



Colorado River District

Protecting Western Colorado Water Since 1937

MEMORANDUM

JULY 6, 2011

TO: BOARD OF DIRECTORS

FROM: CHRIS TREESE

SUBJECT: FEDERAL AFFAIRS:
2ND QUARTER 2011

I will continue my tradition of a "progressive memo" on federal affairs for the Board's quarterly meetings. Since federal issues remain active longer than state issues, creating separate quarterly memos for each federal issue would be redundant and inefficient. This progressive memo will follow the issues and developments of interest to the River District in the 112th Congress with **new materials and updates appearing in bold**. Since a session of Congress runs for two years, I will continue the same memo through 2012 to provide the Board with an easier, read-at-a-glance communication concerning federal affairs.

The length of this memo will grow considerably with each quarterly Board meeting. If Board members have questions between quarterly updates or desire additional information on federal legislative developments, do not hesitate to contact me.

No specific Board action is requested; however, director direction is invited especially on EPA's Guidance Document below.

2nd Quarter (2011) Highlights:

- **170 Members of the House signed an April 14th letter to EPA Administrator Lisa Jackson and Assistant Secretary of the Army for Civil Works Jo Ellen Darcy. The letter warned both agencies against their current plan to expand the authority of the Executive Branch of government to designate what constitutes a "water of the US."**

A key passage of the letter reads:

"The Agencies cannot, through guidance, change the scope and meaning of the Clean Water Act or the statute's implementing regulations. If the Administration seeks statutory changes to the Clean Water Act, a proposal must be submitted to Congress for legislative action. We are very concerned by the action contemplated by the Agencies, and we strongly urge you to reconsider the proposed "Guidance."

- **The House FY'12 Energy and Water Appropriations bill as it passed out of committee in early June contained a rider which prohibits funds from being spent to pursue the**

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EPA's Guidance initiative. There is also a rider that forbids the Administration from spending FY'12 funds "to initiate, administer, promulgate, or enforce" any regulatory action which is defined as a rule with an annual implementation cost of \$100 million or more.

- **Republican lawmakers unveiled new legislation designed to limit the income environmental groups can generate by winning legal cases against the federal government. H.R. 1996, called the "Government Litigation Savings Act," would make changes to the way the Equal Access to Justice Act (EAJA) is implemented. EAJA requires the federal government to pay attorneys fees when it loses cases under statutes that do not specifically call for such fees to be paid by the government. The legislation is sponsored by two Wyoming Republicans, Sen. John Barrasso and Rep. Cynthia Lummis, along with other members of the GOP-only Congressional Western Caucus. Republican lawmakers have been critical of EAJA because they believe environmental groups active in litigation have been gaming the system by filing large numbers of lawsuits they win on procedural grounds because the government cannot keep up with the caseload.**
- **The Senate Agriculture, Nutrition and Forestry Committee on June 21 passed H.R. 872, which would exempt pesticide users who apply pesticides over or near water from requiring a second permit under the Clean Water Act. The committee passed the legislation in a voice vote; no amendments were offered.**

After the vote, holds were placed on the bill by several Democratic Senators.

- **A federal judge has put on hold a settlement that gave the Interior Department six years to consider whether more protections are needed for more than 800 plants and animals. The Center for Biological Diversity objected to the deal, saying it is unenforceable and leaves out important species of animals and plants. The settlement had been embraced by other conservationists as a breakthrough in addressing a decades-long backlog of action on species in danger of extinction.**
- **House Appropriations Committee has assigned each of the 12 Appropriations Subcommittees the amount of money they will have available for FY12. The Subcommittee on Interior and Environment has funding jurisdiction over EPA, US Forest Service, Bureau of Reclamation, US Fish and Wildlife Service, and BLM. The enacted FY11 funding figure for this Subcommittee was \$29.56 billion. Its FY12 allocation is \$27.47 billion, which represents a reduction of \$2.09 billion.**

Funding for the Clean Water State Revolving Loan Fund (SRF) in the FY11 Continuing Resolution was reduced from \$2.1 billion to \$1.525 billion; and from \$1.387 billion to \$965 million for the Drinking Water SRF. In contrast, the SRF program had \$6 billion in Stimulus Funding in 2009.

