

**MINUTES
of the
WATER QUALITY COMMITTEE
Virtual Fall Meeting
(due to COVID-19)
March 24, 2021**

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MEMBERS AND ALTERNATES PRESENT

ALASKA

ARIZONA

Trevor Baggiore
Kyle Miller
AyeshaVohra

CALIFORNIA

Jeanine Jones
Betty Olson

COLORADO

Rebecca Mitchell
Jeremy Neustifter
Scott Steinbrecher

IDAHO

John Simpson

KANSAS

Connie Owens
Kenneth Titus
Tom Stiles

MONTANA

Anna Pakenham Stevenson

NEBRASKA

NEVADA

Jennifer Carr
Micheline Fairbank

NEW MEXICO

John D'Antonio

NORTH DAKOTA

Jennifer Verleger
John Paczkowski

OKLAHOMA

Julie Cunningham
Sara Gibson

OREGON

Tom Byler

SOUTH DAKOTA

Kent Woodmansey

TEXAS

Jon Niermann

UTAH

Norm Johnson
Todd Stonely

WASHINGTON

Mary Verner
Buck Smith

WYOMING

Chris Brown
Kevin Frederick
Steve Wolff

GUESTS

Wendy Ridderbusch, CalDesal
Matt Unruh, Kansas Water Office
Lucas Stephens, Internet of Water
Elizabeth Ossowski, NOAA/NIDIS
Tracy Streeter, Burns and McDonnell
Camille Touton, Bureau of Reclamation
Aaron Snyder, U.S. Army Corps of Engineers
Kevin Moss, Western Governors' Association
Sue Lowry, Interstate Council on Water Policy
Tanya Trujillo, U.S. Department of the Interior
James Golab, Texas Water Development Board
Christopher Estes, Chalk Board Enterprises, LLC
Peter Colohan, Internet of Water, Duke University
Kathleen Ligon, Texas Water Development Board
Mary Schooley, Oklahoma Water Resources Board
Lauren Driscoll, Washington Department of Ecology
Rick Allen, Office of the New Mexico State Engineer
Caroline Sevier, American Society of Civil Engineers
Tom Barrett, Alaska Department of Natural Resources
Jacqueline Tinetti, Council of State Governments-West
Jim Rizk, Texas Commission on Environmental Quality
Earl Lott, Texas Commission on Environmental Quality
Lauren Vernon, House Committee on Natural Resources
Amanda Long, Arizona Department of Water Resources
Nat Chakeres, New Mexico Office of the State Engineer
Jill Csekitz, Texas Commission on Environmental Quality
Kelly Mills, Texas Commission on Environmental Quality

Adriane Borgias, Washington State Department of Ecology
David Galindo, Texas Commission on Environmental Quality
Kevin McCalla, Texas Commission on Environmental Quality
Loreal Stepney, Texas Commission on Environmental Quality
Mary Anne Nelson, Idaho Department of Environmental Quality
Kimberly Nygren, Texas Commission on Environmental Quality
Brooke McGregor, Texas Commission on Environmental Quality
John-Cody Stalsby, Texas Commission on Environmental Quality
Kara Valentine, Nebraska Department of Environment and Energy
Jennifer Zygmunt, Wyoming Department of Environmental Quality
Teresa Wilhelmsen, Division of Water Rights /State Engineer's Office
Nakaila Steen, South Dakota Department of Environment and Natural Resources
Bill McCormick, Colorado Dam Safety/Association of State Dam Safety Officials

WESTFAST

Indrani Graczyk, NASA JPL
Heather Hofman, USDA/NRCS
Lauren Dempsey, US Air Force
Kevin Werner, NOAA Fisheries
Linda Friar, U.S. Bureau of Reclamation
Patrick Lambert, U.S. Geological Survey
Christopher Carlson, USDA Forest Service
Rob Manning, U.S. Bureau of Reclamation
Roger Gorke, Environmental Protection Agency
Paula Cutillo, U.S. Bureau of Land Management
Steve Higginbottom, U.S. Bureau of Reclamation

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Jessica Reimer
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

Due to COVID-19, this meeting was held virtually. Erica Gaddis, Chair called the meeting to order.

