Wildfires Scorch the West

Alliance Supports Senate Wildfire Prevention Bill

The most expensive and destructive wildfire year on record continues in California as end-of-the-month temperatures climbed into the triple-digits. Already, national wildfire suppression costs have surpassed $2.3 billion and burned more than 8.5 million acres.

In the world of Western water, a massive wildfire in the headwaters of a watershed can devastate the water supply – both quantity and quality – so important to the many beneficial uses in that river basin, including the irrigation of farms and ranches that produce some of our Nation’s high-quality food and fiber.

As fire suppression activities continue to rise as a percentage of the U.S. Forest Service’s budget, resources to responsibly manage forests are impacted. Funding for federal wildfire management—particularly for suppression operations on federal lands—is an issue targeted by several bills introduced in Congress this year. However, a fire funding fix is seen as only a partial solution by many, who believe that such a fix should also be paired with management tools. The Family Farm Alliance earlier this month formally supported one such Senate bill that focuses on forest management.

A Wildfire Epidemic

Over the past 10 years, from 2007 to 2016, an average of 70,043 wildfires have burned an average of 6.6 million acres every year, including both federal and nonfederal lands. This figure is double the average annual acreage burned in the 1990s (3.3 million acres), although a greater number of fires occurred annually (83,000 wildfires on average) in that period. In 2015, just over 68,000 wildfires burned 10.1 million acres, the largest acreage burned on record and more than the previous two years combined (3.6 million acres burned in 2014 and 4.3 million acres burned in 2013).

According to the U.S. Forest Service, in FY 2017 during peak times of the fire season, approximately 28,000 person...
nel, 600 crews, 1,900 engines, 250 aircraft and 200 active-duty military personnel were deployed. With costs exceeding $2 billion, the 2017 fire season was the most expensive ever. The cumulative costs of wildland fire suppression activities in 2017 once again exceeded the funding available.

There are a series of complex factors that are to blame for what has become an annual exercise in many parts of the Western U.S. More large, complex fires are occurring simultaneously, often on landscapes with heavy fuels and steep terrain. The fire season is now a year-round occurrence, and the expansion of construction into the urban-wildland interface now puts 44 million homes at risk.

“Conditions on the ground are worsening and we are now projecting the fire budget to consume two thirds of the overall budget four years sooner than originally calculated,” the Forest Service says.

Congressional Spending on Emergency Wildfire Aid

The U.S. Senate late this month passed a $36.5 billion hurricane and wildfire aid package after the White House assured it more federal dollars would come next month. Senate Majority Leader Mitch McConnell (R-KY) set a cloture vote to advance the bill after an earlier attempt to move it by unanimous consent failed. The House has already passed the legislation. There are no policy provisions in the emergency spending bill. However, another dozen stand-alone wildfire bills have been introduced in Congress. Three key bills are discussed further below.

Resilient Federal Forests Act

So far, only one bill—H.R. 2936, the Resilient Federal Forests Act—has passed committee. That bill, in part, would broaden the definition of major disaster under the Stafford Act to include “wildfires on federal lands” and it would create a related budgetary mechanism that potentially could be used to fund the response to each wildfire on federal land that had been declared to be a major disaster. The bill would require that the President establish a specific account from which available funds could be transferred to the Interior Department Secretary or U.S. Department of Agriculture (USDA) Secretary to conduct wildfire suppression operations if a declaration of a major disaster is made. The bill would also prohibit the agencies from transferring funds from their other accounts for suppression purposes, potentially eliminating the agencies’ fire borrowing. The House is scheduled to vote on the bill during the first week of November.

Wildfires in the West (Cont’d from Pg. 1)

Wildfire Prevention and Mitigation Act

The Family Farm Alliance this month formally supported draft legislation proposed by Senator John Barrasso (R-WYOMING) - the Wildfire Prevention and Mitigation Act - which would expand categorical exclusions from certain environmental reviews and overturn a federal court decision from 2015 that forced more consultation between the Forest Service and the Fish and Wildlife Service on forest management projects.

The draft bill is intended to discourage litigation against the Forest Service and the Bureau of Land Management relating to land management projects, require the Secretary of the Interior to develop a categorical exclusion under the National Environmental Policy Act (NEPA) for covered vegetative management activities carried out to establish or improve habitat for greater sage-grouse and mule deer, address the forest health crisis on National Forest System land, and expedite and prioritize forest management activities to achieve ecosystem restoration objectives, among other purposes.

