



MEMORANDUM

TO: SAN LUIS & DELTA-MENDOTA WATER AUTHORITY DIRECTORS
FROM: DAN KEPPEL, EXECUTIVE DIRECTOR
SUBJECT: UPDATE REPORT
DATE: JULY 11, 2022

This memo is intended to keep you apprised as to what is happening behind the scenes on policy issues the Family Farm Alliance is engaged in. In the past month, much of our efforts have focused on preparing for multiple Congressional hearings, monitoring federal agency implementation of the *Infrastructure Investment and Jobs Act*, working with Congressional staff on hearings and draft legislation, and expanding public outreach associated with global food insecurity and the importance of Western irrigated agriculture. These issues and other matters important to our members are further discussed in this memo.

BIDEN ADMINISTRATION DEVELOPMENTS

1. IIJA Implementation

As the Bureau of Reclamation (Reclamation) continues to steadily advance implementation of the \$8.3 billion for Western water projects provided by the Infrastructure Investment and Jobs Act (IIJA), inflation is taking a toll on water projects across the country. Consumer prices surged 8.6% in May over last year, the highest rate since 1981, according to the U.S. Department of Labor. Prices for some key materials in infrastructure construction have risen even more. Inflation is driving up costs so much that some state and local officials are postponing projects, scaling back others and reprioritizing their needs. Many of our members are concerned about how rising energy costs and availability of petroleum products with impact current and near-term projects, many of them funded with the \$8.3 billion for Western water projects provided by the infrastructure plan President Joe Biden signed into law seven months ago. The IIJA allocates \$8.3 billion for Reclamation water infrastructure projects to repair aging water delivery systems, secure dams, complete rural water projects, protect aquatic ecosystems and fulfill Indian Water Rights

Settlements. Reclamation is hosting a stakeholders call on its implementation of the Bipartisan Infrastructure Law (BIL) on **July 28**, from 11:00 a.m. – 12:00 p.m. Pacific time.

a. \$25.5 Million for Water Efficiency Projects in 8 Western States

Reclamation appears to be on track towards putting the IIJA funds to work on the ground. The Department of the Interior last month announced \$25.5 million in IIJA funds for WaterSMART Water and Energy Efficiency Grants to safeguard local water supplies in the face of severe western drought. Fourteen projects in eight western states will be awarded funding to help local communities improve water use efficiency by lining canals, upgrading water meters, installing automated gates to control water flow and making other infrastructure improvements. The projects are anticipated to save more than 12 billion gallons of water annually through reductions in residential water use and improvements to increase irrigation efficiency. Two of the projects will also receive funding for solar energy installations to power the affiliated water facility and water district buildings. Including non-federal funding contributions, the projects represent more than \$130 million in water management improvements. The latest funding announcement is part of the \$160 million in WaterSMART grants provided by the IIJA in 2022. Local governments in eight states set to receive funding must complete their project within three years.

b. B.F. Sisk Dam Safety Modification Project

As you know, Reclamation kicked off its 120th anniversary year last month at San Luis Reservoir with the groundbreaking of the B.F. Sisk Dam Safety Modification Project. The billion-dollar effort received a \$100 million investment earlier this year from the IIJA. This is Reclamation's largest project under the 1978 Safety of Dams Act and when complete will modernize the dam to reduce risks due to seismic events. The celebration also marked the beginning of construction to retrofit the 3.5-mile-long B.F. Sisk Dam to protect it from future seismic events and for public safety. Construction will include stability berms and other engineered features. The dam impounds San Luis Reservoir, the nation's largest off stream reservoir, which provides water for farms, wildlife refuges, and Californians served by the federal Central Valley Project and State Water Project. Congrats, SLDMWA!

c. Reclamation: ARPA Funds Count as Non-Federal Cost-Share for Grant Programs

In recent months, the Commissioner's office has been fielding questions regarding the use of funding provided under the America Rescue Plan Act (ARPA) as the nonfederal match for WaterSMART grants. Mat Maucieri, the point person on IIJA implementation for Reclamation in the Commissioner's office, says, in general, yes, funding provided to states, U.S. territories, and Tribal governments under ARPA may be counted toward non-Federal cost-share requirements for WaterSMART and similar Reclamation grant programs. Each Notice of Funding Opportunity describes other requirements applicable to all cost-share contributions.