APPROVAL OF MINUTES

Jon Niermann made a motion to approve the minutes of the virtual meeting held October 13, 2020. A second was made by Mary Verner. The minutes were approved with no objections.

SUNSETTING POSTIONS

There were no sunseting positions to discuss during this meeting.

BIDEN ADMINISTRATION PRIORITIES

Roger Gorke, Environmental Protection Agency's (EPA) Office of Water, provided an overview of the Biden Administration priorities for the water sector. Radhika Fox, Principal Deputy Assistant Administrator for the Office of Water, has highlighted five specific priorities for the Office of Water, which include: (1) COVID relief and economic recovery; (2) equity and environmental justice across our EPA water programs; (3) working to harmonize the Clean Water Act and Safe Drinking Water Act; (4) integrated water resources management and looking at the role of water in addressing the climate crisis; and (5) the water sector workforce.

EPA wants to improve water quality for low income and disadvantaged communities that have been disproportionately affected by pollution and in areas that need further investment. Drinking water will be a primary focus.

With the economy, EPA will be looking to leverage existing infrastructure financing tools, such as the State Revolving Funds (SRFs), Water Infrastructure Financing and Innovation Act (WIFIA) loans, the WIFIA State Infrastructure Finance Authority (SWIFIA), as well as new grant programs to target needs, such as the Water Infrastructure Improvements for the Nation Act (WIIN Act), which is for disadvantaged communities and schools. The EPA Water Finance Center provides financing information for local decision makers. EPA also announced a new grant program for the water sector workforce, which we hope will bring awareness to jobs in the water sector.

Harmonizing the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) is already happening on the ground. Communities are doing this consistent with the water cycle, and EPA is interested in feedback from states on how to develop policies and programs that are consistent with this approach. This includes surface water, drinking water, wastewater, stormwater, and groundwater. EPA is also interested in harmonizing the SDWA and CWA so that, at a minimum, they are not in conflict with each other.

Climate stress is often experienced as water stress from drought, flooding, and sea level rise. States are central to managing those climate stresses. The new Administration is calling for a whole government approach to the climate crisis, which has been reflected in the executive orders that are setting really ambitious and holistic goals. We are also recognizing that the water sector plays a key role in managing climate, and even mitigating the rise of greenhouse gases.

In regard to Waters of the United States (WOTUS) and CWA Section 401, Executive Order (EO) 13990 directs federal agencies to review agency actions issued, promulgated, and adopted between January 20, 2017, and January 20, 2021, which includes the Navigable Waters Protection Rule (NWPR). During the review, EPA will engage with a range of stakeholders who are impacted by the rule, review what we learned from both the Obama WOTUS rule and the Trump NWPR rule. Section 401 will also be under review per EO 13990. It is not clear yet whether there will be changes to the rule, or if it will be rewritten or left alone. Review of the rule will be similar to WOTUS.

Questions:

Erica Gaddis: Roger, can you give us any more detail on what that consultation might look like this round? Are there meetings anticipated in various parts of the country like a work group that would include some states?

Roger: This is the opportunity to say that work groups would be great with regular communication. States have a say in that and hopefully we can make sure the Council is well represented.

Tom Stiles: What do we see happening with per- and polyfluoroalkyl substances (PFAS)?

Roger: EPA is committed to advancing science and advancing data. We're going to be moving forward on the primary national drinking water standard development process for PFAS, and we're using the best available science for enforceable limits for maximum contaminant level (MCL) goals. We also re-proposed the fifth Unregulated Contaminant Monitoring Rule (UCMR) on March 11, 2021. This will give us some new data on the frequency that the 29 PFAS are found in drinking water and at what levels. It would require a sample collection for 30 chemical contaminants between 2023 and 2025 using analytical methods developed by EPA and consensus organizations. Finally, EPA signed an action to solicit data on the presence and treatment of PFAS in wastewater discharges from the PFAS formulators and manufacturers.

