



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

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

ADMINISTRATION/WATER RESOURCES

USGS/Streamflows

The U.S. Geological Survey (USGS) recently published a new report called "Flow Modification in the Nation's Streams and Rivers," which summarized a national assessment of flowing waters conducted by the USGS National Water-Quality Assessment (NAWQA) Project. The assessment is based on the integration, modeling, and synthesis of monitoring data collected by USGS and the U.S. Environmental Protection Agency (EPA) at more than 7,000 streams and rivers across the conterminous United States from 1980 to 2014.

First, at a national scale, human management of land and water resources has modified patterns of streamflow along an estimated 1.2 million miles – more than one-third – of the Nation's streams and rivers. The modifications documented include changes to streamflow magnitude, duration, frequency, annual variability, and daily flow fluctuation. Specifically: (1) the magnitude of low flows was higher than natural conditions would suggest, and the magnitude of high flows was lower than natural; (2) the duration of low flows was shorter than natural at most streams assessed, but regional differences existed in the duration of high flows; (3) low flows were more frequent and high flows were less frequent than they would be naturally; (4) the natural year-to-year variability in flow has decreased in streams and rivers; and (5) most assessed streams had greater fluctuations in daily flow than natural conditions.

Second, data from 600 sites with minimal influence from land and water management over the last 60 years show a change of 50% or more in streamflows at two-thirds of streamgage sites. Third, all types of streamflow modification were associated with a higher probability of impaired stream health. Finally, the report highlighted strategies for mitigating or avoiding impacts, including scientific understanding of ecosystems.
<https://pubs.usgs.gov/circ/1461/cir1461.pdf>

CONGRESS/WATER QUALITY

COVID-19

On May 15, the U.S. House of Representatives narrowly passed the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), the

fourth relief bill associated with the COVID-19 pandemic. The bill was originally introduced by House Democratic leadership. Within the bill are provisions that authorize potable water delivery to individuals and communities, including tribes and low-income communities.

Specifically, the bill authorizes \$30M to provide and deliver potable water to tribal communities through the Bureau of Indian Affairs (\$20M) and the Department of Health and Human Services Indian Health Service (\$10M). The bill also authorizes \$1.5B to carry out the Low Income Household Drinking Water and Wastewater Assistance Program "to assist low income households, particularly those with the lowest incomes, that pay a high proportion of household income for drinking water and wastewater services, by providing funds to owners or operators of public water systems or treatment works to reduce rates charged to such households for such services." These funds would be delivered to, administered, and distributed by each state.

In addition, state housing finance authorities would be given at least \$250M per state to help homeowners with mortgage payments and associated costs, including utility payments. \$100B in short to medium-term assistance is provided to renters through the Emergency Solutions Grants program. There are also provisions that protect consumers who cannot pay their utility bills (including water) and prevent water shut-offs and disconnections for nonpayment. It requires that any reconnections to public water systems "are conducted in a manner that minimizes risk to the health of individuals receiving such service." The bill can be found at: <https://docs.house.gov/billsthisweek/20200511/BILLS-116hr6800ih.pdf>.

Navigable Waters Protection Rule/WOTUS

On May 8, House Transportation and Infrastructure Chairman Peter DeFazio (D-OR), and Representative Grace Napolitano (D-CA), introduced the Clean Water for All Act to prohibit the implementation of the new Navigable Waters Protection Rule, which goes into effect June 21. The legislation states that the Trump Administration's "Dirty Water Rule" will eliminate "...Clean Water Act (CWA) protections for countless rivers, streams, lakes, and wetlands that have been protected by the [CWA] for decades under regulations

established by the Corps of Engineers under the Reagan administration in 1986, and implemented by Republican and Democratic administrations alike.”

DeFazio said, “By removing critical protections at the behest of industry, Trump’s Dirty Water Rule will make streams and waterways more vulnerable to pollution, which is devastating for the 117 million Americans who rely on these waterways for drinking water....”

