

**MINUTES
of the
WATER QUALITY COMMITTEE
Doubletree by Hilton Sonoma Wine Country
Rohnert Park, California
June 28, 2017**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Einav Henenson Trevor Baggioire
CALIFORNIA	Jeanine Jones
COLORADO	John Stulp Patrick Pfaltzgraff
IDAHO	Jerry Rigby
KANSAS	Tracy Streeter
MONTANA	Jan Langel
NEBRASKA	Jim Macy
NEVADA	Roland Westergard
NEW MEXICO	Greg Ridgley
NORTH DAKOTA	Garland Erbele Jennifer Verleger
OKLAHOMA	
OREGON	Tom Byler Jennifer Wigal (via phone)
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Jon Niermann Robert Mace
UTAH	Norm Johnson

Eric Millis

WASHINGTON

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WYOMING

Pat Tyrrell
Steve Wolff
Chris Brown (via phone)

GUESTS

David Moon, The Water Report, Eugene, OR
Dave Mitamura, U.S. Army Corps of Engineers, Austin, TX
Cherilyn Plaxco, U.S. Army Corps of Engineers, Little Rock, AR
Christopher Estes, Chalk Board Enterprises, Anchorage, AK (via phone)
Mike Gallagher, Washington State Department of Ecology, Olympia, WA
Gary Lippner, California Department of Water Resources, Sacramento, CA

WESTFAST

Roger Pierce, Federal Liaison, Murray, UT
Roger Gorke, U.S. Environmental Protection Agency, Sacramento, CA (via phone)

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

Kent Woodmansey, Chair of the Water Quality Committee, called the meeting to order.

APPROVAL OF MINUTES

The minutes of the meeting held in Nebraska City, Nebraska on April 13, 2017, were unanimously approved.

SUNSETTING POSITION

The Committee discussed two sunseting positions. Position #369 regarding Clean Water Jurisdiction had some minor clean-up and was moved for approval. A motion, seconded. It was unanimously approved. Position #370 - the Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices, was allowed to sunset, with a comment that we can bring this back later if we need it again.

CWA WOTUS 2.0

Jennifer Wigal discussed EPA's webinars with the WSWC and the Association of Clean Water Administrators (ACWA). Jennifer is the current ACWA President. She also addressed EPA's other efforts with states across the country, and working groups that have developed to provide substantive feedback to EPA as they develop a new rule defining the extent of jurisdiction over waters of the United States.

After the White House issued an Executive Order on reviewing and withdrawing the WOTUS rule, EPA's outreach started at a high level. ACWA noted that if EPA was going to develop a well-functioning rule, it wouldn't be enough to share thoughts on the conference calls; EPA needed to put words down on paper so that EPA could get meaningful feedback. So far there has been no indication about EPA's specific process for rescinding the old rule or promulgating a new rule.

There is an enormous diversity of ideas regarding interconnectedness, and the types of water bodies and hydrology in the states, that to come to a consensus would be amazing. Hopefully EPA will take up the states' request to have meaningful conversations. If they do that, how can we be prepared to work with the EPA and bring our diversity to the table? At a minimum, states can be thinking about the implications of the possible definitions and jurisdiction and be prepared to inform the process with meaningful examples. If certain waters were not covered by federal jurisdiction, and the effort is to put the work of protecting these waters in the hands of the states, are the states able to close the gap? States should be able to illustrate and ground truth the viability and practicality of whatever is developed and proposed by EPA. Are there any significant changes to the ways that states would issue permits? There may be implications beyond just permitting that states need to be able to discuss with EPA.

Kent: Haven't read the withdrawal, but 30-days to comment on that. Don't expect that South Dakota will be commenting. Is this something that the water quality committee would be interested in commenting on?

Pat Pfaltzgraff: We need time to read the withdrawal before we decide to comment.

Jen Verleger: Assume that states involved in the WOTUS litigation will submit comments in support of the withdrawal.

David Schade: Don't think this committee needs to weigh in, just let it go back to the way it was.

Tony: A lot of the conversation from Jennifer is on the process. Just because waters don't fall under the definition of WOTUS, doesn't mean that they aren't regulated by the states. Now that EPA is coming to WSWC, we should have an idea of what we want and what is workable so we can provide substantive feedback. The USACE also thinks this is their responsibility. Should the states be involved in not only the rule-making, but the jurisdictional determinations? Right now it's being done on a case by case basis. Can we do this on a HUC by HUC basis? We have 30 days for discussion. Whenever they come up with the new rule, there will be more opportunities to discuss this and decide what kind of alternative will we suggest.

Trevor: For practical purposes, Arizona Water Quality is making jurisdictional determinations on a regular basis without USACE. They're just not official. EPA doesn't recognize it, but waiting around for the Corps doesn't work. We do it anyway because we need to. That needs to be a part of the conversation.