d. EPA Infrastructure Webinar

Learn how IJA funding can help communities improve their water and wastewater infrastructure. For example, the BIL invests \$43 billion through the State Revolving Funds (SRFs), with a significant portion of funding provided as grants or principal forgiveness loans to disadvantaged communities. The webinar will include an opportunity to submit questions. The webinar presentation will be recorded, and EPA will post the recording and slides online after the webinar. The webinar will be July 13, 2022, 10:00 AM, [registration is here](#).

2. **Environmental Protection Agency (EPA)**

a. WOTUS Regional Roundtables

EPA has wrapped up ten virtual stakeholder meetings regarding changes to the definition of “Waters of the U.S.” (WOTUS) under the federal Clean Water Act. This rule, which has been defined by the agencies since the 1970s, establishes the geographic scope of federal authority under the Clean Water Act (CWA). Last year, the federal agencies under the Biden administration rewrote the 2020 Trump administration WOTUS rule, with public comments on the draft due this past February. The Alliance and many other agricultural interests said the Trump Administration’s version of WOTUS, the Navigable Waters Protection Rule, provided clearer guidelines while ensuring clean water. In 2015, after the WOTUS rule was written, federal courts blocked its implementation in more than half of the states.

After accepting a proposal by the California Farm Bureau to lead a Western geographic region roundtable, EPA and the Army Corps of Engineers (Corps) participated in a livestream discussion June 16. EPA and Corps officials heard from business and farm groups, water managers, government agencies and others on the application of WOTUS in each of their respective states. I represented the Family Farm Alliance at the WOTUS Western Region roundtable. Our thanks go out to California Farm Bureau (CFB) for including us in their formal regional roundtable proposal to EPA. CFB also did a nice job summarizing the hearing and some of my testimony in their June 23 issue of *Ag Alert*, as did *Progressive Farmer*, in [this June 20 article](#).

My comments at the Roundtable emphasized that the proposed WOTUS rule vastly expands regulatory jurisdiction beyond just returning to the pre-2015 regulations and guidance as proposed in the rule. I warned that any possible expansion of WOTUS in a future rulemaking could transform the CWA into a federal land-use regulation. I advocated for the need of crystal-clear exclusions from CWA jurisdiction from all of the western irrigation infrastructure. Otherwise, the entire western irrigation and drainage system could be classified as a WOTUS. Without exemptions for irrigation infrastructure, the rule could disrupt the timing of water deliveries, result in fallowing, and lead to lengthy and costly litigation. Exemptions for construction, operation and maintenance of ditches and maintenance of canals and drains, provide important assurances that irrigated agriculture can continue to function without the need for CWA permits to work on these man-made features. Other participants in the roundtable said the rule as proposed could impact

Western farming communities by adding new, regulatory burdens for important infrastructure projects. They argued that would increase risks of litigation and undercut local and state water management.

Many participating stakeholders – including yours truly - suggested that the agencies postpone finalizing its pending WOTUS rule until the U.S. Supreme Court issues its decision in the pending case, *Sackett v. Environmental Protection Agency*. The Supreme Court will hear the *Sackett* case on October 3. A decision in that case could trigger the Biden administration to revise its pending WOTUS rule, which is expected to be finalized prior to the decision. EPA and the Corps are still working on the first phase of the pre-2015 regulations that were revised to reflect the Supreme Court's decisions in *Rapanos* and *SWANCC*. EPA currently does not plan to release a proposed rule to redefine WOTUS until November 2023, with no date specified for finalizing the rule, according to the latest version of the Unified Agenda, the regulatory blueprint of the Biden Administration. The Unified Agenda indicates that the "Part 1" final rule is expected this August, followed by the proposed "Part 2" rule in November, 2023 - after the Supreme Court rules on the *Sackett* case. The Administration appear to be giving themselves an opportunity to wrap all of this up before any potential change in administration following the 2024 elections.