“This draft bill would actually implement some important forest management projects on federal lands to ward off these disastrous wildfires and protect some of our most vulnerable Western water supplies in the process,” said Patrick O’Toole, president of the Family Farm Alliance. “The draft bill does not waive or ignore existing federal environmental laws; it would simply make them work better.”

The draft bill would streamline the application of environmental laws by allowing landscape-level land management plans to guide individual actions on the ground without duplicative administrative process under federal environmental laws. It would also direct the creation and use of categorical exclusions already allowed under NEPA in preventing wildfires and restoring forest habitat and ecosystems more effectively and on a timely basis.

“We believe these provisions could help these agencies use their limited resources to actually implement land management actions designed to prevent wildfires and improve habitat for priority, endangered and/or threatened species, instead of spending those resources on more bureaucratic process and litigation,” said Alliance director Bill Kennedy, who manages ranch land in California and Oregon.

Wildland Fires Act of 2017

Ranking Member of the Senate Energy and Natural Re-

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Bipartisan Bill Would Enhance ESA Protections for Fish

Alliance Testifies at House Subcommittee Hearing

Earlier this month, the Subcommittee on Water, Power and Oceans held a legislative hearing on H.R. 3144 (Rep. Cathy McMorris Rodgers, R-WASHINGTON and H.R. 3916 (Rep. Ken Calvert, R-CALIFORNIA), the “Federally Integrated Species Health Act” or “FISH Act,” bills to improve the recovery of Endangered Species Act (ESA) listed fish while providing certainty for water and power users.

“Clearly, the ESA process is broken and the status quo isn’t working for species, farmers and ranchers and rural communities that depend on our natural resources,” said Subcommittee Chairman Doug Lamborn (R-COLORADO). “Under the status quo, American taxpayers and ratepayers in the Pacific Northwest and elsewhere in the West spend literally billions of dollars each year resulting from conflicting or duplicative federal regulatory or judicial edicts under the guise of the ESA. These bills represent bipartisan, pragmatic solutions.”

H.R. 3916 would consolidate the management and regulation of the Endangered Species Act (ESA) - listed anadromous fish – currently undertaken by the National Marine Fisheries Service (NMFS), which resides in the Commerce Department within the Fish and Wildlife Service (FWS).

Family Farm Alliance Executive Director Dan Keppen testified in support of H.R. 3916, a concept supported by President Obama in 2011, also eliminates redundancies and regulatory confusion across federal agencies related to ESA enforcement.

“H.R. 3916 is [an] important step in reducing wasted time and money and represents a practical, common-sense change… that we strongly support,” said Mr. Keppen. “The FISH Act provides an opportunity to enhance protections to threatened and endangered species by improving the efficiency and effectiveness of the federal government’s approach to species protection through better decision-making.”

At the hearing, Congressman Doug LaMalfa (R-CALIFORNIA) said the NMFS biological opinion (BiOp) for ESA-list salmon in the California Bay-Delta and the USFWS BiOp for the endangered Delta smelt are “competing” with each other for water, causing adverse impacts to water users without benefiting the fish.

However, Mr. LaMalfa directed most of his questions to Acting Commissioner of the Bureau of Reclamation Allen Mikkelsen regarding a separate issue: removal of four private hydroelectric dams on the Klamath River in northern California.

Congressman Jim Costa (D-CALIFORNIA), a cosponsor of H.R. 3916, discussed how many areas in the country that have faced duplicate and conflicting actions proposed by USFWS and NMFS in an attempt to preserve and ultimately recover species listed under the ESA. He asked Mr. Keppen, a resident of the Klamath Basin, how the recently implemented joint NMFS-USFWS BiOp for two Klamath Basin species compares with previous separate biological opinions.

Mr. Keppen noted that earlier competing NMFS and USFWS BiOps resulted in the disastrous 2001 shut-off of water to Klamath irrigators, and he noted that the National Academy of Science later concluded that the two agencies had erred in the implementation of ESA in the Basin. He said that the integrated BiOp now in effect (and recently ordered by the courts to be redone) is an improvement. But he said development and implementation of BiOps would be more efficient if decisions were made “under the same roof.”

Introducing our newly designed website....

