



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

Chair - Julie Cunningham; Executive Director - Tony Willardson; Editor - Michelle Bushman

CONGRESS

Clean Water Act/Permitting

On June 25, the House Transportation and Infrastructure Committee approved in a 34-30 vote the Promoting Efficient Review for Modern Infrastructure Today (PERMIT) Act (H.R. 3898), introduced by Water Resources and Environment Subcommittee Chairman Mike Collins (R-GA) and Committee Chairman Sam Graves (R-MO). The bill incorporates 13 bills previously introduced including the Water Quality Standards Attainability Act (H.R. 3984), Water Quality Criteria Development and Transparency Act (H.R. 3888), Water Quality Technology Availability Act (H.R. 3900), Improving Water Quality Certifications and American Energy Infrastructure Act (H.R. 3928), Clarifying Federal General Permits Act (H.R. 3899), Confidence in Clean Water Permits Act (H.R. 3897), Forest Protection and Wildland Firefighter Safety Act of 2025 (H.R. 3300), Reducing Regulatory Burdens Act (H.R. 3824), Reducing Permitting Uncertainty Act (H.R. 3935), Judicial Review Timeline Clarity Act (H.R. 3905), Restoring Federalism in Clean Water Act Permitting Act (H.R. 3902), and Jurisdictional Determination Backlog Reduction Act (H.R. 3901). For summaries of these bills see WSW #2668.

The combined legislation also adds a provision extending the maximum length of National Pollutant Discharge Elimination System (NPDES) terms from five years to ten and exempts agricultural stormwater discharge from NPDES permitting requirements. The bill defines agricultural land as (1) land on which an agricultural input (such as manure and other crop nutrients, crop protection, or seed) is applied; (2) land on which animals (including fish and shellfish), crops (including fruit and nut trees), crop residue, plants, seed, or vegetation are present for purposes of farming or ranching; and (3) land that is immediately adjacent and functionally related to such lands that are necessary to support agricultural production, soil conservation, flood control, or water quality.

Chairman Graves said: "This bill will unleash America's power to build by cutting red tape, streamlining permitting processes, and providing regulatory certainty, all while continuing to protect clean water. The legislation

does not overhaul or roll back the Clean Water Act; it instead makes targeted reforms to the law informed by on-the-ground feedback."

LITIGATION/WATER QUALITY

NID v. FERC/CWA §401 Authority

On July 10, 2025, the D.C. Circuit Court of Appeals issued an unpublished opinion in *Nevada Irrigation District v. Federal Energy Regulatory Commission (FERC)* (#23-1342), upholding the FERC decision that the California State Water Resources Control Board (SWRCB) had not waived its CWA §401 certification authority, and rejecting the licensee's claim that the Board engaged in a coordinated withdrawal-and-submission-scheme in the relicensing process of two hydroelectric projects in California.

Beginning in 2011, the licensee repeatedly withdrew and resubmitted its water quality certification applications for the Yuba-Bear and Drum-Spaulding Projects. The Board repeatedly replied indicating that each application resubmission had initiated a new one-year deadline. In 2019, the D.C. Circuit Court of Appeals issued an opinion in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, holding that, where a State and an applicant agree to repeatedly withdraw and refile the same water quality certification request, the State has waived certification authority. On the same day, the Board denied without prejudice the licensee's requests for water quality certification, stating that the California Environmental Quality Act (CEQA) process and consultation under the Endangered Species Act (ESA) had not been completed. The licensee filed requests with FERC, asking them to determine that the Board had waived its certification authority for the relicensing of the projects.

In the case of the Yuba-Bear project, FERC initially determined that the exchanges between the Board and licensee established a "coordinated scheme" which resulted in the Board waiving its certification authority. FERC reasoned that, although *Hoopa Valley* had involved a formal contract between the parties to defer certification and delay federal licensing proceedings, "an explicit agreement to withdraw and refile is not necessary" to a finding of waiver. Rather, evidence of a

“functional agreement” or evidence of “the state’s coordination with the licensee” would suffice to show that the State had “fail[ed] or refuse[d] to act” under §401.

