

**MINUTES
of the
WATER QUALITY COMMITTEE
Holiday Inn Conference Center
Helena, MT
July 17, 2014**

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Those in attendance at the Water Quality Committee meeting were as follows:

MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Bill Staudenmaier
CALIFORNIA	Jeanine Jones Betty Olson Tom Howard
COLORADO	Trisha Oeth
IDAHO	Jerry Rigby Barry Burnell (via phone)
KANSAS	Greg Foley
MONTANA	John Tubbs George Mathieus Tim Davis Alice Stanley
NEBRASKA	Jim Schneider
NEVADA	Roland Westergard
NEW MEXICO	Scott Verhines
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	J.D. Strong
OREGON	Raquel Rancier
SOUTH DAKOTA	Kent Woodmansey

TEXAS

Carlos Rubinstein
Toby Baker

UTAH

Walt Baker
Eric Millis
Norm Johnson

WASHINGTON

Stephen Bernath
Buck Smith

WYOMING

Chris Brown
Pat Tyrrell
Kevin Frederick
Philip Stuckert
Curtis Seaton

WESTFAST

Lee Koss, Bureau of Land Management, Washington, DC
Jean Thomas, U.S. Forest Service, Washington, DC
Becky Fulkerson, U.S. Bureau of Reclamation, Washington, DC
Eric Stevens, WestFAST Liaison, Salt Lake City, UT
Patrick Lambert, U.S. Geological Survey – Incoming WestFAST Liaison, Salt Lake City, UT

GUESTS

Veva Deheza, NOAA/NIDIS, Boulder, CO
Larry Kramka, Houston Engineering, Fargo, ND
James Pena, USDA Forest Service, Washington, DC
John Hagengruber, U.S. Forest Service, Helena, MT
Carlee Brown, Western Governors' Association, Denver, CO
Peter Nicholas, Berg Hill Greenleaf & Ruscitti, LLP, Denver, CO
Doug Kluck, National Oceanic and Atmospheric Administration, Kansas City, MO
Alice Stanley, Montana Department of Natural Resources and Conservation, Helena, MT

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

J.D. Strong, Chair of the Water Quality Committee, called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held in Arlington, Virginia in April, were moved for approval. The motion was seconded. The minutes were unanimously approved.

WORKPLAN FOR FY2014-2015

Nathan Bracken discussed the Committee's proposed workplan for 2014-2015. He reported that the Committee had discussed an earlier draft at the WSWC's spring meetings in Arlington, Virginia, and that the WSWC would need to adopt the workplan at this meeting. In addition to monitoring a number of Clean Water Act (CWA) activities, Nathan said the workplan would require two specific tasks: (1) a summary of WSWC state experiences regarding hydraulic fracturing; and (2) a workshop to discuss the nexus between water quantity and quality

Kevin Frederick noted that the workplan would require the hydraulic fracturing summary to be conducted in coordination with the Association of Clean Water Administrators (ACWA) to build upon its hydraulic fracturing efforts. Kevin further noted that ACWA has not been heavily engaged with hydraulic fracturing. Walt Baker suggested that the language be changed to state that staff will coordinate with other relevant state associations and organizations to avoid duplication.

A motion to approve the workplan with Walt's suggested change was made, a second was offered, and the motion passed unanimously.

SUNSETTING POSITION

The Committee discussed sunseting Position No. 350.5 regarding CWA jurisdiction. Nathan explained that the WSWC adopted this position, which is in the form of a letter, in 2011 in response to a proposed guidance document the Environmental Protection Agency and the U.S. Army Corps of Engineers had proposed to clarify CWA jurisdiction. This position has since served as the basis of the various comment letters and other actions that the WSWC has taken in response to the agencies' efforts to clarify CWA jurisdiction, including its current proposed CWA rule, which they proposed after withdrawing the guidance.

In light of the various developments that have taken place since 2011, Nathan reported that the Committee's CWA Workgroup has developed a new resolution to replace position #350.5. The new document uses a "WHEREAS" format and while relevant to the proposed CWA rule, is not specific to that particular rulemaking and is intended to apply to any and all efforts that the Administration may take to clarify the CWA. In addition, Nathan noted that the

resolution is based upon the WSWC's March 10 letter to EPA and the Corps regarding the rulemaking, which the states approved unanimously and the WGA has subsequently endorsed.

