



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESSIONAL UPDATE/WATER QUALITY **America's Commitment to Clean Water Act**

On June 20, Rep. James Oberstar (D-MN) released letters from the heads of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, saying that his America's Commitment to Clean Water Act (H.R. 5088) would restore, but not expand, the scope of the Clean Water Act (CWA) that existed prior to the U.S. Supreme Court's rulings in *SWANCC* and *Rapanos*. The letters respond to requests by Oberstar for a technical evaluation of the bill, which would strike the term "navigable" in the CWA and replace it with the term "waters of the United States." The bill remains stalled in the Subcommittee on Water Resources and Environment. Oberstar released the letters to address concerns that it would expand the CWA.

Assistant Secretary of the Army Jo Ellen Darcy, wrote on April 4: "These decisions have unquestionably narrowed the scope of the [CWA] and have created a regulatory environment which is becoming more unpredictable and less efficient.... The Army holds the view that H.R. 5088, as drafted, would generally restore the historic scope of the [CWA] jurisdiction as it existed prior to *SWANCC* and *Rapanos/Carabell*." Similarly, EPA Administrator Lisa Jackson wrote on April 30: "Unfortunately, Supreme Court decisions have weakened the ability of EPA to protect the Nation's waters by narrowing the scope of water bodies to which the CWA applies and creating hurdles to exercising the Agency's jurisdiction under the Act.... After reviewing the legislation, it is EPA's view that [H.R. 5088] would restore the historic scope of CWA jurisdiction as it existed prior to the Supreme Court decisions without expanding it.... If this legislation is enacted, EPA would interpret and implement the CWA as we did prior to the Supreme Court decisions." To read the letters, see: <http://transportation.house.gov/News/PRArticle.aspx?NewsID=1278>. (WSW #1855 and #1875)

Hydraulic Fracturing

This week, Senate Majority Leader Harry Reid (D-NV) introduced the Clean Energy Jobs and Oil Company Accountability Act of 2010 (S. 3663). Title XLIII of the bill would require oil and gas companies that use hydraulic fracturing, a process that injects water, sand, and chemicals underground to break apart rock

and extract trapped hydrocarbons, to disclose the chemicals "...used in each hydraulic fracturing process (identified by well location and number)." Drillers would not be required to provide "proprietary chemical formulas" unless the identification of the formulas is necessary for treating a medical emergency. Unlike pending bills (S. 1215 and H.R. 2766) by Senator Bob Casey (D-PA) and Rep. Diana DeGette (D-CO), the provision would not regulate hydraulic fracturing under the Safe Drinking Water Act. The EPA is also conducting a study of the relationship between hydraulic fracturing and drinking water, and the Western Governors' Association has adopted a resolution urging EPA to collaborate with stakeholders and leverage existing state knowledge and policies in carrying out this study. (WSW #1888 and 1880)

CONGRESSIONAL UPDATE/WATER RESOURCES **Water Resources Development Act of 2010**

On July 29, the House Transportation and Infrastructure Committee reported the Water Resources Development Act of 2010 (H.R. 5892), which Committee Chair James Oberstar (D-MN) introduced earlier in the week. The bill would authorize \$6B in flood protection, navigation, environmental and other water projects and studies undertaken by the Corps. Provisions of note include: (1) technical changes to the Corps' programmatic authorities to clarify its authority to provide credits towards the non-federal portion of a project or study, increase the transparency of independent reviews, and improve the effectiveness of mitigation that addresses environmental impacts from Corps projects; (2) authorize the Corps to work with local communities in the assessment and evaluation of local flood control structures, including levees; (3) authorize over 75 small water resources projects; (4) authorize over 160 studies for potential future water resources projects; and (5) increase opportunities for the Corps to facilitate watershed planning and carry out watershed and river basin assessments. See: <http://transportation.house.gov>.

