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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESSIONAL UPDATE/WATER QUALITY
Clean Water Restoration Act

On April 2, Senator Russ Feingold (D-WI) re-introduced the Clean Water Restoration Act (S. 787) in the 111th Congress, along with 23 co-sponsors, including Senate Environment and Public Works Committee Chair, Barbara Boxer (D-CA). The legislation is a response to the Supreme Court's *Rapanos* and *SWANCC* decisions, which Senator Feingold and others believe created confusion regarding Clean Water Act (CWA) jurisdiction and removed CWA protection for a number of water bodies.

A press release from Senator Feingold states that the bill would again protect water bodies that "were long protected" under the CWA. To accomplish this goal, the bill would redefine the term "waters of the United States," used to determine CWA jurisdiction, as "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

The bill states that one of its purposes is to "provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution, " and that "the intent of Congress with enactment of this Act is to restore geographical jurisdiction of the [CWA] to that which was in existence before the dates of the [*Rapanos and SWANCC*] decisions." Of note, the findings section of the bill identifies "those features that were treated as [waters of the U.S.] pursuant to the regulations of the EPA and the [Army Corps of Engineers] in existence before the dates of the [Supreme Court] decisions." It also states that "'ground waters' are treated separately from 'waters of the United States' for the purposes of the [CWA] and are not considered 'waters of the United States' under this Act." Further, the bill maintains that "Congress supports the policy in effect under section 101(g) of the [CWA]," which states in part that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by the [CWA]." For a copy of the bill visit: http://www.thomas.gov/cgi-bin/query/z?c111:S.787.

Feingold explained the need for the bill, saying, "If you support the [CWA], you must also support this bill to restore the protections of the [CWA]. Every day Congress fails to reaffirm [CWA] protections, more and more waters are stripped of their protections, jeopardizing the drinking water of millions of Americans, as well as our nation's wildlife habitats, recreational pursuits, agricultural and industrial uses, and public health." Both Feingold and Rep. James Oberstar (D-MN) introduced legislation in the 110th Congress that aimed to implement pre-*Rapanos* CWA jurisdiction but failed to pass (WSW #1815 and #1771). To read Senator Feingold's full statement, please visit: http://feingold.senate.gov/record.cfm?id=311001.

ENVIRONMENT
California/Endangered Species Act/Longfin Smelt

On April 8, the U.S. Fish and Wildlife Service (FWS) announced that the San Francisco Bay-Delta population of the longfin smelt does not meet the legal criteria for protection under the Endangered Species Act (ESA) as a species subpopulation. The determination was in response to a petition seeking protection for the longfin as a distinct population segment (DPS) under the ESA. According to a FWS press release, in order for the longfin to be classified as a DPS, it must be "markedly separated from other populations" of the species. However, FWS determined that the Bay-Delta longfin population did not satisfy this requirement because: (1) some longfin migrate into the Pacific Ocean and can travel up the coast to breed with other longfin further north; (2) coastal currents disperse longfin to northern estuaries; (3) "a conclusion could not be reached" that the Bay-Delta population is "markedly separate" than other populations; and (4) the single genetic study used was too limited to show that the Bay-Delta population is genetically different from other longfin. Despite its determination, FWS will seek additional information for a broader assessment that could lead to future action.

Longfin tolerate wide ranges of salinity and are cousins of the delta smelt, which is already protected under the ESA and are found exclusively in the Delta. Pumps in the Delta provide water to over 16M people in the San Joaquin Valley and southern California. The

petition which prompted FWS' determination had argued that reduced outflow from the Delta had contributed to the longfin's decline. State and federal court decisions aimed at protecting the smelt have already curtailed the amount of water that can be diverted from the Delta, and a decision by FWS to list the longfin could have reducing pumping. To read FWS' press release, visit http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=86D5FA27-998B-5D3D-4F605AB46CC8AA3C. (WSW #1820, #1808, #1806).