- **President Obama has nominated the leader of a conservation group to be the Interior Department's next Assistant Secretary for Fish, Wildlife and Parks, a position that oversees National Parks and the Fish and Wildlife Service. Rebecca Wodder, who since 1995 has served as CEO of American Rivers, a national river conservation group, will**

replace Tom Strickland, who left Interior for the private sector in early January. Wodder's selection is seen as a nod to environmental groups and could draw opposition from some in the Senate over her group's positions on hydroelectric power and river restoration, particularly in the West.

- **President Obama announced his intention to nominate Ken Kopocis to be the next EPA Assistant Administrator for Water, saying Kopocis has "played a role in crafting and defending numerous pieces of environmental legislation including the Clean Water Act." A longtime Hill staffer, Kopocis currently serves as Senior Counsel on the House Transportation and Infrastructure. Kopocis worked closely with former Committee Chairman Jim Oberstar (D-MN) on efforts to amend the Clean Water Act by dropping the word "navigable" from the bill's original language. Accordingly, he will likely face tough questioning during his confirmation hearing.**
- **The House Transportation and Infrastructure Committee approved a bill that would strip the Environmental Protection Agency of authority under the Clean Water Act to revise state water-quality standards once they are agreed to by the state and EPA. H.R. 2018, the "Clean Water Cooperative Federalism Act," would give each state the final say in whether a revised state water-quality standard satisfies the Clean Water Act.**

Under present law, EPA may veto a new state water-quality standard for a previously regulated pollutant if the EPA determines that the new standard is not consistent with the Clean Water Act. The bill passed the committee 35-20, with 30 Republicans and five Democrats supporting the bill; 19 Democrats and 1 Republican opposed the bill.

112th Congress:

Hydro Incentives:

Congressmen Adrian Smith (R-NE) and Jim Costa (D-CA) introduced legislation that will wholly exempt hydropower projects generating less than 1.5 megawatts from the Federal Energy Regulatory Commission (FERC) licensing process. To qualify, projects must be constructed on manmade conduits that are existing components of a water district's system. While FERC currently offers an exemption from its onerous permitting requirements for certain small projects, applicants must still undertake a costly, paperwork-driven process that can take months to complete. This bill would eliminate these requirements entirely.

More Hydro Incentives:

A bill introduced by Ranking Member Lisa Murkowski (R-AK) includes provisions aiming to streamline the small hydropower regulatory process. At a hearing on the bill before the Water & Power subcommittee, Bureau of Reclamation Commissioner Michael Connor signaled his agency's support for small hydropower initiatives. Reclamation is in the midst of a one-year study of small hydropower opportunities at federally owned facilities as a follow-up to a final study released today on hydropower opportunities as a whole. The agency also intends to announce small hydropower

pilot project grant opportunities in the coming weeks.

FERC Director Jeff Wright indicated his support for more efforts to streamline the process and voiced his optimism that a pilot project in which FERC partnered with the State of Colorado to fast-track projects could be replicated nationwide.

Pesticide Application, H.R. 872:

A bi-partisan bill, co-sponsored by lawmakers from the House Agriculture and Transportation and Infrastructure Committees, was introduced in early March 2011. H.R. 872 would address the Court of Appeal's ruling in the National Cotton Council (NCC) case that requires pesticide users-including farmers, ranchers, forest managers, state agencies, city and county municipalities, mosquito control districts, and water districts, among others to obtain a permit under the Clean Water Act (CWA) for the use of pesticides, in addition to compliance with the Federal Insecticide, fungicide and Rodenticide Act (FIFRA). 872 must be enacted by October 31, at that time the court ruling will go into effect and pesticide applications not covered by a National Pollutant Discharge Elimination System (NPDES) permit are subject to a fine of up to \$37,500 per day per violation. In addition to the cost of compliance, pesticide users will be subject to an increased risk of litigation under the citizen suit provision of the CWA. Colorado water users have indicated this is an important issue for Colorado farmers.

The Senate Agriculture, Nutrition and Forestry Committee on June 21 passed H.R. 872. The committee choose to address the House-passed bill rather than the introduced Senate companion bill, S.871, in order to expedite passage. Ranking committee member Pat Roberts (R-KS), sponsor of 871, supported the choice to pursue the House bill. The committee passed the legislation in a voice vote. However, after the vote, holds were placed on the bill by several Democratic Senators indicating the increase in politics and lobbying surrounding this bill.

The House passed the measure in March by a 292-130 vote. It earned the support of all the chamber's Republicans and 57 Democrats.

