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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/ENVIRONMENT
CWA §404/Endangered Species Act

On May 21, the Environmental Protection Agency (EPA) published a Request for Information (RFI) in the Federal Register (85 FR 30953), soliciting views on whether a Clean Water Act (CWA) §404(h) transfer of the dredge and fill permitting program to an eligible state or tribe requires an Endangered Species Act (ESA) §7 consultation. EPA has historically taken the position that a CWA §404(h) transfer is not a discretionary action, and therefore is not subject to an ESA §7 consultation. Currently, only the States of Michigan and New Jersey have delegated CWA §404 authority. Recently, Florida has investigated the possibility of assuming §404 authority, and last year the Florida Department of Environmental Protection (FDEP) requested ESA §7 consultation as part of that process.

In the past, EPA has relied on the U.S. Supreme Court decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The RFI notes that the Court "held that because the transfer of CWA National Pollutant Discharge Elimination System (NPDES) permitting authority to a state 'is not discretionary, but rather is mandated once a State has met the criteria set forth in section 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger section 7(a)(2)'s consultation and no-jeopardy requirements.'" Similar to the NPDES permitting authority, assumption of the dredge and fill permitting program under CWA §404(h)(2) is mandatory, not discretionary, such that if the state or tribe meets all of the program requirements, the EPA Administrator "shall approve" the request for transfer.

In 2010, the Environmental Council of States (ECOS) and the Association of State Wetland Managers (ASWM) "sent a letter to EPA asking whether the EPA must conduct a section 7 consultation prior to approving or disapproving a state or tribe's section 404 program request." EPA's response was that, despite the differences between CWA §402 and §404, the transfer of both programs to states and tribes is non-discretionary, and therefore no ESA consultation is required. The letter also noted other ESA safeguards included in the §404 assumption of authority process, including prohibitions on or EPA review of permits that jeopardize or affect endangered or threatened species or their habitat.

The FDEP expressed a different perspective of EPA's discretion. "In contrast to CWA section 402(b), FDEP noted that CWA sections 404(g)(2) and (3) expressly require that, when a state or tribe applies for assumption, the EPA must provide 'the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service' an opportunity to comment on a state application for assumption of the CWA section 404 program."

EPA's RFI seeks input on "whether to reconsider its position that it lacks discretionary involvement or control within the meaning for 50 CFR 402.03…." The agency is interested in comments "as to the legal viability" and "programmatic implications" of FDEP's interpretation, "including its implications for existing state CWA section 404 programs and for permit applicants and permittees." Comments are due at www.regulations.gov by July 6, under docket EPA-HQ-OW-OW-2020-0008.

ADMINISTRATION/WATER QUALITY
EPA/Nutrients/Harmful Algal Blooms

On May 22, the EPA published a draft of *Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs in the Conterminous United States: Information Supporting the Development of Numeric Nutrient Criteria* (85 FR 31184). This update to the national criteria recommendations will be the first in nearly 20 years. Once finalized, these recommendations will replace those published in 2000 and 2001 for lakes and reservoirs.

The summary of the draft recommendations states: "These draft national criteria recommendations are models for total nitrogen and total phosphorus concentrations in lakes and reservoirs to protect three different designated uses – aquatic life, recreation, and drinking water source protection – from the adverse effects of nutrient pollution." The recommendations are based on stressor-response models that link nutrient pollution to the responses associated with the protection of designated uses. Specifically, the recommendations aim to reduce the incidence of harmful algal blooms that can occur as a result of nutrient pollution.

In a press release, EPA Assistant Administrator for Water David Ross said: "Under the Trump Administration, we are working with states, tribes and farmers from across the country to develop a wide range of tools that will reduce excess nutrients in America's water bodies....This flexible approach is based on the latest scientific information and will help States and Tribes protect lakes and reservoirs from harmful algal blooms."

EPA is accepting comments on the draft recommendations until July 21, with a specific request for scientific input. See www.regulations.gov, docket number EPA-HQ-OW-2019-0675.