Endangered Species Act

On April 9, twenty environmental and conservation groups, including the Sierra Club, the Izaak Walton League, and the Union of Concerned Scientists, sent a letter to the Departments of the Interior and Commerce, asking them to rescind Endangered Species Act (ESA) consultation rules that the agencies finalized in the last months of the Bush administration. Under new authority from Congress, the agencies have until May 9 to rescind the rules without public hearing or comment. The letter asks the agencies to fast-track the process, and urges the agencies "...to restore integrity to the [ESA] and withdraw the Bush administration's ideologically driven regulations." The regulations in question modified the ESA process in which federal agencies consult with FWS biologists to determine if their actions are likely to harm endangered species. These rules have been criticized as weakening the ESA by allowing federal agencies to determine for themselves whether consultation is necessary. (WSW #1809, #1805).

LITIGATION/ENERGY

***Entergy v. Riverkeeper*/Cooling Water**

On April 1, the Supreme Court held 6-3 in *Entergy v. Riverkeeper* that Section 316(b) the Clean Water Act (CWA) does not categorically forbid the Environmental Protection Agency (EPA) from using a cost-benefit analysis to determine whether protecting aquatic creatures is worth the cost of the most advanced upgrades for cooling water intakes in older power plants. Section 316(b), which governs industrial power plant intake structures, provides that the EPA "shall require" that such structures "...reflect the best technology available for minimizing adverse environmental impact." EPA has interpreted this language as authorizing the use of a cost benefit analysis in promulgating regulations under Section 316(b). Riverkeeper, the environmental group that brought the lawsuit, argued that 316(b) precluded the use of a cost benefit analysis.

However, Justice Antonin Scalia, who authored the opinion, reasoned that "the phrase 'best technology available,' even with the added specification 'for minimizing adverse environmental impact,' does not unambiguously preclude cost-benefit analysis." Scalia also stated that the "less ambitious goal of 'minimizing adverse environmental impact' suggests...that the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances. That determination could plausibly involve a consideration of the benefits derived from reductions and the costs of achieving them." The Court did not hold that the EPA must use a cost benefit analysis, nor did it determine how or in which circumstances such an analysis may be used. Justices Roberts, Thomas, Alito, Breyer, and Kennedy joined Scalia.

Justice John Paul Stevens criticized the majority in his dissent. "The EPA has misinterpreted the plain text of [Section 316(b)]," said Stevens. "Unless costs are so high that the best technology is not 'available,' Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits them." Justices Ginsberg and Souter joined Stevens in his dissent.

In a press release, Riverkeeper stated that it was "disappointed" with the decision but is "looking forward to working with EPA's new Administrator, whom we are confident will agree that the...EPA regulations failed to satisfy the [CWA's] mandate that the adverse environmental impacts of cooling water intake structures should be minimized." EPA Administrator Lisa Jackson, who has not commented on the decision, led New Jersey's Environmental Protection Agency prior to her nomination and confirmation. New Jersey was one of the states that supported Riverkeeper in its law suit.

WATER QUALITY

Clean Water/Drinking Water SRFs

The Environmental Protection Agency has begun awarding the first of the Clean Water and Drinking Water State Revolving Funds (SRFs) grants under the Stimulus package. The Clean Water SRF provides low-interest loans and grants for wastewater treatment projects. The Drinking Water SRF provides low-interest loans for drinking water systems to finance improvements, while also providing funds to small disadvantaged communities and to programs that encourage pollution prevention as a tool for ensuring safe drinking water.

Drinking Water SRF appropriations under the Stimulus total $2B in funding, which is in addition to the SRF funding for FY2009. The state-by-state appropriations are as follows: AK ($19.5M); AZ ($55.3M); CA ($159M); CO ($34.3M); ID ($19.5M); KS ($19.5M); MO ($37.8M); MT ($19.5M); NE ($19.5M); NV ($19.5M); NM ($19.5M); ND ($19.5M); OK ($31.5M); OR ($28.5M); SD ($19.5M); TX ($160.6M); UT ($19.5M); WA ($41.8M); WY ($19.5M). In the West, Nebraska has begun receiving funding for both SRFs, while Kansas has begun receiving Drinking Water SRF funding.