a. CWA Section 401 Policy

EPA recently proposed a rule that would reverse a controversial Trump-era policy on the federal CWA Section 401 permits. Developers of dams, pipelines, power lines, mines and other similar projects must request federal permits to discharge into regulated waterways and wetlands under Section 401. For the first time, the EPA proposed rule would allow states and tribes to take part in defining a “reasonable time” to conduct such reviews and restore flexibility on what states and tribes consider when reviewing applications, according to the agency. Environmental groups and some Democrats applauded the proposed rule, stating that states and tribes will now have the ability to adequately protect their water resources in the federal permitting process. But industry and Republicans argue the rule would allow states and tribes to slow walk the permitting process and increase costs and construction timeframes impacting the ability to complete new projects.

Under Section 401, states and tribes have one year to issue their certifications before they are considered to have waived their authority, but that deadline is sometimes surpassed. Under the Trump rule replaced by this rulemaking, an extended timeline beyond one-year was not allowed. Also under the proposed rule, states and tribes can broaden their review to include the entire project as a whole in determining whether the project meets water quality requirements, including state and tribal requirements. The [proposed rule](#) is available for public comment until August 2.

3. U.S. Department of Agriculture (USDA) Forest Service: Time for “Bold Action”

With the 2022 wildfire season on track to be one of the worst in the past decade, the USDA and some Members of Congress are urging the Forest Service to take bold action to restore forests and improve resilience. USDA Secretary Tom Vilsack on June 23 issued a memorandum to the USDA

Forest Service directing the agency to take “bold actions” to restore forests, improve resilience, and address the climate crisis. This direction comes, in part, in response to President Biden’s “Executive Order on Strengthening the Nation’s Forests, Communities, and Local Economies,” which tasks the USDA with a series of actions to pursue science-based, sustainable forest and land management. This includes intensifying work to reduce wildfire risk, accelerate reforestation, restore ecosystems, support forest products jobs and markets in rural communities, and define and inventory old-growth and mature forests on federally managed lands. These plans include the forthcoming Forest Service strategies for climate adaptation, reforestation, and recreation.

Secretary Vilsack also highlighted the Forest Service’s 10-year “Confronting the Wildfire Crisis” strategy, which aims to treat 20 million acres of national forests and 30 million acres of other federal, state, Tribal, and private lands over the next decade to improve conditions and reduce wildfire risk across the landscape. USDA and partner agencies also announced earlier in June that federal wildland firefighters would receive a substantial pay raise to bring their pay into alignment with their state and local government counterparts, and build a more stable, permanent wildland firefighting workforce.

The 2.7 million acres burned so far this year in the U.S. is a stark contrast to where the nation stood one year ago to date. As of June 15, a total of 27,732 fires had burned 981,356 acres of land. California is one of five states including Texas, North Carolina, Georgia and Florida that have seen the most wildfires caused by humans so far this year, according to a report issued by the National Interagency Fire Center. House Committee on Natural Resources Ranking Member Bruce Westerman (R-Ark.) and Western Caucus Chair Dan Newhouse (R-Wash.) in late June led a letter to Forest Service Chief Moore, urging the Forest Service to increase the pace and scale of essential forest management activities. They claim that a substantial portion of this acreage burned as a result of escaped prescribed burns initiated by the Forest Service. The Biden Administration imposed a 90-day pause on the use of prescribed fire in order to review protocols, tools, and practices after a poorly conducted Forest Service prescribed fire resulted in the largest wildfire in New Mexico’s history.

4. FWS and NMFS: Definition of “Habitat” Rescinded

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are rescinding a 2020 Trump Administration rule that established a regulatory definition of “habitat” specific to critical habitat under the federal Endangered Species Act (ESA). The decision follows President Joe Biden’s Executive Order 13990, signed 5 days into his presidency. That order directed all federal agencies to review and address agency actions to ensure consistency with Biden-Harris administration objectives. FWS and NMFS (or, “the Services”) concluded that codifying a single definition of “habitat” could impede the Services’ ability to fulfill their obligations to designate critical habitat based upon the best available science. Critical habitat designations identify those areas and habitat features that are essential for recovery of listed species. Federal agencies must ensure that actions funded, permitted or conducted by those agencies do not destroy or adversely modify designated critical habitats.