Tony: Before the NWPR was even released, the outreach to the States during development of the rule was unprecedented. We met in Washington, DC with many States. During the Association of Clean Water Administrators (ACWA) meeting last week, we encouraged the new Administrator to have similar outreach. Formerly, we had bi-weekly calls. One of the real challenges has been that there is no baseline of jurisdictional waters, and there really never has been. Everyone talking about the impacts is talking from a different perspective. With that background, Roger, could you mention the work that's going on between EPA and USGS as far as an effort to map Waters of the United States?

Roger: Dwane Young has been working on a mapping tool. That effort is underway. It is not just a mapping for jurisdictional WOTUS, it is also for looking at aquatic resources across the board. I can get more specific answers about progress, but this will be an invaluable tool so we can determine what is jurisdictional and what is not.

Michelle: Do we need to initiate communication with EPA? How urgently is this Administration looking at these issues? We don't want to get out ahead of EPA too much, but we would appreciate your thoughts on timing.

Roger: It is always appropriate to reach out to us. The WSWC is seen much more on par with some of the bigger water organizations in stature. I think this would be an appropriate thing for us to begin the discussions on, especially on the WOTUS rule.

Erica Gaddis made the comment that we could contemplate a motion to send such a letter to EPA requesting that sort of meeting when we get to that agenda item.

Kent Woodmansey made a comment in the chat feature regarding guidance and environmental justice, stating that South Dakota was unlikely to implement any policies specifically addressing environmental justice unless it is in a rule.

Erica Gaddis: As we get further into the new Administration on environmental justice and how states are responding to some of the guidance and suggestions might be a really good topic on an agenda. We've got a couple things that we've been discussing in Utah, and we also have a new governor and administration. So I'm going to make a note that perhaps this might be a topic that we revisit at an upcoming meeting.

Roger: It might be an opportunity to do a webinar through WestFAST on aquatic resource mapping. This would be good in the coming months.

IMPACTS OF NAVIGABLE WATER PROTECTION RULE – Roundtable Discussion

Washington: Lauren Driscoll, Washington Department of Ecology.

A couple of things that we've been experiencing with the navigable waters protection rule. We're lucky in the sense that we have a very broad definition of state waters, and so all wetlands and waters are protected under state law. We don't really have a risk to waters other than the fact that we do not have a dredge and fill permit program. Historically, most of our permitting actions were 401 certifications. After the Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineer Supreme Court decision, we issued administrative orders to protect isolated wetlands. Since we don't have a permit program, we use the enforcement provision under our Water Pollution Control Act to issue administrative orders with mitigation requirements. We did a rough GIS exercise and at least 29% of our wetlands will lose federal jurisdiction; at least 14% of those are really coarse, based on the GIS layers that we had.

Our worked has increased. We've gone from having about seven administrative orders per year before the Navigable Waters Protection Rule came into effect, to 20 jurisdictional determinations and another 13 non-jurisdictional projects in review. In order to address this gap, we decided to embark on developing a state dredge-and-fill permit program. We had the authority under our existing laws to develop a program, but needed to seek legislative support for a fee rule. We started to work on that, then we had a hiring freeze come in, which slowed down things. With

the Biden Administration coming in, we decided to pause the rulemaking and see what happens with the Administration and the cases in the courts. In the meantime, we will keep issuing administrative orders and we've put in a budget request for 2.9 FTEs to help address the workload.

Adrian Borgias, Water Quality Manger, Washington State Department of Ecology

I am going to touch on the impact that the NWPR/WOTUS rule has had on our permitting. Our section does National Pollutant Discharge Elimination System (NPDES) permits for discharges to water, and state waste discharge permits to land. We already have delegation for the NPDES permits and our own state waste discharge permits as well. Before the NWPR, it was pretty simple for us to do permitting. The impact of the rule creates this sort of gap. There are now areas which used to be considered WOTUS, but may now require instead a state waste discharge permit. We need to figure out how to fill that gap with our regulatory program. We have yet to take a wholesale survey of all of our NPDES permits because we believe it is only a handful that may switch from an NPDES to a state waste discharge permit.