Check out www.familyfarmalliance.org to see how the Family Farm Alliance advocates to protect and enhance water supplies for farmers and ranchers in the 17 Western states. Our new website includes links to breaking water policy news, comprehensive policy reports and case studies, insightful commentary, agency correspondence, and recent written testimony from some of our 60 appearances before Congressional committees since 2005.
The U.S., Mexico and the Colorado River
A binational tour on water use and habitat restoration

The Family Farm Alliance earlier this month was part of a select group of 24 invited U.S. and Mexican participants who spent over five days traveling the lower Colorado River, from Hoover Dam to Baja California (Mexico) and back to San Diego (CALIFORNIA). Funded by the Walton Family Foundation and arranged by the Meridian International Center, the intent of the tour was to “bring together Colorado River thought-leaders and decision makers to share their binational expertise and collaboration on the issues surrounding use and conservation of the River”.

Walton Family Foundation Colorado River Initiative

The Walton Family Foundation continues a philanthropic vision begun by Walmart founders Sam and Helen Walton. The Foundation focuses its efforts on improving K-12 education for all students in America, to protect rivers and oceans and the communities they support, and to give back to the region that first gave Sam and Helen Walton opportunity. In 2016, the Walton Family Foundation awarded grants totaling more than $454 million. With its 2020 Environment Strategic Plan, the Foundation lays out four key initiatives, including oceans, the Mississippi River, coastal Gulf of Mexico, and the Colorado River.

On the Colorado, the Foundation is working to develop a flexible water management system by increasing market incentives for agricultural and urban water efficiency in the Upper Basin; shaping binational and multi-state water agreements in the Lower Basin; and restoring riparian habitat and water flows. The foundation is employing the following strategies throughout the entire Colorado River Basin — upper river, lower river and delta:

- Test whether water markets work for agriculture, cities and rivers;
- Expand financing for agricultural and urban water efficiency;
- Directly improve river flows and riparian habitat in targeted geographies; and
- Support development of priority Lower Basin water agreements.

One of those agreements is Minute 323, a pact between Mexico and the United States intended to increase water security for people in both places. Signed in Santa Fe (NEW MEXICO) on September 27, 2017. Minute 323 is the latest of a series of addendums to a 1944 treaty between the two countries. Minute 323 updates and agrees to new provisions that govern water from the Colorado and Tijuana Rivers and the Rio Grande, extends a number of the provisions of Minute 319, and adds a number of conservation and planning measures that are intended to improve cooperation and management of the Colorado River.

Minute 323 will remain in effect until 2026.

“Raise the River”

The philanthropic community and non-governmental organizations (NGOs) – through the “Raise the River” coalition — intend to play key roles in the success of the binational agreement. Philanthropic organizations in both countries – including the Walton Family Foundation - and NGOs have pledged to share the cost of the Delta restoration work, the water needed for restoration, and monitoring within the U.S. and Mexican governments.

Raise the River is a partnership of U.S. and Mexican non-governmental organizations — including The Nature Conservancy, Audubon, Sonoran Institute, Pronatura and the Redford Center — committed to restoring the Colorado River Delta. With the signing of the historic binational agreement in November 2012, restoration efforts kicked into high gear. Partners believe that the signing of Minute 323 ensured their efforts will not only be carried forward but will be expanded.

Raise the River’s primary goal is to “bring water and life back to the Colorado River Delta” in Mexico. By adding a “relatively small amount of water to the Colorado River Delta—less than 1% of its annual flow”, the partnership believes they can restore 2,300 acres of forest and marsh along a 70-mile stretch of river, thereby “generating rural economic activities and job opportunities for local people, including river restoration, tourism, recreational hunting, and sport and commercial fisheries”.

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Raise the River met its original goal to raise $10 million by 2017 — which was accomplished by December 2016. The money was used to conduct restoration work, such as putting native trees in the ground, and to acquire water rights dedicated to supporting the restored areas in the Delta.

**Binational Tour, Day 1: Hoover Dam to Lake Havasu**

Family Farm Alliance executive director Dan Keppen made the trip from Oregon to the Lower Basin earlier this month, where the program began in Las Vegas (NEVADA) on October 15, with an examination of Lake Mead, followed by an insider “hardhat” visit to Hoover Dam. The group traveled by boat through Topock Gorge and the Havasu National Wildlife Refuge, one of the last remaining natural stretches of the lower Colorado River, with a discussion of conservation, sustainability and wildlife protection. The second night of the tour was spent in Lake Havasu City, Arizona, a popular tourist destination and new home to the London Bridge, which was brought from England to Lake Havasu City and reconstructed, stone-by-stone, in the early 1970’s.

**Binational Tour, Day 2: U.S. Infrastructure & Agriculture**

The trip continued overland along the Colorado River through Arizona, with an examination of water infrastructure, including Imperial Diver
tion Dam, completed in 1938, which retains the water of the river into the Imperial Reservoir before desalting and diversion into the All-American Canal, the Gila River, and the Yuma Project aqueduct. About 90% of the volume of the Colorado River is diverted into canals at this location. Diversions can top 40,000 cubic feet per second, more than 50 times the flow of the Rio Grande.