The Family Farm Alliance and other agricultural organizations in 2020 believed that the final definition of habitat proposed then would continue to improve implementation of the ESA, which defines critical habitat and establishes separate criteria depending on whether the area is within or outside the geographical area occupied by the species at the time of listing. The Alliance has long supported efforts to balance effective, science-based conservation with common-sense policy designed to bring the ESA into the 21st century. We felt the 2020 Final Rule was a strong step in this direction. The Alliance and others last November formally opposed the Services' proposal to rescind the definition of "habitat". The 2020 final rule marked the first instance that "habitat" was defined and interpreted for purposes of application to ESA critical habitat designations. The recent decision rescinding the rule is the antithesis of promoting transparency, clarity, and consistency. Some Western Members of Congress claim the Services' action will result in inflated, unscientific critical habitat designations and infringement on personal property rights.

DEVELOPMENTS IN CONGRESS

The House has completed mark up on all 12 of their FY 2023 appropriations bills. Floor time has been set for July 18. The Senate has not released any bills, yet, as there is no bipartisan agreement on spending limits.

On July 21, the Senate Energy and Natural Resources Committee will mark up its water bills. Senator Feinstein's STREAM Act may be marked up in this first tranche of water bills. Other bills are further along. There may be another markup in September, and there is the potential for a Reclamation Title for drought (authorizations only) legislation that could be tacked onto the Water Resources Development Act or other legislative vehicle.

5. Senate Energy and Natural Resources (ENR) Committee Hearing

Short-term and long-term solutions to the Western drought were the topic of the June 14 Senate Energy and Natural Resources Committee hearing. Alliance President Patrick O'Toole's unscripted, heartfelt testimony about the drought's impact to Western farmers and ranchers was a hearing highlight. The Colorado River was the primary focus of discussion at the hearing, due in part to the obvious interest of Senators Barrasso (WY), Lee (UT), Kelly (AZ), and Cortez-Masto (NV), all of whom engaged the witnesses at the hearing. Mr. O'Toole's family owns and operates a ranch on a headwater tributary of the Colorado River in Wyoming. Over the last 20 years, the flows of the Colorado River have been 20% below average due to a drought more severe than any in the last 1,200 years.

Early on in the hearing, Bureau of Reclamation Commissioner Camille Touton emphasized that between 2-4 million acre-feet of "conservation and demand management" actions are needed in the Colorado River Basin, starting in 2023. John Enstminger (Southern Nevada Water Authority) summarized urban efforts to reduce per-capita water use and echoed Commissioner Touton's comments, suggesting that agriculture must also cut its consumption. He further suggested that

farmers reconsider growing crops like alfalfa. He also noted that SNWA is planning to serve a population that will swell to 3.8 million by 2072.

Mr. O'Toole told the Committee that he believes water storage and improving forest health are important steps to addressing the severe ongoing drought in the West. While other witnesses testified that additional "agricultural conservation and demand management actions are needed" to shore up dwindling Colorado River supplies, he cautioned that taking water away from farms would increase the amount of food the U.S. needs to import from other countries. In his written testimony, Mr. O'Toole pointed out the domino effect of drought in the West, highlighted the recent brutal Western wildfires, and concluded by emphasizing the importance of local decision-making in Western water management. Senator Barrasso and Committee Chairman Joe Manchin (D-WV) also agreed that the Western drought is tied to food insecurity and higher prices. Ranking Member Barrasso explained that drought denies water to vital grazing lands and alfalfa fields necessary for feeding and raising cattle. This can result in significant economic impacts for communities that depend on agriculture and ranching to create jobs.