Pat: All valid points. CO first response is focused on the implications to 401 certifications and the implications that may have, particularly with transmountain diversions. The other big concern is that a lot of comments before came from eastern, water rich states, and don't really take into account the concerns we have in the west. The definition of perennial streams—how often it is a flowing stream--is particularly concerning. We want to make sure that western states issues are taken into consideration by the administrator when the new rule comes out.

Kent: Should we draft a letter that reflects our position on involving the states in the process and then have a conference call before the end of the comment period? We can see if there's something else we might add in there? Like Jennifer said, it might be hard to reach consensus.

Pat: I volunteer to draft that.

Kent: South Dakota has been involved with tribal land issues, where EPA is claiming waters aren't waters of the state, where if it is off-reservation we would say it is regulated.

Tony: Trish and I had some discussions before we wrote the letter. One of my thoughts is that when we schedule a conference call, we send an invitation with options for yes, no, or maybe. Could we do a similar test for jurisdiction over wetlands to reduce uncertainty? At least under this administration we all seem to agree that if it meets Scalia's test, then it's waters of the U.S. And then where there are "maybe's" is where the Kennedy test could come in, and take a closer look at whether there is a significant nexus. Also within those maybe's, perhaps there is room for the states to weigh in about their preferences? For example, Colorado has a particular interest in protecting their high elevation wetlands. Why can't we treat those wetlands of particular concern differently and allow one watershed to be regulated more stringently than some other watershed? We have said no in some areas, such as groundwater, prairie potholes, ephemeral streams and effluent-dominated streams where the only flow is coming from the sewage treatment plant. We haven't said that Scalia's test should be the rule, but at least we could use that test to draw a line to

provide some certainty on a greater scale. One size is not going to fit all of the states, so the states need a greater role in making those jurisdictional determinations. It's not solely a Corps determination. There was a famous stock pond in WY. It was an area that had never been regulated, so the presumption on the part of the state probably was that it's not jurisdictional. USACE says under the old rule, just because it has not been determined doesn't mean it's not jurisdictional. We've had discussions with the Corps, and there is a database with information that can show where JDs have been made. We ought to be able to use that data to more clearly visualize where JDs have and have not been made. If there's a basin with six determinations, maybe there's a higher probability that the water in that basin is all jurisdictional. We may be able to provide suggestions that give us greater certainty while still providing some flexibility.

EPA UPDATE

Regarding the Advanced Notice of Proposed Rulemaking (ANPR) on Tribal Water Quality Standards, there are no plans at this point and nothing in rulemaking schedule for this. Same thing with the NPDES rulemaking. For now, both have been kicked way down into late 2018. In terms of HABS, that has also been bounced around, but looks like it's headed for a signature sometime in August. The rulemaking process has been pretty fluid. On the Water Science Center, they're developing different tools and white papers on the Water Innovation Fund - a way of using the SRF money while it sits in between larger projects, often 20% of total fund. They're looking to focus on small and medium utilities to implement work. They're currently working with Jim in Colorado and his folks for sketching this out, and they're planning to hold a webinar conference in August to discuss what this is and how it can be used. We want to get your input on as it is being developed, not something just thrown out there, and build on the work that they've done with Colorado.

Regarding WOTUS 2.0 rulemaking, the discussions with states and other stakeholders via webinar went really well. The Washington, D.C. colleagues were surprised by some of the input with things they'd never thought of before. The process might not seem like a big deal to the states, but for the federal side it's a big step in the right direction, not just on this rule but as EPA develops future rules. They're still sorting out how do we have substantive and meaningful consultation with the states. Jennifer Wigal said earlier that consultation required more than just talking, but also putting it on paper. General counsel is concerned about ability to keep that information and process deliberative and free from FOIA. Once it leaves the agency on paper, the information is then FOIA-able. He provided an example of the drinking water program and the effort to include states on EPA workgroups. FOIA was a known and accepted risk. There were some guiding principles between key people at EPA to make that work. At the time 3 to 5 states were meeting monthly. There were some issues about workgroup and expectations of work on the other side. As Jennifer said, be careful what you ask for. Under WOTUS 2.0, if the water is not jurisdictional, what does that mean under the act? Could federal funds be used on these areas if there is a spill? Or would that be left up to the states to cover the entire costs? There could some negative aspects to clarifying jurisdiction and leaving it to the states.

Jennifer Wigal: Given where this rule has been we hope EPA would weigh the language being shared. This has been very contentious and litigated. More sharing might be better than being worried about FOIA. We frequently hear from other organizations an interest in more inclusion for working together. Would ask that EPA would take all of that into account. None of us want to have a repeat of the tortured process. There has to be a fast forward that allows for a better product that states can live with. It's not going to be something that everyone will be happy with, but something we can live with.