[Adrian shared her screen to show an example of a community of less than 500 people.] This community built a treatment plant. It's officially called Audubon Lake because once they built the plant, the area attracts wildlife. If you look at the WOTUS rule, one could make an argument that this is not a WOTUS because there is no connection to navigable waters in this body and it was artificially created by the treatment plant itself. This is an example of the kind of thinking that we have to go through. Is this a WOTUS or not? If not, how do we apply our program? Because traditionally our state waste discharge program was for land treatment or land discharge, if Audubon Lake requires a state waste discharge permit, then what are the beneficial uses that we're protecting under that permit? Traditionally, we issued those permit with a groundwater quality standard. If we shifted it to a state waste discharge permit, how would it change the conditions issued through the NPDES permit, if at all? I think the impact of the rule for NPDES permitting is fairly minor. Although, it requires us to really look at our state program and fill in the gaps, where before it was pretty clear what the state permit was.

Erica Gaddis: Utah's experience has been very similar. Our permits are both federal and state permits. All of our regulations speak to waters of the state, rather than WOTUS. Our attorneys have reviewed our Utah Pollutant Discharge Elimination System (UPDES) permits and determined that they are joint federal and state permits. We point to both regulations in our permits, and we feel okay about it. Not a huge impact other than the volume of Section 401 certifications, as there's a lot of wetlands around Great Salt Lake that are no longer jurisdictional with the Trump rule.

New Mexico: Rebecca Roose, Director, Water Protection Division, New Mexico Environment Department

New Mexico is one of the three states remaining without NPDES program authorization. We do have a broad definition of waters of the state, but we don't have the regulatory permitting infrastructure established in the state to issue surface water discharge permits for non-WOTUS. We don't have staff resources, because our point source program is really focused on Section 401 certifications of NPDES permits issued by EPA, and supporting EPA's implementation of the

Section 402 program through conducting inspections and things like that. We do have NPDES EPA credentialed inspectors. That's a very different workload than doing our own surface water discharge permitting program for the first time. As we look at our gap analysis, we're estimating nearly 90% of our surface waters in the state are not jurisdictional under the NWPR. As we're looking at gaps from a regulatory standpoint, or programmatic standpoint, we're looking to our existing groundwater discharge permitting program under the State Water Quality Act. That is a very mature state program with staff and resources. Similar to what we heard from Washington with their waste permits, I've noticed a lot of similarities there. We already had an understaffed groundwater discharge permitting program. We have about 700 existing groundwater discharge permits and a fraction of the staff that we need to keep up with permit issuance, renewals, inspections, enforcement, and things like that. The challenge for us is to know what our legal authority is, depending on how EPA decides to implement. Our current fees only cover 10-15% of the expenses of the program.

On the 404 side, we certify the permits issued by the Army Corps of Engineers (Corps). We've seen some impacts there in terms of jurisdictional determinations. Some projects had started in the permit process before the NWPR went into effect. We got around to our certification, after the fact, and had to figure out how to approach it most effectively. A lot of impacts are still being revealed. Less tools in our toolbox on the surface water side of things to fill any gaps.

We've been talking about seeking NPDES program authorization as a state on and off for years. We've gotten close before. We're certainly moving to having renewed conversations about it. The state may decide to do this, but it would not be the end of the inquiry for us. We are really intently looking at how to build a surface water discharge permitting program that potentially includes seeking NPDES authorization, but also gets us to a sustained state program with the needed water quality protections, regardless of what the WOTUS definition happens to be. We're hoping to do some really dedicated public outreach and engagement over the next year and there's some great examples from other states, including Arizona, on how to approach that and build the business case as a state for how and why we need to invest in our surface water protection.

Trevor Baggione: Questions for Utah and Washington. For Utah, how are you handling EPA involvement?