Kevin asked that the following statement be added at the end of the 8th WHEREAS clause: "...despite repeated requests from the Western States Water Council to do so."

Walt Baker also raised some initial concerns about language in the resolution requesting that playa lakes and prairie potholes be excluded from jurisdiction, stating these features often do have an impact on jurisdictional waters and may have a significant nexus with surface waters. As a result, Walt opined that he did not know if the WSWC "could sell this."

J.D. said that no such nexus existing in Oklahoma with respect to these waters.

Chris Brown also noted that the resolution acknowledges that playa lakes and prairie potholes, as well as the other features that it identifies for exclusion, are "generally considered to be outside the scope of CWA jurisdiction."

After some discussion, Walt withdrew his objection.

A motion to allow Position #350.5 to sunset was made, a second was offered, and the motion passed unanimously.

A motion to recommend that the WSWC approve the new resolution with Kevin's request change was made, a second was offered, and the motion passed unanimously.

OVERVIEW AND DISCUSSION OF WSWC CWA ACTIVITIES AND POSSIBLE NEXT STEPS

The WSWC discussed a number of possible next steps regarding the jurisdictional rule and other related efforts involving the CWA.

A. CWA Jurisdiction Rule

With respect to the CWA rule, the Committee agreed to ask the CWA Workgroup to develop comments for the WSWC to submit. The Committee further agreed that the Workgroup should use the new resolution as the basis for its comments, assuming the full WSWC approves the resolution.

Nathan also noted that the WSWC is still working to schedule a call with EPA and the Corps to discuss how the proposed rule will interact with state water allocation authority and comply with Sections 101(g) and 101(b). Nathan said he would work to schedule such as call as soon as possible, noting further that the WSWC and ACWA had agreed to allow their respective memberships to participate in the calls they schedule with EPA and the Corps to discuss the proposed rule.

B. Agricultural Interpretive Rule

Greg Foley of Kansas raised concerns about an interpretive rule EPA and the Corps finalized in March that identified 56 agricultural conservation activities that the agencies believe are exempt under Section 404(f)(1)(A) of the CWA. Greg said the rule has created a significant amount of uncertainty about the scope of the CWA's existing agricultural exemptions and has raised concerns in Kansas that it improperly limits the scope of the exemptions. Consequently, Greg asked the WSWC if it would be willing to approve a letter asking the agencies to withdraw the rule.

Stephen Bernath said Washington is concerned that the rule conflicts with its state water quality laws.

Trisha Oeth, Jennifer Verleger, and J.D. noted that Colorado, North Dakota, and Oklahoma have asked the agencies to withdraw the letter. Walt further opined that the rule "closes the loop" on the types of activities that are exempt while the CWA does not.

After some discussion, the Committee asked Greg and Stephen to work with staff to develop a letter asking the agencies to withdraw the rule for the full WSWC to consider. Nathan noted that since the letter was not included in the 30-day notice, it would require unanimous consent to be considered and would require an additional ten-day review from the Western Governors' Association.

USFS PROPOSED DIRECTIVES FOR WATER QUALITY BEST MANAGEMENT PRACTICES

Jim Pena, Associate Deputy Chief of the National Forest System, discussed the U.S. Forest Service's proposed directive regarding water quality best management practices (BMPs) for National Forest System (NFS) lands.

Jim said the directive is intended to establish a consistent national approach to demonstrate that the BMPs the agency uses are effective. The directive is also intended to help the Forest Service achieve and document water quality and NPS pollution control. According to Jim, the Forest Service has been working on these issues for 4-5 years. Prior to this effort, each region had its own BMP program, which prompted the agency to lift the issue from the regional to the national level to support more consistent operations. The directive is also based upon the expectation that the Forest Service will work with state and tribal governments. Put out a technical guide in April.

With respect to timing, Jim said the initial public comment period for the directive closed on July 7, but that the agency has authorized another 30-day comment period.

Stephen said Washington provided comments and felt that there are a number of positive components but that a few tweaks will be needed. He also said Washington recognizes the NFS

lands play and wants to work with the Forest Service on this directive. Ultimately, Stephen said Washington is generally supportive of the directive.