Roger: If you have specific examples of where that consultation has happened, it would be great to get that and look at it. A little unclear who would decide where that level of risk lies. We're pulling together some potential options to brief up the chain of command. We're hoping for a less contentious process as well.

Jennifer: I will corral those examples for you and talk to Kent about those options.

Tony: We appreciate the outreach through you and the Office of Water. We did get a call from Mike about the withdrawal of WOTUS 1.0.

Roger: That's how it's supposed to be. To help funnel information and get it to the right folks.

Tracy: It would really help the states to get a better view of things if the EPA would put forth its definitions, and the ramifications to funding so that states can get the full perspective (cause and effect) of the direction that this rule goes. True to the current administration's interpretation, but we also want a rule that mitigates the areas that need to keep protections/funding.

Roger: Those questions were addressed in the PowerPoint from EPA's outreach webinars. What do YOU guys think are the potential consequences of a stream being jurisdictional or not, good or bad? Please send questions to me on the process.

UNIQUE FEATURES OF SOUTH DAKOTA'S GENERAL CAFO PERMITS

Kent Woodmansey described the permitting process and goals for controlling water pollution from concentrated animal feeding operations (CAFOs). As of August 2016, South Dakota had 429 CAFOs permitted, primarily in the eastern half of the state, including 8 CAFOs located in another state with land application areas located in South Dakota. The state made changes to its 2012 Nutrient Management Plan Standards based on suggestions from producers, engineers, crop consultants, environmental groups, and others. The state requirements protect South Dakota's surface water and shallow groundwater aquifers, and are written to be understandable to those who use the land-applied fertilizers for a management plan that results in environmental compliance. Small and medium operations can be covered by general water pollution control permits through county zoning, or they can voluntarily obtain individual permit coverage. Large CAFOs, including from other states or Indian Country with land application in South Dakota, require individual permits unless waived by coverage under an EPA-issued permit.

The state and NPDES permits have several requirements in common, but have different application requirements and issuance processes. For example, unlike the NPDES permit, the state process does not allow an opportunity for a contested case hearing. They also have different effluent limits, different annual reporting requirements, and different processes for updating nutrient management plans. All operations with uncovered manure containment systems are required to submit NRCS' Soil, Plant, Air and Water (SPAW) verification, whereas the NPDES permit only requires this for swine, poultry, and veal operations. State permits also require applicants to include detailed information about their legal structure and parent/subsidiary corporations, to ensure compliance with South Dakota's bad actor law, SDCL 1-40-27.

A producer can sell or give away up to 100 cubic yards of solid manure per year without including that manure in their annual nutrient management plan. All other manure or process wastewater must be included in and land applied in accordance with a nutrient management plan. All operations with manure containment systems or land application areas within ¼ mile of streams where Topeka shiners have been observed or have potentially occupied are required to develop and implement an ESA plan. Permitted operations currently have 1.1M acres in approved nutrient management plans, with fields capable of accommodating an annual average 106M pounds of nitrogen and 39M pounds of phosphorus.

South Dakota's clay liner requirements are 20% more stringent than the NRCS national standard. New or expanding operations have soil boring, soil sampling, and groundwater monitoring requirements included in their permits to protect shallow aquifers. Those without water right permits when they submit their applications are required to install flow meters to document that their operation doesn't exceed the maximum allowable daily water volume and flow rate without a water right.

Producers are required to have attended CAFO Environmental Training Programs in the 3 years prior to applying for permit coverage, and the majority of participants report plans to adopt practices learned at the training sessions.

ONLINE PERMITTING IN NEBRASKA: DOING MORE WITH LESS

Jim Macy discussed the details of Nebraska's efforts to shift toward online permitting. They went from 14 days on a NEPA review to an hour online. They made some general permits between sister agencies that used to take months to complete. His power point slides show the process and steps an applicant must complete online. They started the process of converting from paper to online process beginning in August 2015. By April 9, 2017, they'd completed 1,000 permits. The return on investment scenario is that they have saved almost two full time employees to do this work over the past two years. It takes about 4 hours per permit, and they do about 600 permits per year.

They initially encountered some barriers to sharing across platforms, such as from Apple to PC, but now the transition is not much of an issue.

Nebraska has created the E-Enterprise model for collaborative leadership among environmental co-regulators for simplifying, streamlining, and modernizing the implementation of their environmental programs. The model for shared governance involves working together across agencies from the start of the process. Nebraska is willing to share their knowledge and experience with all of the other states. He used a raspberry plant as an analogy for how the E-Enterprise can be shared and incorporated, describing the state, federal, and tribal participants of the E-Enterprise Leadership Council and their roles.