LITIGATION/WATER RESOURCES **Tarrant v. Herrmann/Oklahoma/Texas**

___The U.S. District Court for the Western District of Oklahoma has rejected another attempt by the Tarrant Regional Water District in Texas to appropriate water in Oklahoma. In 2007, Tarrant sued the Oklahoma Water

Resources Board (OWRB) over a series of Oklahoma laws that limit out-of-state water sales, which it claimed to be in violation of the Commerce and Supremacy clauses of the U.S. Constitution. Tarrant also filed applications with OWRB to appropriate water from Red River tributaries located in Oklahoma. In November 2009, the court ruled that the water was subject to the Red River Compact and was therefore shielded from a Commerce Clause challenge. Tarrant subsequently amended its complaint to allege that it had made arrangements to purchase Oklahoma water that is not subject to the Compact, including a 10-year option to purchase ground water in Stephens County and a memorandum of understanding (MOU) with the Apache Tribe of Oklahoma, which states that Tarrant would "work cooperatively" with the Tribe to further quantify its reserved water rights and develop terms for the purchase or lease of certain amounts of its water.

In a July 16th ruling, the court held that neither of Tarrant's allegations made out a case or controversy. First, the court found that the statutes in question do not apply to groundwater and therefore do not obstruct Tarrant from appropriating the water subject to its 10-year option. Second, the court held that the MOU with the Apache Tribe was not an enforceable agreement and reasoned that "...it is very much an open question whether the Tribe has any water rights at all which are pertinent to plaintiff's needs and, if so, what those rights are.... And even if, at some point, the Apache Tribe is able to establish that it in fact has reserved water rights as a general matter, its obligation to pursue any further arrangement with plaintiff is made expressly contingent on the 'quantification' of those rights.... The court concludes such a scenario is far too speculative and subject to too many contingencies to set out a controversy ripe for judicial resolution." Acting OWRB Executive Director and Oklahoma Secretary of Environment J.D. Strong, also a WSWC member, praised the decision. "This important ruling once again strengthens Oklahoma's right to control the use of its most precious natural resource and enables the state to meet its interstate water obligations." Please see: <http://www.oag.state.ok.us/>. (WSW #1864)

WATER RESOURCES **Corps of Engineers/ NRCS**

The Corps and the Natural Resources Conservation Service (NRCS) have issued a joint memorandum regarding the agencies' Partnership Agreement, which seeks to improve their management of water and related natural resources under their respective authorities and missions. The memorandum states that a major effort in 2010 will be the researching and drafting of a "Partnership Handbook" that will include sections on ecosystem restoration, flood risk management, natural disaster recovery, permitting under Section 404 of the CWA, and Integrated Water

Resources Management. It will also include information on relevant programs and authorities for the NRCS and Corps, the role of non-federal partners, the intersection between the agencies' regulatory programs, and other information. The agencies will work on the handbook throughout the summer and will update the Partnership Agreement they signed in July 2005. Contact the WSWC offices for a copy of the memorandum. (WSW #1888)

WATER RIGHTS **Crow Settlement/Montana**

Last month, the Department of Interior sent a letter to House and Senate Committee leaders with jurisdiction over Indian water rights settlements in support of changes to legislation (H.R. 3563) that would authorize the Crow settlement in Montana. The letter comes after 2½ months of negotiations between the Crow Tribe and Interior to address a number of Administration concerns, including the total federal cost of the settlement, which the modified legislation would reduce from over \$600M to no more than \$460M. The letter also said negotiations began after the Tribe offered to work with Interior to address concerns and agreed to put all issues on the table, including the settlement's overall cost.

The modified legislation would further address Administration concerns that the settlement would benefit non-Indians but contained no cost-sharing provisions other than a \$20M contribution from Montana. In particular, it would include language that would provide for further discussions with Montana and other non-Indian beneficiaries to determine whether a non-federal contribution to a municipal, rural and industrial water system proposed in the settlement would be appropriate based on the extent of utilization of the proposed system by non-federal parties, if any. Other changes are intended to ensure that allottees have "appropriate access" to settlement benefits and make technical corrections to reflect the intent of certain provisions.

"In conclusion, the Administration believes that most of its major policy objections to H.R. 3563 are satisfactorily addressed in the revised legislation, and that the revisions substantially improve the bill," the letter said. "Given the budget challenges facing the Federal Government over the next several years, the revised bill would allow the Government to fulfill the Federal trust responsibility while also acting with proper regard for fiscal limitations that exist both now and in the foreseeable future. We are pleased to express our support for H.R. 3563 as the Tribe proposes to amend it.... The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the President's program." Counselor to the Deputy Secretary Letty Belin and Bureau of Reclamation Commissioner Mike Connor signed the letter. Please contact the WSWC offices for a copy. (WSW #1888 and #1845)

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.