Erica: We don't have active discharges in non-WOTUS waters. Our individual permits are pretty clearly Waters of the United States. There have maybe been a few questions in relation to stormwater, but overall it has worked to issue a joint state and federal permit.

Trevor: For Washington, do you have any specific tools, or systems that you're using to determine what are Waters of the United States and what are not?

Adriane Borgias: No, we do not have any tools. Really, it's on a case-by-case basis. How that permit is written affects if and how they can comply. The point with the small communities is that we have to be really careful not to bankrupt them with our water treatment standards. So how do we find the best way to get clean water for these communities?

Arizona: Trevor Baggio, Director, Arizona Water Quality Division

Arizona does not have a state surface water discharge permitting program, yet. It has passed the State House and it's in the State Senate. I expect it to pass tomorrow and then it will take effect later this year. We've done something similar to Utah as it is not a direct replacement for waters of the state and waters of the United States, but our state program will be based on the infrastructure of the federal program with discharge permits, compliance and enforcement. We're relying on our existing infrastructure and authority.

Because EPA has not given us a set of tools, we've developed what we call our Screening Toolkit for WOTUS. We use U.S. Geological Survey's (USGS) rain drop tool to determine if there is a path to a WOTUS, we use some groundwater data, we use some riparian vegetation data to give us some indicators of whether these waters are likely WOTUS. It gives us a better picture because right now, we don't have a good picture in Arizona of what is jurisdictional and what's not. Our state program is actually going to rope in a whole bunch of additional waters. We will systematically go through all of our permits and all of our impaired waters with this screening toolkit, and make a call for whether those are WOTUS or not. The other challenge that we've come across is, if we're renewing a permit and determine that their discharge is not to a WOTUS, but the discharge reaches a downstream WOTUS, how do we address that? It changes the standards in the permit, and it also changes the antidegradation requirements that facility has. I'd be curious to know how other states are handling those two pieces with changing standards.

Erica: To answer for Utah, we have the same standards for both. Ephemeral washes are included.

Trevor: Okay. That is going to be different because in Arizona, we do not regulate ephemeral washes.

Nevada: Jennifer Carr, Deputy Administrator, Nevada Division of Environmental Protection

For Adriane, if it helps, our state surface water discharge permits are essentially identical to our NPDES permits, they just cite different authorities. They do not cite the federal authorities, they only cite state authorities, and they do not go through EPA's 30-day review process. Other than that, they are essentially identical. They use the same surface water standards and surface water beneficial uses that exist for the NPDES permit program, as well. We're taking a similar approach for creating new state-based stormwater permits, because we've never had a state municipal separate storm sewer systems (MS4) equivalent. NWPR is pushing us in that direction to create a state-based stormwater program. To make it easy on the permittees, we're just going to take essentially what's in the MS4 program, strip it of all the federal citations, and replace it with state citations. If a construction company has an MS4 federal stormwater permit and a state stormwater permit on different projects, they'll have similar conditions and won't get confused about what applies in different locations. We are also working on a state-based permit related to potential impacts to wetlands. I have been spending a lot of time engaging as a new member of the Association of State Wetlands Managers, which has been highly valuable. We don't have the authority to create a mitigation banking system, or an in-lieu-of fee program, so we're coming up

with some creative thinking on how we could put mitigation requirements, potentially, in schedules of compliance on a permit.

Most recently, one of our staff had a brainchild to see how maybe The Nature Conservancy could lend a hand in that regard. We're in the early stages of those discussions and we will see where that lands legally. We're trying to see if we can bring in other partners to help us out with that process. We've also had a lot of new activity in meeting with EPA Region 9 and the Corps leadership out of the Sacramento district. We had our first meeting at the end of last month and I think we're going to do them bi-monthly now. We really need to be talking together as a leadership team on all three fronts, because clearly the decisions that the Corps makes over jurisdiction are not necessarily going to apply to the decisions that EPA may make for 402 permitting, and that's becoming clearer. It was mentioned by others this morning, the Corps very well might not claim jurisdiction over a project, but EPA might say that same reach necessitates a 402 permit because the discharge could make it to a WOTUS eventually, or something along those lines.