6. House GOP Energy Forum

Family Farm Alliance Director Steve Benson – a vegetable and seed crop grower from California's Imperial Valley – last month testified remotely before a forum hosted by the House Natural Resources Committee and Energy and Commerce Committee Republicans on how rising energy prices are impacting American households and businesses. House Committee on Natural Resources Ranking Member Bruce Westerman (R-Ark.) and House Committee on Energy and Commerce Ranking Member Cathy McMorris Rodgers (R-Wash.) hosted a June 24 joint forum to hear from Americans across the country about how soaring energy costs are hurting their businesses and paychecks. Members heard from Mr. Benson and over a dozen other witnesses across the country who are experiencing the impacts of rising energy prices firsthand and discuss solutions to address skyrocketing costs.

Mr. Benson testified that it now costs more to ship vegetables across the United States than the cost to grow. His written testimony also explained that fossil fuels are critical ingredients towards tackling challenges associated with aging infrastructure, water conservation and improving water efficiencies. Water conservation and modernization of small and large water systems throughout the West rely on petroleum and natural gas for fuels and the many modern materials that go into these improvement projects. Resins for pipe, coatings, and canal and reservoir linings are refined from natural gas and petroleum. Coal and petroleum are used for carbon black that protects polyethylene products from ultraviolet rays. In some areas, PVC and HDPE are great plastic materials that are expected to last more than a century. Corrosion blocking and life extending coatings of steel and other metallic pipe and fittings also come from petroleum. You can view the archived video recording of the forum [here](#).

7. House Passes 2022 WRDA Legislation: Senate Next

On a 384-37 vote, the House of Representatives last month passed H.R. 7776, their version of a Water Resource Development Act (WRDA), a bill that would set policy priorities and authorize new studies and construction of water, flood, navigation, and environmental projects for the Army Corps of Engineers (Corps). The Senate Environment and Public Works (EPW) Committee approved its version of the WRDA bill, S. 4137, with unanimous support in May. The House bill would authorize construction of 18 projects and four existing project modifications. Their total cost would hover around \$40 billion. The Senate bill would authorize 17 new projects and four modifications for a total of about \$37 billion.

Recent versions of the Water Resources Development Act (WRDA) have also included provisions for Bureau of Reclamation projects, something the 2022 WRDA does not provide. The 2022 WRDA being advanced in each chamber of Congress are more Corps-centric, although there are provisions that focus on the Western U.S. The Senate bill includes several sections of interest to Western water users. We'll be keeping an eye on those areas of the Senate WRDA that address agency coordination on Western water matters, water supply conservation provisions, Columbia River flood management, NEPA reporting, and assessing Western water infrastructure. The Senate now can move forward in passing their version which differs from the House passed bill, requiring negotiations in a conference committee to combine the bills into one that can pass Congress and be signed into law by the President.

8. Bipartisan WIFIA Bill Introduced

Congresswoman Kim Schrier, M.D. (D-WA) on June 16 introduced the *Water Infrastructure Finance and Innovation Act Amendments of 2022*, a bipartisan bill to fund critical water and wastewater infrastructure projects in Washington State. Representatives Dan Newhouse (R-WA), Doug LaMalfa (R-CA), John Garamendi (D-CA), Jim Costa (D-CA), and Sharice Davids (D-KS) are co-leading this bill with Rep. Schrier. The bill makes common-sense fixes and includes parts of previously introduced legislation to improve the *Water Infrastructure Finance and Innovation Act of 2014* (WIFIA), a law which created a federal credit program administered by the EPA for eligible water and wastewater infrastructure projects. Our Western membership will require funding and financing from many sources, and this amendment would open an entire suite of common-sense, fiscally responsible financing tools that would be very helpful to us in this effort.

The program was reauthorized through 2026 by the Infrastructure Investment and Jobs Act (IIJA), signed into law by President Biden last November. Specifically, the bill:

- Broadens WIFIA funding and financing eligibility to state and federal projects and entities. This includes state-led water storage projects, transferred works of the Bureau of Reclamation, and congressionally authorized Army Corps of Engineers (USACE) projects.
- Authorizes the use of collaborative project delivery methods for WIFIA projects, allowing more flexibility and reducing time and cost of the project.

- Allows certain federal water infrastructure loans to have maturity dates of up to 55 years.
- Reauthorizes USACE WIFIA program through FY2026.
- Directs the USACE to implement its WIFIA program, which it has not done despite its authorization in 2014.