Jim said he hopes that there can be agreement about the concept for the directive and noted that the Forest Service has a lot of latitude to change the proposal. The agency has received 15 comments to date, and some of those indicate that some states feel threatened about the possible usurpation of state authority.

John Tubbs asked about how the Forest Service has reached out to state foresters.

Jim said the Forest Service has held a series of webinars brought in “hundreds of people.”

Walt asked if it was intentional that the directive came out at the same time as the Forest Service’s groundwater management directive.

Jim said this was a coincidence and that the directives were developed on separate tracks.

S.D.N.Y. WATER TRANSFERS DECISION

Peter Nichols, Special Assistant Attorney General for the States of Colorado and New Mexico, gave an update on the status of litigation that is seeking to overturn EPA’s water transfers rule, which clarifies that certain transfers are not subject to National Pollutant Discharge Elimination System permits under the CWA. Although the Eleventh Circuit Court of Appeals has upheld the rule, the U.S. District Court for the Southern District of New York vacated the rule earlier this year, prompting appeals to the Second Circuit Court of Appeals. The district court took issue with EPA’s reasoning for the rule, which it felt was inconsistent with the U.S. Supreme Court’s *Rapanos* decision, among other concerns.

EPA has filed a “protective” notice of appeal and has until September to file its opening briefs. Peter also said a coalition of eleven states led by Colorado and New Mexico, which he represents, has intervened in the litigation and will appeal the decision as well. The western states will argue that the rule is the only permissible interpretation of the CWA. In support of this argument, the states intend to make the following arguments: (1) the court’s clear statement rule requires such a statement to infringe on state law; (2) the district court did not pay attention to the avoidance doctrine, which provides that if there are two possible interpretations, courts should pick the one that does not create constitutional problems; and (3) the rule is needed for the operation of certain interstate compacts.

In addition to Colorado and New Mexico, the other members of the coalition include Alaska, the Arizona Department of Water Resources, Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming. To date every other western state has weighed in on the rule, with the exception of Washington, which is one of the states challenging the rule. Peter also said a group of western water providers has also intervened in support of the rule and will likely file an appeal that makes similar arguments to those that the states will make.

Peter then discussed the briefing schedule, which requires the parties that are appealing the decision to file opening briefs by September 15. Response briefs from the parties challenging the rule would then be due on December 15, with reply briefs due on January 14.

Of further note, Peter said the Department of the Interior and the Bureau of Reclamation were able to persuade EPA to postpone an earlier proposal that would have convened an interagency task force to reconsider the rule, notwithstanding significant pressure from environmental groups.

John Tubbs, who served previously as the Deputy Assistant Secretary of the Interior for Water and Science, said that his boss Anne Castle was very influential in persuading EPA to defer reconsideration of the rule. “People often think of transfers as a cross boundary issue,” he said. “EPA doesn’t look at it that way. They see it as a ditch that returns water.” As a result, he said EPA sees transfers as ditches that return water to a river. As a result, John said he has been thinking about how to preserve this definition in the CWA jurisdiction rule. Montana permits discharges into ditches but John said he does not want the discharge of a ditch to a receiving stream to be permitted.

EPA TREATMENT AS STATES PROPOSAL REGARDING TRIBAL CWA ADMINISTRATION DISCUSSION

Nathan followed up on comments EPA Region 8 Administrator Shaun McGrath made during the Water Resources Committee meeting. Namely, that EPA is considering a possible interpretive rule to make it easier for tribes to obtain “treatment of states” status to administer CWA regulatory programs by removing the requirement that they demonstrate “inherent regulatory authority.” EPA has not developed a formal proposal and is conducting pre-proposal consultation with the states and tribes, although a formal proposal is expected towards the end of 2014. As a result, Shaun has offered to help set up a call with the WSWC to discuss the issue.

After some discussion, the Committee asked staff to work with Shaun to set up a conference call to discuss the proposal before the WSWC’s fall meetings.

Stephen noted that Washington is generally supportive of the concept, but has issues with how EPA manages tribal standards, which may conflict with state standards, particularly when the tribal standards are higher than the state standards. Consequently, Washington would want to speak with EPA about this aspect of the proposal.

OTHER MATTERS

There being no other matters, the meeting was adjourned.