Roger Gorke: I'd like to start a discussion with you all from an EPA perspective and a WestFAST perspective. What can we do to help foster that process for you so there can be greater learning between the states so you don't always have to plow new ground?

Jim: I'm a newcomer to the EELC committee. We don't have a basic spreadsheet for what has been developed out there. These decisions come across my desk, and we need to be able to turn over the questions on the techniques to our IT people.

WATER QUALITY POSITION AND NUTRIENTS

Michelle passed out a memo she prepared that shared thoughts from Walt Baker on our Water Quality Committee Work Plan regarding nutrients. Our Work Plan contains a reference to WGA's position, quoting some language on non-point sources and nutrients. Do we want to make a change to our Work Plan? We can't change WGA's language, though we may want to suggest the change to them if we think that it's important. Kent agreed with Walt's suggestions, and noted that it puts the decisions about nutrients more fully in the hands of the individual states.

STATE CERTIFICATION AUTHORITY: CWA 401 AND HYDROPOWER LICENSING

Tony - Under Tab P is a 2014 WSWC survey of our states about the CWA §401 program for FERC licensing and permitting of hydropower projects. The WSWC has had a long-standing legal battle over the states' conditioning authority. The purpose of §401 certification authority was to ensure it is consistent with your state water quality standards. Some of those standards are not always the typical "water quality" requirements, but might include things like bypass flows for fish.

The states' right to manage water resources under the Federal Power Act savings clause became an issue in the Rock Creek case, *California v. FERC*, which went to the Supreme Court in 1990. WSWC members got all 49 states to sign the state rights argument, but we lost 9 to 1. Four years later, under *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Supreme Court ruled in favor of the states, but under the §401 certification authority. This became the basis for protecting the states' rights under §401.

There are a few states that have separate reviews. California is one that has a concurrent review. Lack of state resources can be an issue that causes delays, and staff turnover can set things

back. California and FERC have a memo of agreement. In 2010, Colorado signed a small hydro memo of understanding. In Idaho there was a settlement agreement. Overall, the §401 state review process is not a major obstacle to completing FERC licenses. The Council's position has been that the state's role should not be diminished.

FY2017 – 2018 COMMITTEE WORK PLAN

We had a Committee phone call since our last meeting in Nebraska to make some tweaks and organizational changes to the work plan. Under the Water Quality-Water Quantity Nexus, Tom Stiles from Kansas, Kent Woodmansey from South Dakota, and David Schade from Alaska are going to work on a focused review of the 1997 report before the next meeting. The second item is Clean Water Act Issues, and we changed the organization of these sections. The first subsection is CWA Jurisdiction, followed by SRFs, EPA's Water Transfers Rule, Nutrients, Tribal Treatment as States, Abandoned Hard Rock Mine Remediation.

A motion was made to approve the work plan, which was seconded, and some discussion and clarifications followed.

For the Nutrients subsection, the wording of WGA's quoted language caught Walt Baker's attention as noted earlier. Kent recommended that we change the language of the work plan as recommended by Walt. Tony noted that we can't change WGA's position. Another suggestion was to strike through the entire paragraph that discusses WGA's position.

Tony noted that as we look at the EPA Water Transfers Rule, one of the questions that has come up is whether a changed definition of Waters of the U.S. would remove jurisdiction over waters that currently benefit from the Water Transfers Rule. Would this change the legal basis of the Rule, meaning that some transferred waters may no longer be exempt from NPDES permits.

Question: Tony, with that, do you think that any of the language that's in the current provisions of the work plan here goes for or against that, or is in conflict with that?

Tony: I don't think so, and I'm not sure EPA has any idea how they will deal with that. But water transfers are obviously a big issue for all of our Colorado River Basin States.

Kent: It's certainly something to keep an eye on and ask EPA about as they clarify what they're going to do.

Michelle: Just a head's up that BLM is planning on issuing a new hydraulic fracturing rule in the near future, so there may be more communication over that in the coming months than there has been in the past couple of years.

Kent: I spoke with Kevin from Wyoming, and he noted that the hydraulic fracturing section is in the work plan because of Wyoming. He was fine with moving it to the bottom of the work plan, as long as it's still in there in case something does happen.

An amended motion was made to accept the proposed changes in the work plan, with the modification of striking through the paragraph under subsection 2(d) on Nutrients, Work-to-Date, that begins "Paragraph B(3)(b) of WGA Resolution..." The motion was seconded and approved.

SUNSETTING POSITIONS FOR 2017 SUMMER MEETING

There are two Sunsetting Positions for Fall Meeting: Position #373 – Letter commenting on the proposed rule developed by the EPA and the USACE to clarify the scope of Clean Water Act jurisdiction; and Position #377 – Asserting state primacy on Protecting Ground Water Quality.

OTHER MATTERS

There being no other matters, the meeting was adjourned.