The All-American Canal – the largest irrigation canal in the world – delivers approximately 3.1 million acre-feet of Colorado River water to nine cities and 500,000 acres of agricultural lands throughout the Imperial Valley.

The tour group met Tom Davis, general manager of the Yuma County Water Users Association, at the Yuma Desalting Plant, located at the local Area Office for the Bureau of Reclamation. The plant was constructed under the authority of the Colorado River Basin Salinity Control Act of 1974 to treat saline agricultural return flows from the Wellton-Mohawk Irrigation and Drainage District. The treated water is intended for inclusion in water deliveries to Mexico, thereby preserving the like amount of water in Lake Mead, behind Hoover Dam. Construction of the plant was completed in 1992, but it has only operated on two occasions since then. The plant continues to be maintained, however, but obviously, rarely operated.

Mr. Davis, who serves on the Family Farm Alliance advisory committee, also acted as tour guide through some of the highly productive farmland in Yuma County, which ranks at the very top of U.S. counties in several measures of agricultural sales, acreage and production. Yuma sits in the top 0.1% in vegetable and melon sales, the top 0.2% in lettuce acreage, and 0.5% in all crop sales among all producing U.S. counties.

Durham wheat (used for pasta) is the major grain crop in Yuma.

“Yuma is to U.S. agriculture what Silicon Valley is to U.S. computer and electronics production, what Detroit is to U.S. automobile production, and what Napa is to U.S. wine sales,” says Dr. George Frisvold, with the University of Arizona College of Agriculture and Life Sciences.

Mr. Davis directed the tour bus to pull over alongside a lettuce field which had just been planted a few weeks earlier. Irrigation water diverted to farms has decreased 15 percent since 1990 and nearly 18 percent since 1975. Factors contributing to this reduction in water use include a reduction in irrigable acres, expanded use of multi-crop production systems that require less water and significant improvements in crop and irrigation management and infrastructure.

“Most Yuma growers use highly efficient level furrow or level basin surface irrigation systems,” Mr. Davis said.

Buried drip or trickle irrigation is not widely used in the Yuma area, primarily because drip irrigation in vegetable production can lead to non-uniform emergence caused by variation in soil moisture, inability to leach salts that accumulate near the soil surface, and the industry need to adjust row orientation and spacing to optimize production efficiencies.

**Binational Tour, Day 3: Mexican Agriculture, Infrastructure, and Environment**

Mr. Davis bade the group farewell, and the tour bus crossed into Mexico at San Luis Rio Colorado, where the evening dinner was presided over by Will Ostick, the U.S. General Counsel in Tijuana, whose keynote speech was titled, “The U.S. and Mexico: The River Flows Beyond the Wall”. Historically, San Luis Rio Colorado – known as one of the hottest and driest cities in Mexico – was an important location for steamers traveling the Colorado River from the Gulf of California. Since the early 1900’s, the river has been almost entirely drained for irrigation purposes.

While in Mexico, the group toured Morelos Dam, Mexican agricultural lands, and important wetland and riparian habitat features.

Morelos Dam, located about 1 mile below the junction of

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the California border and the Colorado River, allows Mexico to divert its allotted water from the Colorado River to highly developed crop lands in the Mexicali Valley. It is the last dam on the river. On March 23, 2014, an eight-week controlled flood was triggered with the opening of a gate at Morelos Dam. The goal was to rejuvenate a desert riparian habitat. Many of the residents of San Luis Rio Colorado had never before seen Colorado River water flowing through their community.

From Morelos Dam, the group traveled in two smaller tour buses, through sandy, sparsely vegetated desert to the Ciénega de Santa Clara, a 15,000-acre wetland in Sonora, Mexico. The Ciénega is the largest wetland in the Colorado River Delta and provides critical habitat for several endangered or threatened bird and fish species. It is maintained by agricultural runoff from the Wellton-Mohawk Irrigation and Drainage District in Arizona. In 2009, Mexico and the U.S. agreed to develop a monitoring plan to provide guidelines for implementing a comprehensive program for the Ciénega.

After spending an hour paddling around the shallow, cattail-lined Ciénega, the group climbed back on to the tour buses for a bumpy ride north to the Laguna Grande Restoration Area, located in the heart of the Colorado River riparian corridor in Mexico. The Sonoran Institute and partner Pronatura Noroeste began restoration of the site in 2006, and to date have restored over 150 acres of riparian habitat along the river. The long-term restoration goal is to create a 1,200-acre nature preserve.