H.R. 1042, The DELIST Act:

This Legislation was introduced in March by Congressman Joe Baca (D-CA) with 8 co-sponsors including three Democrats. "DELIST" provides that any species given ESA protection must be declared extinct after 15 years if it has not increased in population and if the listing poses an economic hardship on the communities located in the range of the species. Mr. Baca is particularly focused on the Deli Sands Flower-Loving Fly whose ESA status has hamstrung economic development projects in his district in Southern California and adjacent areas.

Black Canyon & Dominguez Wilderness; McInnis Canyons Wild & Scenic evaluations:

Congressman Tipton has agreed to sponsor legislation addressing the consensus recommendations arising from the Grand Junction BLM's Wild & Scenic stakeholder process. I have circulated draft language to Mesa and Delta counties, area water users and environmental community partners (the Wilderness Society and Colorado Environmental Coalition).

EPA Guidance proposal:

for most of 2011 EPA's proposed "Guidance Document" has been the focus of considerable debate in the water community and in Congressional hearings. This document is intended to

provide administrative clarity to the reach and scope of the Clean Water Act post-Rapanos and SWANCC decisions from the US Supreme Court as well as the failure of past Chairman Oberstar's repeated, proposed "Clean Water Restoration Act" legislation. Concerns with EPA's document include:

1. Guidance extends the definition of "waters of the US" to ditches and other water conveyance structures.
2. Dry arroyos and ephemeral streams would be "waters of the US."
3. Constructed wetlands that are component parts of water reuse projects may be regulated.
4. Uncertainty results when agencies move water supplies through their systems which could create a nexus with navigable waters.
5. Although billed as "guidance" this has the impact of a rule and therefore should be subject of a formal Rule-making process.

In lobbying against Mr. Oberstar's legislation of past Congresses, the River District has consistently held that resolution of uncertainties resulting from recent Court decisions regarding the reach and scope of the Clean Water Act is Congress' alone. While we did not agree with Mr. Oberstar's solution, our message was consistent that Congress must resolve the ambiguity of its legislation and clarify the current intent.

The House FY'12 Energy and Water Appropriations bill as it passed out of committee in early June, contained a rider which prohibits funds from being spent to pursue the EPA's Guidance initiative. There is also a rider that forbids the Administration from spending FY'12 funds "to initiate, administer, promulgate, or enforce" any regulatory action which is defined as a rule with an annual implementation cost of \$100 million or more. I do not, however, expect these amendments to survive the full process.

Limits to Financial Awards in Environmental Suits:

H.R. 1996, called the "Government Litigation Savings Act," would make changes to the way the Equal Access to Justice Act (EAJA) is implemented. EAJA requires the federal government to pay attorneys fees when it loses cases under statutes that do not specifically call for such fees to be paid by the government. The legislation is sponsored by two Wyoming Republicans, Sen. John Barrasso and Rep. Cynthia Lummis, along with other members of the GOP-only Congressional Western Caucus. Republican lawmakers have been critical of EAJA because they believe environmental groups active in litigation have been gaming the system by filing large numbers of lawsuits they win on procedural grounds because the government cannot keep up with the caseload.

State Supremacy under Clean Water Act:

H.R. 2018, the "Clean Water Cooperative Federalism Act," would give each state the final say in whether a revised state water-quality standard satisfies the Clean Water Act.

Under present law, EPA may veto a new state water-quality standard for a previously regulated pollutant if the EPA determines that the new standard is not consistent with the Clean Water Act. The bill passed the committee 35-20, with 30 Republicans and five Democrats supporting the bill; 19 Democrats and 1 Republican opposed the bill.

Degette Wilderness Legislation:

Congresswoman DeGette's (D-CO) office called this week to let us know the Congresswoman intends to introduce her perennial multiple-wilderness area legislation soon. She believes her legislation addresses the River District's and West Divide's concerns with the Assignment Ridge boundaries and water language and the West Divide project water rights. However, the office has yet to share actual language or boundaries with us. I hope to have better information by the Board meeting.

Recovery Program Authorization:

The Upper Colorado River and San Juan River Recovery Programs require Congressional authorizing legislation to extend their annual operations appropriations. Current authorization expires this year. The on-going and evolving confusion concerning funding restrictions and guidelines for Congressional appropriations continues to stymie plans to introduce authorizing legislation for the programs. Sponsors are lined up and delegation support from Colorado, Wyoming and New Mexico is secure as are key committee members.