The Board appealed the decision to the Ninth Circuit Court, which vacated and remanded the Yuba-Bear order, among others, back to FERC. “We need not decide whether the coordination standard FERC advances is consistent with the text of §401 because we agree with [SWRCB] and the environmental organizations that FERC’s findings of coordination are not supported by substantial evidence in the record. Instead, the evidence shows only that [SWRCB] acquiesced in the Project Applicants’ own decisions to withdraw and resubmit their applications rather than have them denied.... Indeed, for all three projects, it seems that [SWRCB], unlike the Project Applicants, would have had an interest in moving along the environmental-review process.” *SWRCB v. FERC*, 43 F.4d 920 (9th Cir. 2022). Subsequently, for the Drum-Spaulding project, FERC followed the precedent set in *SWRCB v. FERC* and denied the licensee’s petition to hold that the Board waived its certification authority.

On remand in *SWRCB v. FERC*, the licensee submitted a supplemental petition to present a new argument and evidence, which FERC denied. The licensee appealed the denial to the D.C. Circuit Court of Appeals, which denied the licensee’s petition for review and sustained FERC’s decisions for both projects.

In the unsigned decision, the D.C. Circuit Court made the following distinctions: (1) the evidence presented did not suggest the Board directed, requested, or encouraged the withdrawals; (2) FERC correctly characterized the Board’s responses as “routine informational” responses, which do not amount to “coordination”; (3) evidence did not include a written agreement with “express intent of circumventing § 401’s one-year limitations period” as in *Hoopa Valley*; (4) FERC reasonably found the Board had a contrary “interest in moving along the environmental-review process,” as longer delays could mean continued operation under weaker interim environmental protections; (5) the fact that the Board eventually denied the certification requests also undercut the District’s assertions of motive; (6) the common practice of applicants withdrawing and refiling requests in California does not, by itself, indicate the Board coordinated that practice because, as FERC noted, waiver claims are “highly dependent on the facts of the case.”

WATER RESOURCES

Funding/SRFs

On July 20, a coalition of water funding organizations, including the American Water Works

Association, Association of Metropolitan Water Agencies, Clean Water Construction Coalition, Interstate Council on Water Policy, National Association of Clean Water Agencies, National Association of Water Companies, and the WaterReuse Association, wrote a letter to House and Senate Appropriations Committees leadership, urging them to provide meaningful funding for several water infrastructure priorities in the FY 2026 Interior, Environment, and Related Agencies Appropriations legislation.

“Our organizations recommend continued and sufficient funding for the Clean Water and Drinking Water State Revolving Funds, the Water Infrastructure Finance and Innovation Act, as well as the suite of issue-specific water infrastructure and hydrologic data collection programs of the Department of Interior and EPA, which address such challenges as lead and PFAS issues, water system cybersecurity and resilience, water reuse and efficiency, and more. Such funding is necessary to support economic growth, protect public health, and adequately tackle the increasing development of artificial intelligence, data centers, and other water-reliant sectors. Funding reductions, however, could result in potential disruptions in service for “(these key) industries, costing more than \$287 billion by 2043.”

They noted important areas and programs for the committees to consider including: emerging contaminants, water infrastructure financing, water system resilience and cybersecurity and sustainability, technical assistance, technology innovation, and water reuse.

PEOPLE

Jason Olive, National Fish Habitat Partnership Coordinator, U.S. Fish and Wildlife Service (USFWS), has been selected as the new WSWC and Western States Federal Agency Support Team (WestFAST) Liaison. He will serve a two-year detail, beginning in July, 2025. At USFS Jason leads interagency collaboration across federal departments and supports 20 regional partnerships nationwide. He has successfully coordinated development of a Federal Interagency Operational Plan, led the development of the 2026 National Fish Habitat Action Plan, and secured a Secretarial waiver for state projects in Hawaii. Prior to this role, he served as Fisheries Division Chief for the Arkansas Game and Fish Commission, where he partnered with agencies and NGOs on aquatic conservation, lead the fisheries management team, and represented the Fisheries Division on the agency Leadership Team. We congratulate Jason and look forward to working with him. He will replace Madeline Franklin.

The WESTERN STATES WATER COUNCIL is a government entity 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.