



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION

Corps of Engineers/Clean Water Act - Section 401

On August 7, the U.S. Army Corps of Engineers (Corps) released its guidance on "Timeframes for Clean Water Act (CWA) Section 401 Water Quality Certifications and Clarification of Waiver Responsibility." The guidance applies to general and individual permits under CWA §404, Rivers and Harbors Act §9 and §10, and the Marine Protect, Research, and Sanctuaries Act §103.

The guidance notes that, although the CWA provides a maximum time of one year for a state agency to make a §401 certification, the default period of time under the Corps' regulations is 60 days, unless a shorter or longer time is deemed appropriate on a case by case basis. Any additional time granted for a §401 certification "should be the minimum amount of time necessary for the certifying agency to act.... If the certifying agency's request for additional time to act is not received before the 60-day period (or other reasonable time period established for the action) ends..." the §401 certification is waived.

District engineers are directed to re-evaluate any agreements with state agencies to establish new agreements consistent with this guidance, particularly where the certifying agency's processing time frame exceeds 60 days. However, the guidance also allows for some flexibility for districts to develop agreements with alternative timeframes for issuing or waiving §401 certifications where the state agencies have their own regulations in place establishing application review timelines. Discretionary extensions may be granted for complex or atypical projects, large magnitude discharges, and public hearing requirements. However, extensions should not be granted for backlogs, under staffing, or public notice requirements.

The guidance establishes formal communication procedures between the Corps, the applicant, and the state agency, clarifying that the applicant needs to be in contact with the state agency. It also clarifies that the lead federal agency determines the timeframe for when a §401 certification waiver occurs.

Corps of Engineers/Missouri River

On August 6, the Corps Northwestern Division said that July runoff in the Upper Missouri River Basin was 213% of average, due to heavy rainfall above Sioux City, SD. Gavins Point Dam releases are currently 70,000 cubic feet per second, nearly twice the average. John Remus, Chief of the Corps' Missouri River Basin Water Management Division, said: "We will maintain Gavins Point releases at this rate to continue evacuating water from the Missouri River mainstem reservoir system." Reservoir releases will continue to be above average for several months to ensure evacuation of all stored flood waters.

The Corps' news release says: "The 2019 upper basin runoff forecast is 52.9 MAF. If realized, this runoff total will be the second highest runoff in 121 years of record-keeping, only surpassed by 2011 (61.0 MAF) and exceeding 49.0 MAF observed in 1997. Total upper basin runoff through July 31 was 45.3 MAF, exceeding the total upper basin runoff in 2018 of 42.1 MAF."

Weekly water management calls have included states, tribes, congressional delegations, local governments, and levee and drainage districts. The stakeholder calls have included "...a briefing from the National Weather Service's Missouri Basin River Forecast Center, an update on the Missouri River mainstem reservoir system operations, and updates on the ongoing and planned flood recovery efforts in the Omaha and Kansas City Districts." See <https://www.nwd.usace.army.mil/Media/News-Releases/Article/1927366/system-storage-has-peaked-gavins-point-releases-to-remain-at-high-levels-into-f/>.

EPA/Clean Water Act - Section 404 Veto

On July 30, the U.S. Environmental Protection Agency (EPA) announced that it has withdrawn the 2014 preemptive Clean Water Act (CWA) §404 veto of the proposed Pebble Mine disposal site, which was issued before the Corps application was complete. Since then, a lawsuit settlement, new guidance from the EPA Administrator, and extensive information contained in the permit application have caused the veto to be outdated.

The veto was based on three hypothetical scenarios for the mine site, none of which matched the actual permit application submitted to the Corps in 2017.

EPA's news release notes that the withdrawal of the veto "...restores the well-understood permit review process." The Corps has reached some preliminary conclusions that conflict with the conclusions in the veto. Additionally, "...other processes are available and better suited for EPA to resolve issues with the Corps as the record develops; specifically, the well-understood elevation process under CWA section 404(q) and the NEPA process. EPA believes these processes should be exhausted prior to any decision by EPA, based upon all information that has and will be developed, to exercise its 404(c) authority."