The bill specifically would prevent the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) from implementing the new rule, and no later than two years from the enactment of the act requires the agencies to promulgate a new rule-making defining “waters of the United States” (WOTUS). It requires the process include a public process lasting at least 180 days, and directs the WOTUS definition include “categories of water bodies that affect the physical, chemical, or biological integrity of traditionally navigable and interstate waters, based on the best available scientific evidence.” It prevents: “(A) degradation of surface water quality; (B) increased contaminant levels in drinking water sources; (C) increased flooding-related risks to human life or property; and (D) disproportionate adverse impacts on minority or low-income populations.”

LITIGATION/WATER QUALITY

CWA/WOTUS

On May 1, the States of California, New Mexico, Oregon, and Washington, together with thirteen other States, filed a complaint (U.S. District Court, Northern California, #20-cv-3005) against EPA and the Corps challenging the 2020 Navigable Waters Protection Rule defining WOTUS. The States claim violations of the Administrative Procedures Act (APA) including: (1) the interpretation of WOTUS is impermissible; (2) the rule disregards scientific evidence, prior factual findings, and policy and practice; and (3) the rule fails to consider statutory objectives and the impact on water quality. The States request that the court vacate the rule as “arbitrary, capricious, and not in accordance with law.”

The state complaint alleges: “The 2020 Rule discards the ‘significant nexus’ standard for [WOTUS] set forth in Justice Kennedy’s concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) and endorsed by a majority of the Justices on the Court.... [The Rule] improperly relies on and implements the plurality opinion in *Rapanos* which did not command a majority of the Court’s Justices and is not consistent with the [CWA’s] text, structure and purpose. Contrary to the Act’s objective ‘to restore and maintain the chemical, physical and biological integrity of the Nation’s waters,’ 33 U.S.C. § 1251(a), the [Rule] excludes many waters, including ephemeral streams and many wetlands, from the scope of [WOTUS] and thereby deprives these waters of CWA protections.”

“By eliminating CWA protections for all ephemeral streams, many wetlands, and other waters...the [Rule] also contradicts...the scientific evidence and the Agencies’ prior factual findings.... The [Rule] harms the States and Cities by limiting the waters subject to the Act’s protections, thereby exposing the States’ and Cities’ waters to pollution entering from jurisdictions that are less protective of their waters; putting the States and Cities at a competitive disadvantage by incentivizing industry to relocate to upstream states with less stringent water quality protections; disrupting the States’ and Cities’ regulatory programs; and threatening injury to the States’ and Cities’ sovereign and proprietary interests.”

Another case, filed in the U.S. District Court of Maryland, *Chesapeake Bay Foundation v. Wheeler* (#20-cv-1064) similarly alleges APA violations. It also alleges that Congress did not intend for the agencies to rely on States to fill in the gaps in clean water protection. “The Final Rule expressly relies on states to protect waters removed from the [WOTUS] definition. The Agencies determined that interstate waters without surface water connection to traditionally navigable waters, ephemeral streams, and non-adjacent wetlands ‘are more appropriately regulated by States and Tribes pursuant to their own authorities.’”

The Chesapeake Bay complaint says: “The Agencies assume that states will implement programs to protect waters in the wake of a federal retreat from [CWA] protections. Even though the Agencies conclude that it is more appropriate for states to regulate these waters, the Agencies were unable to ‘predict what changes [in state regulations] might result from the final rule.’ The Agencies therefore relied on a factor Congress did not intend for them to consider and did not meaningfully evaluate whether that reliance was misplaced.... When passing the [CWA], Congress created a comprehensive approach to water quality protection that directly rejected the prior tactic of relying on state actions without strong federal support.... The [CWA] directs the Agencies to set the agenda for water protection and delegates states with the authority to implement day-to-day programs including the various permitting programs. Congress did not intend for vast numbers of waters to be left solely to the states to protect under varying state laws, as the Act granted broad federal authority to define [WOTUS] and the scope of jurisdiction under the [CWA].”

Other cases previously filed to challenge the agencies’ multi-step process to define WOTUS for different reasons have since amended their complaints to incorporate the Navigable Water Rule: *Washington Cattlemen’s Association v. EPA* (U.S. District Court Western Washington, #19-cv-569); *Oregon Cattlemen’s Association v. EPA* (U.S. District Court Oregon, #19-cv-564); and *Murray v. Wheeler* (U.S. District Court, Northern New York, #19-cv-1498).