**Binational Tour, Day 4: Mexicali, Imperial Valley Agriculture**

After a late return to Mexicali, the second largest city in Baja, California – the group departed the following morning for the United States. On the way, they stopped at a cotton gin in the Mexicali Valley and met with local producers and water managers. The bus crossed the border into the U.S. at Calexico, and proceeded to Imperial Irrigation District (IID), where a late lunch was shared with IID general manager Kevin Kelley and Tina Shields (IID water department manager). IID’s Dave Bradford then guided a tour of the surrounding irrigation district, the largest in the country.

The IID Water Department effectively delivers its annual entitlement of 3.1 million acre-feet, less water transfer obligations, to nearly one-half million acres for agricultural, municipal and industrial use. Of the water IID transports, approximately 97 percent is used for agricultural purposes, making possible Imperial County’s ranking as one of the top 10 agricultural regions nationwide. The remaining 3 percent of its water deliveries supply seven municipalities, one private water company and two community water systems as well as a variety of industrial uses and rural homes or businesses.

As on-farm conservation efficiency measures are implemented, this ratio will change. Inflow to the Salton Sea is expected to shrink significantly after 2017, when water transfers from the Imperial Valley accelerate and mitigation water deliveries stop under agreements reached years ago.

“The lake is saltier than the ocean,” said Mr. Keppen.

In 2003, the state of California assumed responsibility for the restoration of the Salton Sea, if restoration were determined to be feasible. Now, experts who have studied the Salton Sea – both environmental groups and academia – believe that it is possible to restore the Salton Sea by making it smaller but sustainable. Projects sited on exposed lakebed will serve a dual purpose: producing renewable energy while doubling as groundwater to mitigate air emissions. Under legislation enacted in 2013, planning and implementing projects at the sea will be driven locally by the Salton Sea Authority, with support from the State of California.

The Initiative will first focus on developing up to 1,700 megawatts of new geothermal energy at the Sea – enough to power more than one million homes.

“Not only is there more geothermal generating capacity in the Imperial Valley than anywhere else in the U.S., but geothermal energy can be produced with minimal impact on landscape and habitat,” said Mr. Kelley.

Following the tour of IID farmland, a wetland project swarming with waterfowl, and a quick stop at the Spreckels Sugar Company (a sugar beet refiner that for many years controlled much of the U.S. West Coast refined sugar market), the remaining tour group members climbed back onto the bus one last time for the trip back to San Diego.

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Binational Tour of Colorado River (Continued from Page 6)

Takeaways

There are many pressing issues facing the U.S. and Mexico with respect to the Colorado River, and the tour helped shed light on those challenges.

“This overarching issue was one that I had hoped to learn more about on tour, so mission accomplished on that front,” said Mr. Keppen. “There’s simply no other way I would have had the rare experience of touring the Ciénega or the Laguna Grande restoration site. And getting to better know the Mexican farmers, water managers, conservation reps and policy makers was also very positive.”

Colorado River water – like all Western water resources – is a finite resource subject to competing demands. Demands for water can already exceed available supplies in normal years, let alone during times of drought-induced shortages. In recent years, more and more focus has been placed on using perceived “simple” or “cost-effective” solutions to meeting growing demands in other sectors. In many areas, agricultural irrigation water has become the default “reservoir” to meet growing municipal, industrial, environmental, recreational and energy sector demands.

“Family Farm Alliance members are most concerned about impacts and opportunities associated with any new demands on the Colorado River system – be they driven by municipal / industrial or new environmental priorities – and whether those demands will be looking to irrigated agriculture as a source to meet those demands,” said Mr. Keppen.

Mr. Keppen believes the tour was successful in drilling down on specific binational Colorado River issues about which he – and perhaps other tour participants – were unaware or misinformed. Because of this tour, he thinks participants developed better binational perspectives on Colorado River management.

“These recent Minute decisions provide a sort of unique cooperative vehicle which may make it easier to move water between the countries,” said Mr. Keppen. “Proponents to raise the river are rightfully proud of their cooperative efforts, and I count myself lucky to have seen how they are working together to put more priority on the ecological components of the Colorado River system.”