EPA General Counsel Matthew Z. Leopold said: "Region 10's decision restores the proper process for 404(c) determinations, eliminating a preemptive veto of a hypothetical mine and focusing EPA's environmental review on an actual project before the Agency." Region 10 Administrator Chris Hladick said: "After today's action EPA will focus on the permit review process for the Pebble Mine project. The agency has worked closely with the Army Corps to engage with stakeholders and the public on this issue, which has resulted in an expansive public record, including specific information about the proposed mining project that did not exist in 2014." See <https://www.epa.gov/newsreleases>.

CONGRESS

EPA/CWA 404 Veto

On July 31, Senator Cindy Hyde-Smith (R-MS) introduced the Flood Reduction, Wildlife Habitat, and Water Quality Improvement Act (S. 2410). A press release says the bill "...would reform section 404 of the Clean Water Act to prohibit EPA from vetoing a Corps of Engineers flood control project specifically authorized by Congress. If enacted, the legislation would also immediately nullify any prior veto determinations made by EPA that resulted in severe flooding and damage to life and property."

One particular EPA veto in 2008 halted work on the Yazoos Backwater Area Pumps Project, a key part of a flood control project in the Lower Mississippi Valley that Congress authorized in 1941. She noted that hundreds of families' homes, agriculture, and basic infrastructure have been under floodwaters in the Valley since January. See <https://www.hydesmith.senate.gov/hyde-smith-wick-er-introduce-bill-rein-clean-water-act-veto-authority>.

WATER RESOURCES/WATER RIGHTS

Kansas/Quivera National Wildlife Refuge

On July 30, the Kansas Department of Water Resources (KDWR) rejected a Local Enhanced

Management Area (LEMA) plan to reduce water use and address declining streamflows. Groundwater pumping in the basin has impaired the water rights of the Quivera National Wildlife Refuge in central Kansas. Quivera spent decades of voluntary efforts trying to resolve its water right impairment concerns, then filed a formal complaint with KDWR in 2013. KDWR issued its impairment investigation report in 2015. Groundwater Management District 5 (GMD5) has been developing the LEMA plan since 2016, including a water augmentation project and the retirement of water rights in the high-impact area. Several technical and legal problems hinder the LEMA plan from meeting the core KDWR requirements to resolve the impairment.

David Barfield, KDWR Chief Engineer, said: "As matters currently stand, I can no longer delay action in the basin. It is now necessary for me to exercise my duties as Chief Engineer and take action to protect the senior water right owned by the U.S. Fish and Wildlife Service. Therefore, I intend to directly administer the basin by administrative orders issued on or around September 1, 2019, and to become effective on January 1, 2020. Our intention is to provide time for local irrigators to plan for the 2020 growing season."

The water use reductions will be based on the seniority of water rights and their historic use, with older rights getting larger allocations, and average reductions will be less than 15%. KDWR will work with local water users to develop a Water Conservation Area for the flexible administration of water rights, including multi-year allocations and the ability to move allocations between water rights.

Barfield added, "While we have so far been unable to reach an agreement on how best to solve the impairment through this LEMA process, should GMD5 develop a viable LEMA plan in the future, we hope that it might be put in place and allow the administration orders to be lifted." See <http://kda-dwr-updates.org/%ef%bb%bfchief-engineers-action-on-gmd-5-lema-plan-and-path-forward-on-quivera-impairment/>.

PEOPLE

WestFAST Member **Andrew Hautzinger**, Chief, Division of Water Resources, Southwest Region, has announced his retirement from the U.S. Fish and Wildlife Service (FWS) after 23 years of service. He was responsible for the day to day management and supervision of six hydrologists with responsibilities for field-based gaging and data acquisition and database maintenance and other support services for 47 refuges and 8 fish hatcheries across four Southwest States, including Arizona, New Mexico, Oklahoma and Texas. He represented FWS as a WestFAST member for a number of years. We appreciate his service and our association, and wish him the best of luck in retirement.

The WESTERN STATES WATER COUNCIL is an organization 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.