Our quote in support of the legislation was included in a press release issued by Rep. Schrier.

JUDICIAL DEVELOPMENTS

9. *West Virginia v. EPA*

The Supreme Court’s 6-3 decision last Thursday in *West Virginia v. EPA* strikes a blow to President Biden’s climate agenda and has Democrats and activists scrambling to salvage the president’s pledge to reduce greenhouse gas pollution by 50 percent by 2030. While the formal adoption of the “major questions doctrine” by the Court was covered by the media as primarily a blow to EPA’s proposed regulations to combat global climate change, the news coverage largely missed the decision’s true significance. Check out this *Washington Post* [guest editorial](#) from our friend, Hugh Hewitt. He notes that the larger, more important take away from the Court’s decision is that federal bureaucrats need explicit permission from the Congress to undertake the sort of regulatory regime they propose to implement. It will be interesting to see how this stacks up against the Chevron Doctrine, the consistent federal deference to agencies in court proceedings.

10. Court Issues Yuba Order

The Fresno Superior Court two weeks ago issued a ruling supporting the Yuba Water Agency and finding that the State Water Board does not have the authority under the Clean Water Act and its regulations to issue a 401 certification without an application from the Agency. The order commands the State Water Board to set aside and vacate its July 17, 2020 Clean Water Act section 401 certification to Yuba Water Agency. The Minute Order is [here](#).

ALLIANCE INITIATIVES

11. Food Insecurity Public Relations Campaign

Driven by concerns with rising food prices and the Russian invasion of Ukraine, the Family Farm Alliance board at its meetings in Reno last February directed contractors to work with others in an effort to improve communications on what rising inflation and the Ukraine crisis means to American consumers. In April, the Alliance partnered with California Farm Water Coalition and Klamath Basin producers to place a full-page ad in the *Wall Street Journal* warning of the consequences if State and federal officials ignore the need for reliable water supplies and a stable, affordable, domestic food supply. We are part of a small working group that did the heavy lifting of raising the money for the WSJ ad, which was a great first step, but it was only a first step. I’ve

previously reported on some of the good progress our small working group has been doing on this front to advance the message teed up in the ad.

Working with CFWC, efforts are underway to do some focused social media advertising, as a follow-up to the full-page ad. With contributor support, we extended its reach into a digital ad program on Facebook and Instagram using the same artwork, message, and link to the landing page: <https://www.farmwater.org/food-security-and-water/>. As of last week, our efforts had resulted in 1,677,343 impressions, a reach of 582,176, and 84,144 clicks, or individual visits to the web site. Our friends at CFWC are seeing another surge in food cost-related articles, although that surge is relative; the sheer volume of Roe vs. Wade articles to food articles is significant. Still, I think the message we're delivering is right. The analytics show that people continue to respond in strong numbers. We have a small group meeting later this week to assess what other actions might be taken to keep this issue on the public's screen.

12. 2022 Farmer Lobbyist Trip

Mark your calendars! This year's farmer lobbyist trip is scheduled for the week of September 26. The Family Farm Alliance annual farmer lobbyist trip is one of the cornerstone programs of our organization. It was created to allow farmers, ranchers and water managers to interact directly with elected officials and other policymakers in Washington, D.C. It presents a unique opportunity for our members to share with Members of Congress and the Administration the important issues that impact our industry.

Monday and Friday would be travel days, Tuesday-Thursday would be three days of back-to-back meetings with some high-calorie dinners mixed in between. We're also working with The Ferguson Group to set up a "Western drought briefing" that will allow representatives from our contingent to directly share stories with a host of Congressional and agency staff in one fell swoop. Participants will have the opportunity to engage directly with high-level Biden Administration officials and Congressional committee staff, and gain insight into what lawmakers and policymakers are saying about the issues impacting Western irrigated agriculture. The farmer lobbyist meetings will allow us to again deliver the diverse but unified voice of irrigated agriculture champions in Washington, D.C.

This is a quick summary of just a few of the issues the Alliance has been engaged in. Please do not hesitate to contact me at dan@familyfarmalliance.org if you would like further information about what the Alliance is doing to protect water for Western irrigated agriculture.