Inspecting the quality of cotton at a gin near Mexicali, Mexico (top right). Below sea level at the Spreckles sugar plant in California’s Imperial Valley (center). Sugar extracted from beets grown with Imperial Irrigation District water is sought out by many, including Krispy Kreme. Bottom right—Yuma Desalting Plant in Arizona.
Wildfire Legislation (Cont’d from Pg. 2)

resources Committee Maria Cantwell (D-WASHINGTON), Senator Patty Murray (D-WASHINGTON), and a bipartisan group of Western Senators have also introduced a bill to better prepare for and prevent costly wildfires while supporting rural jobs restoring forests.

The Wildland Fires Act of 2017 (S. 1991) would help further the Federal and State firefighting agencies’ “National Cohesive Fire Strategy” by authorizing additional funding for at-risk communities and directing Federal agencies to treat their most-at-risk forests to better protect communities and to reestablish natural fire regimes. In addition, the bill will provide stability to companies involved in restoration projects on Federal land, particularly those focused on cross-laminated timber. Several cross-laminated timber companies have recently expressed interest in developing businesses throughout Washington state.

“It’s time to create new tools to reduce fire risk and help better protect our communities,” said Senator Cantwell. “By targeting our most vulnerable pine forests, this science-based pilot program gives the Forest Service tools to address wildfire in our most vulnerable forests and prioritizes cross-laminated timber.”

In addition to Sens. Cantwell and Murray, the bill is co-sponsored by Senators Risch (R-IDAH0), Wyden (D-OREGON), Crapo (R-IDAH0), and Merkley (D-OREGON).

National Governors Weigh In

The nation’s governors continue to urge Congress to reform the federal wildfire suppression funding formula and provide stability for long-term planning and wildfire mitigation practices. The National Governors Association (NGA) believes the practice of using Department of Interior and U.S. Forest Service year average suppression costs for budgeting continues to constrain non-suppression program resources and no longer provides accurate funding estimates for wildfire suppression activities.

“Governors believe a comprehensive fix must address both the challenges of the rising costs of fire suppression, and the complicating challenges of mid-season fire transfers,” the NGA recently said in a letter to Congressional leaders.

“Governors urge Congressional action this year to enact comprehensive budgetary reform that addresses budget erosion and minimizes transfers.”

USDA Offers Opportunities to Help California Producers Rebuild and Recover

The USDA Natural Resources Conservation Services (NRCS) is targeting $4 million to help farmers, ranchers, and forest land owners in California recover from the recent wildfires. NRCS will issue waivers for those interested in the Environmental Quality Incentives Program to enable recovery work to begin immediately. This is one of several disaster assistance programs available through USDA to support recovery efforts for individuals and communities.

Assistant to the Secretary for Rural Development Anne Hazlett announced that USDA is making resources available to help rural people and communities recover from the effects of California wildfires.

“While the full extent of damage from the current wildfires is not yet known, USDA Rural Development is committed to supporting the recovery of impacted rural communities,” Ms. Hazlett said. “We have a variety of assistance rural communities can use during the rebuilding process.”

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The patio at Paradise Ridge Winery after the Tubbs Fire burned through north Santa Rosa (CALIFORNIA) on October 9, 2017. Photo via Facebook.
Administration, Congress Take Aim at ‘Sue & Settle’ Practices

In fulfilling his promise to end the practice of regulation through litigation that has harmed the American public, Environmental Protection Agency (EPA) Administrator Scott Pruitt issued an Agency-wide directive earlier this month designed to end “sue and settle” practices within the Agency, providing an unprecedented level of public participation and transparency in EPA consent decrees and settlement agreements. Meanwhile, legislative efforts are underway on Capitol Hill to also take on the “environmental litigation industry”.

EPA Issues Policy Directive to End ‘Sue & Settle’

“The days of regulation through litigation are over,” said EPA Administrator Scott Pruitt. “We will no longer go behind closed doors and use consent decrees and settlement agreements to resolve lawsuits filed against the Agency by special interest groups where doing so would circumvent the regulatory process set forth by Congress. Additionally, gone are the days of routinely paying tens of thousands of dollars in attorney’s fees to these groups with which we swiftly settle.”

“Sue and settle” cases establish agency obligations without participation by states and/or the regulated community; foreclose meaningful public participation in rulemaking; effectively force the agency to reach certain regulatory outcomes; and, cost the American taxpayer millions of dollars.

“Clearly, certain environmental groups have greatly abused the original intent of environmental statutes to find procedural flaws in agency actions, sue the government, and receive millions of federal taxpayer dollars in attorney fees for settling or winning these cases,” said Family Farm Alliance executive director Dan Keppen. “This in turn allows them to continue litigating against the government.”

