobs Act (IIJA) was enacted. Other nominees include: (1) Brian Nesvik, former Wyoming Game and Fish Department Director, as Director of the U.S. Fish and Wildlife Service; (2) Kathleen Sgamma, President of the Western Energy Alliance, as Director of the Bureau of Land Management; (3) Neil Jacobs, former acting administrator, as administrator of the National Oceanic and Atmospheric Administration (NOAA); and (4) Ned Mamula, former critical minerals director at the Department of Energy, as director of the U.S. Geological Survey. Secretary of Agriculture Brooke Rollins has appointed Tom Schultz, former Vice President of Resources and Government Affairs at Idaho Forest Group, as the 21st Chief of the U.S. Forest Service.

ADMINISTRATION/WATER RESOURCES
Army Corps/WRDA 2025

On February 27, the Army Corps of Engineers opened a 60-day public comment period for the public to give input on the implementation of any provision of the Thomas R. Carper Water Resources Development Act (WRDA 2024) which was signed into law in January (Special Report #2640). The public comment period will end on April 28. The Corps will hold two stakeholder sessions in March and one in April. See https://www.regulations.gov/document/COE-2024-0004-0001 (Docket ID No. COE-2024-0004).

CONGRESS/ORGANIZATIONS
House/Western Governors

On February 26, the House Natural Resources Subcommittee on Water, Wildlife and Fisheries held a hearing to evaluate the implementation of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). Subcommittee Chair Harriet Hageman (R-WY) said: "I'm committed to working with my colleagues to reform the [ESA] and [MMPA] and the flawed regulations stemming from these laws.... It's time to restore Congressional oversight over U.S. Fish and Wildlife Service and empower local and state officials to conduct their own species management." Subcommittee Ranking Member Val Hoyle (D-OR) emphasized the ESA's popularity and effectiveness in preventing the extinction of over 99% of listed species, with 84% of Americans supporting it. "The [ESA] is already clear. Congress' stated purpose of the ESA is to stop extinction and recover species.... The ESA sets up a straightforward, science based process for this – list, protect, recover, then de-list."

The Western Governors' Association submitted WGA Policy Resolution 2024-03, Species Conservation and the Endangered Species Act, to be included in the hearing record. Executive Director Jack Waldorf added: "As the Subcommittee contemplates potential amendments to the [ESA], the Governors' resolution offers a blueprint for common sense, bipartisan priorities for the protection of threatened and endangered species. I hope you will consider the Governors of our western states and territories as resources to help inform this discussion, and they stand ready to assist you in this important work." https://westgov.org/letters/

WaterSMART/Tribes

On March 5, WSWC wrote a letter to House Natural Resources Committee leadership expressing support for the WaterSMART Access for Tribes Act (H.R. 635). The bill would authorize the Secretary of Interior to reduce or waive non-federal cost sharing requirements for WaterSMART grants for eligible tribes (WSW #2645). The letter reads: "The WSWC supports measures to address the ongoing lack of access to reliable, clean drinking water for federally recognized Indian tribes, which has a significant adverse public health impact.... The trust responsibility of the federal government to ensure the survival and welfare of federally recognized Indian tribes includes the provision of safe and reliable drinking water infrastructure. The WSWC supports

providing access to reliable, clean drinking water through water infrastructure, coupled with developing the technical, managerial, and financial capacity to operate and maintain that infrastructure, is an essential component of the federal trust responsibility to Native Americans, where applicable."

LITIGATION/WATER QUALITY
***San Francisco v. EPA*/NPDES**

On March 4, the U.S. Supreme Court issued a 5-4 decision in *San Francisco v. EPA* (#23-753) in favor of San Francisco, holding that §1311(b)(1)(C) of the Clean Water Act (CWA) does not authorize EPA to issue National Pollutant Discharge Elimination System (NPDES) permit requirements that condition compliance on the quality of receiving waters. While the Court acknowledged CWA authority for "narrative criteria," it rejected what it called "end-result" provisions in a permit.

At issue were two EPA permits prohibiting discharges from combined wastewater-stormwater systems that "contribute to a violation of any applicable water quality standard" or "create pollution, contamination, or nuisance" under California law. The Ninth Circuit denied the city's petition for review, holding that language in the CWA §1311(b)(1)(C) authorizes EPA to impose "any more stringent limitation[s]" to ensure applicable water quality standards (Special Report #2631).

The Supreme Court disagreed and reversed the Ninth Circuit's judgment. The Court held that such "end-result provisions" misinterpreted statutory language, conflicted with legislative history, and undermined the permit shield provision. The Court clarified that "end-result provisions" are "permit provisions that do not spell out what a permittee must do or refrain from doing but instead make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants." On the contrary, the CWA authorizes the EPA to set rules that a permittee must follow in order to achieve a desired result.

The Court rejected San Francisco's argument that all "limitations" imposed under §1311 must qualify as effluent limitations. The CWA suggests that Congress intended to authorize limitations beyond just effluent limitations. The Court reasoned San Francisco's argument would invalidate widely accepted non-numerical permit conditions that the City itself relies on: "As noted earlier, it is common for permits to contain 'narrative' provisions requiring permittees to do such things as following certain 'best practices.' These provisions do not directly restrict the 'quantities, rates, or concentration' of pollutants that a permittee may discharge, and therefore they do not fit easily within the definition of an 'effluent limitation'.... Our decision does not rule out 'narrative limitations.' 'Limitations,' as we understand the term…. are permitted under §1311(b)(1)(C), and limitations may be expressed in both numerical and non-numerical (i.e., 'narrative') form."

The Court compared "end-result provisions" to the "backward-looking" abatement action mechanism of the 1948 Federal Water Pollution Control Act (WPCA), saying Congress had intentionally jettisoned the system in favor of the NPDES program. "The pre-1972 Water Pollution Control Act (WPCA) contained a provision that allowed direct enforcement against a polluter if the quality of the water into which the polluter discharges pollutants failed to meet water quality standards…. But Congress deliberately omitted such provisions when overhauling the law in 1972. Instead, the CWA imposes 'direct restrictions' on polluters rather than working backward from pollution to assign responsibility…. The Government's interpretation would undo what Congress plainly sought to achieve when it scrapped the WPCA's backward-looking approach."

Finally, the Court examined the broader statutory scheme, highlighting that "end-result" requirements would undermine the "permit shield" provision under §1342(k). "Because of the harsh penalties for violating the terms of a permit, the permit shield is invaluable. Because of it, a discharger that complies with all permit conditions can rest assured that it will not be penalized. But the benefit of this provision would be eviscerated if the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard. A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences. It is therefore exceedingly hard to reconcile the Government's interpretation of §1311(b)(1)(C) with the permit shield." The Court also pointed out "the absence of any provision dealing with the problem that arises when more than one permittee discharges into a body of water with substandard water quality."

The Court concluded that determining the necessary steps to meet water quality standards was EPA's responsibility. "Resorting to such [end-result] requirements is not necessary to protect water quality. The EPA may itself determine what a facility should do to protect water quality, and the Agency has ample tools to obtain whatever information it needs to make that determination. If the EPA does its work, our holding should have no adverse effect on water quality."