EPA/PFAS

On May 18, EPA released a final rule to add 172 per- and polyfluoroalkyl substances (PFAS) to the Emergency Planning and Community Right-to-Know Act (EPCRA) Section 313 reportable toxic chemicals list (also known as the Toxics Release Inventory (TRI)) and established a 100-pound reporting threshold. This action is pursuant to the National Defense Authorization Act (NDAA) signed December 20, 2019 (PL 116-92) and will be effective immediately once published in the *Federal Register* (see WSW #2379). Per TRI reporting requirements, a facility should use readily available data collected pursuant to other provisions of law, or reasonable estimates of the amounts when those data are not available. The PFAS additions were effective January 1, 2020, and reporting for the 2020 calendar year will be due to EPA on July 1, 2021.

The NDAA also provided a framework for PFAS to automatically be added to the TRI list on January 1 of any year following specific EPA actions, and instructed EPA to consider adding other PFAS to the TRI list that were not considered in this rulemaking. EPA previously solicited information on these PFAS (84 FR 66369) but no additional action has yet been taken.

EPA Administrator Andrew Wheeler said: "EPA continues to prioritize and make progress to protect the health and well-being of communities across the country that are working to address PFAS. The inclusion of these 172 PFAS on the TRI list will provide EPA and the public with important information on these emerging chemicals of concern."

LITIGATION/WATER QUALITY
CWA/WOTUS

On March 22, the State of Colorado filed a lawsuit against EPA and the Corps in the U.S. District for Colorado (#20-cv-1461), requesting that the 2020 Navigable Waters Protection Rule be vacated for violations of the Clean Water Act, the Administrative Procedures Act, and the National Environmental Policy Act (NEPA). The complaint notes that Colorado's headwaters supply water to nineteen states and Mexico, and that – according to the USGS National Hydrography Dataset – at least 68% of Colorado's waters are intermittent or ephemeral. "The 2020 Rule shifts the burden onto Colorado to protect federally excluded wetlands and waters…."

Colorado defines its "waters of the state" more broadly than "waters of the United States" (WOTUS), and prohibits the discharge of pollutants into state waters without a state or federal permit. However, "Colorado does not have its own program to permit discharges of fill to state waters. Instead, Colorado relies on the Corps to operate the Section 404 program that regulates the dredging and filling of waters within the State and requires compensatory mitigation for unavoidable impacts, and relies on federal oversight and enforcement of this program."

In particular, with many of Colorado's wetlands excluded from federal jurisdiction, the Corps will issue fewer CWA §404 permits limiting dredging or filling in wetlands. "Without such federal permits, the Colorado Water Quality Control Act treats discharges of fill the same as any other discharges of pollutants – these discharges cannot result in exceedances of water quality standards or compromise the classified uses of those waters. Without a permit, such discharges would be illegal under the Colorado Water Quality Control Act. Establishing its own permitting program for fill activities to address the sudden decrease in federal jurisdiction under the 2020 Rule would require that the State of Colorado amend the Colorado Water Quality Control Act, promulgate new regulations, and appropriate millions of dollars for new permitting and mitigation programs – the outcomes of which are far from certain and would likely take years to complete. Until Colorado does this, fill activities cannot occur in waters that are not subject to federal jurisdiction. The narrowed definition of waterbodies subject to federal Clean Water Act jurisdiction creates a '404 permitting gap' where certain development and infrastructure activities will not be able to take place." This could have enormous negative consequences on Colorado's infrastructure, economy, businesses, and local governments.

The complaint alleges that the absence of mitigation requirements and protective best management practices required under Corps §404 permits and Colorado §401 certifications will result in adverse water quality impacts where illegal filling of excluded wetlands and tributaries takes place. Additionally, the absence of state and tribal protections for non-federal upstream waters that enter Colorado from New Mexico, Oklahoma, Utah, Wyoming, or the Southern Ute Tribe means that those waters are also likely to be filled in or polluted without controls, further degrading Colorado's water quality.