According to the EPA, the directive will increase transparency, improve public engagement, and provide accountability to the American public when considering a settlement agreement or consent decree. Notably, it would expressly forbid the practice of entering into any consent decrees that exceed the authority of the courts and would also exclude attorney’s fees and litigation costs when settling with those suing the agency.

Republicans who have long warned that environmentalists are using court settlements to push regulatory agendas have broadly praised the new directive. Environmentalists, though, have slammed Administrator Pruitt for allowing industry to sign off on settlements and court orders. Others argue the directive will make it difficult on lawsuits filed against EPA to enforce missed mandatory deadlines already in law which are typically settled with a court-sanctioned schedule.

House Votes on GOP Bills Targeting ‘Sue and Settle’

The House of Representatives later in the month took up legislation that makes law settlement policies similar to those outlined in two recent memos issued by EPA and the Justice Department. One bill aims to halt what critics call the practice of “sue and settle,” the other would limit who could get money in a settlement agreement. The Judiciary Committee passed both measures earlier this year.

H.R. 469, the Sunshine for Regulations and Regulatory Decrees and Settlements Act introduced by Rep. Doug Collins (R-GA), would require agencies to publicly post and report to Congress on lawsuits, consent decrees or settlement agreements. It would also prohibit same-day filing of complaints and pre-negotiated settlements. H.R. 732, the Stop Settlement Slush Funds Act, a bill by Rep. Bob Goodlatte (R-VA), would bar money from settlements negotiated with the United States from going to any entity other than the federal government. Justice Department settlements would be limited to those that provide restitution for harm “directly and proximately caused by the party making the payment” and would block DOJ from requiring donations to third parties as part of legal settlements.

House Judiciary Chairman Goodlatte called for the full House to take up the sue-and-settle bill after EPA issued its directive aimed at curbing legal settlements with environmental groups.

The Family Farm Alliance has long advocated for legislative and administrative solutions that reduce federal environmental litigation and encourage settlement reform, particularly relative to the federal Endangered Species Act (ESA).

“Producers in the Western United States have seen firsthand the economic impacts that can accompany ESA single species management,” said Mr. Keppen. “Litigation that often surrounds ESA listings and federal agency management decisions adds a whole new level of costs and uncertainty for farmers and ranchers who rely on federal water projects located in areas where ESA-protected fish and wildlife live.”
The Senate Committee on Energy and Natural Resources (ENR) Subcommittee on Water and Power Chairman Jeff Flake (R-ARIZONA) earlier this month held a bipartisan roundtable to discuss opportunities to reduce federal red tape for aquifer recharge when it does not impact other water users, fully respects state primacy on groundwater, and complies with state water law.

Several Family Farm Alliance members were invited to this meeting, including representatives from the Idaho Water Resources Board, Arvin-Edison Water Storage District (CALIFORNIA), East Columbia Basin Irrigation District (WASHINGTON) and Washington State Water Resources Association.

Following the subcommittee’s August hearing on water supply and drought resilience, this roundtable marks another step to gather input from water managers and develop a collaborative west-wide water infrastructure and drought resilience bill.

“Arizona has developed model water policies by focusing on long-term infrastructure needs, flexible management, and supply certainty,” said Chairman Flake. “We will continue to build on last year’s drought bill, this year’s subcommittee hearing, and input we have received from meetings and roundtables like these, to craft a package of much needed water supply and drought resilience legislation.”

“We are pleased to see the continued focus on water infrastructure and resilience, and we look forward to continuing to work with the Committee to develop these important pieces of legislation.”

Sen. Maria Cantwell (D-WASHINGTON) also stated their interest in moving a Western drought bill through their committee. Another drought bill, S 2902, authored by Senators Flake, McCain (ARIZONA), Heller (NEVADA), Barrasso (WYOMING) and other Western Republicans, included reservoir operations language for Lake Mead, operations language for Fontenelle Reservoir in Wyoming, and Senator Barrasso’s Reclamation transparency act. This package was essentially a compilation of several Republican bills that have come before the Senate in recent years, including the Water Rights Protection Act, which the Family Farm Alliance strongly supported.

The Alliance in early 2016 helped organize a coalition of more than 100 farming groups from 12 states that sent a letter to Senators Murkowski and Cantwell, asking them to work on a drought bill that could be passed by the House. The groups sent a similar letter in October 2015, before drought negotiations between the House and Senate collapsed at the end of that year over disagreements on environmental protections. Alliance representatives were asked three times to testify before Senate ENR Committee on Western water drought legislation in the last Congress.

“Sen. Flake has been an important leader in seeking to craft Western water and drought legislation. Photo source: Fox News.”

“We always reiterated to the Committee that the negative impacts of today’s droughts and water shortages have reached staggering levels for our farmers and ranchers, their families and the irrigated agricultural economy,” said Alliance Executive Director Dan Keppen. “While the drought-related problems we face vary by state or region, topography, climate, soil conditions, hydrology, and crop, we believe that many solutions, while varied by location, are also characterized by certain common elements, including creativity, flexibility and balance.”

Ultimately, some components of Senator Feinstein’s drought legislation were blended with proposals offered by Republican House members and tacked on to the Water Infrastructure Improvements for the Nation (WIFIN) Act signed into law by President Obama late last year.

While news of Senator Flake’s intent to continue to push for Western drought legislation was met with praise from many, it was unfortunately overshadowed by his announcement later in the month that he would retire after his current term expires. Pundits claimed that Senator Flake was one of the most vulnerable Republican senators up for reelection in 2018.
Deadline Looms for “WOTUS” Public Comments

As a deadline for the public to share recommendations and concerns with the Trump Administration’s efforts to rescind and replace former President Obama’s 2015 Clean Water Rule, federal agencies are meeting publicly and privately with stakeholders impacted by the rule.

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) provided a comment period ending on September 27 for stakeholders to weigh in on the Trump Administration’s proposal to eliminate the Obama-era Clean Water Rule, which proposed a new definition of ‘Waters of the U.S.’ (WOTUS). Step 1 of the WOTUS process was intended to address the Trump’s Administration to justify eliminating the Obama-era Clean Water Rule. The agencies are now conducting teleconferences and a face-to-face meeting in D.C. to take in ideas on “Step 2” – developing a new WOTUS rule. When finalized, the proposed rule would replace the 2015 Clean Water Rule promulgated by the Obama Administration with the regulations that were in effect immediately preceding the 2015 rule.

Notably, EPA and the Corps were directed by a presidential executive order to consider interpreting the term ‘navigable waters’ consistent with Justice Antonin Scalia’s opinion in Rapanos v. United States, which indicated Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The Family Alliance has been deeply engaged in the two-step WOTUS “rescind and replace” process underway with EPA and the Corps. The Alliance letter transmitted in September for Step 1 supports the reasoning in the proposed rule that a stable regulatory foundation for the status quo would facilitate the agencies’ considered re-evaluation, as appropriate, of the definition of “waters of the United States” that best effectuates the language, structure, and purposes of the Clean Water Act. The Alliance board of directors earlier this year appointed a “WOTUS Subcommittee” which prepared detailed recommendations that will be shared with EPA and the Corps in the second step of the Administration’s effort. The deadline for public comments associated that phase of the process ends on November 28.

“We will be meeting with key officials in the EPA Administrators’ office in Washington, D.C. to brief EPA on the Alliance position paper on WOTUS and how we believe the Administration and EPA could construct the next proposed rule on Clean Water Act administration,” said Alliance executive director Dan Keppen.

Earlier this month, EPA and the Corps hosted a “Waters of the United States” listening session for agriculture stakeholders. Mark Limbaugh (The Ferguson Group, Washington, D.C.) represented the Alliance on this call. He emphasized the Alliance’s long-held position that the new definition of WOTUS should distinguish and specifically exclude irrigation canals, laterals, and ditches and protect exempted maintenance of agricultural drainage ditches.

“WOTUS 2 should ensure there is no confusion regarding the use of the exemptions for construction and maintenance of irrigation ditches and drains,” he said.

He also recommended that WOTUS 2 provide a blanket exclusion for first-order ephemeral/intermittent streams in the arid West; arroyos, dry creeks and washes should all be treated the same.

“The flow duration is nowhere near a volume envisioned by Justice Scalia,” he remarked.

Mr. Limbaugh’s statement also touched on the need to exclude certain artificial lakes and ponds used in agriculture, and to exempt constructed water management and treatment infrastructure with similar attributes to waste treatment systems, such as water reuse and recycling ponds; artificially constructed wetlands designed to treat agricultural or stormwater runoff, and artificially constructed groundwater recharge basins designed to percolate excess surface water into groundwater basins.

Other commenters during the listening session generally stated that a new WOTUS2 rulemaking should provide a clear, simple to understand process and definitions; and should limit federal jurisdiction under the CWA to only traditionally navigable waters, interstate streams and wetlands that have a continuous surface connection to a traditional navigable water.

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