I complained to Region 9 and the Corps at our last meeting that we're providing terrible customer service to our permittees. EPA really heard us. Their solution was actually Arizona's tools as a best path for figuring out the permitting scheme. So Trevor, if you feel like you don't have good tools, the tools you do have are better than the rest of us.

Trevor: We will be happy to share our tools with you.

Mary Anne Nelson: In Idaho, we have recently received an informal jurisdictional determination from the Corps declaring some specific drains existing in stream channels that are used for irrigation are not jurisdictional. It's problematic since we have EPA approved TMDLs for these waterways as well as discharges going into them. We are wondering if EPA will step in and counter that call, and what the authority or process for that may be. We are also wondering what this precedent means for other irrigation drain systems around the state with drains in stream channels..

CLEAN WATER ACT SECTION 401 CERTIFICATION – Roundtable Discussion

Erica: We have two different rulemakings that have gone into effect recently. The first rulemaking is the 401 rule, during which a number of states submitted comment letters. WSWC sent a letter in 2019. The 401 rule went into effect last year. Then the second one is the new Corps' Nationwide Permit (NWP) reissuance and modification, which was finalized by the Corps in January and went into effect on March 15. With respect to the roundtable here, if you could comment on any concerns or issues related to these items, as they're unraveling and rolling out in your state, that would be fantastic.

Utah: Erica Gaddis

One of the things that we have been debating on is whether or not we should go ahead and update our state rules to align with the new federal 401 rulemaking. We've kind of put a hold on

this, especially now that the Biden Administration has included it in their list of items to be reviewed. I don't want to spend a lot of time going through a rulemaking, only to then change it back, or change it again, even though these are obviously things that can change over time. We just issued our very first straight denial of a 401 certification. As I understand from the Sacramento district, it is the first in the district. It was based on our antidegradation rules. This was for a proposed development in our headwaters, which in Utah are protected as Category 1 waters and don't allow any point source discharge at all. The project would have removed 18,000 feet of a Category 1 stream, and in prime aquatic habitat. That's out for public comment now and so I can't really talk in much detail about it. It has raised some questions about what our next steps will be. Having the uncertainty around the new rule certainly complicates those conversations with our permittees.

On the nationwide side, two WSWC meetings ago, we talked about putting together a workgroup. We made some progress towards that with respect to how we will work with other federal agencies that haven't been as involved before in the past. The new nationwide permits pull in federal agencies in a role that is new to many of them. We've started going down a path of developing templates for how we might have an MOU between a state and other federal agencies. I think that's a worthy effort in the event that reissuance stands. In the event that it's changed, I think, we're kind of in a little bit of limbo as well. From Utah's perspective, we really would like to get some clarity here. We hope this doesn't become another WOTUS-type, decade long back and forth, and that we can get some certainty with how the rules are going to be applied.

New Mexico: Rebecca Roose

New Mexico is in the multi-state litigation challenging the final 401 certification rule. As a state, we're certainly hoping to see a change under the new administration - whether that's through it playing out in the courts and going back to EPA for revised rules, or taking on a new rule initiative in advance.

I wanted to share our experience in New Mexico recently on the NWP's. We issued our certification to the Albuquerque District in mid-December. We learned in February, with just a couple of days notice, that the Albuquerque District was declining our certification in its entirety for all 50 plus nationwide permits. The Albuquerque District pointed to language that we had in what we considered to be the preamble to the actual conditions that we put in our certification. They pointed to something that they considered a "reopener" clause, as well as to the EPA final 401 rule - and really the preamble to the rule - as putting the Corps in the position of having no choice but to deny our entire certification.

Last week 16 NWP's that were finalized in the January Federal Register went into effect. For those 16 permits, we will need to individually certify every project in New Mexico that comes in under those nationwide permits. We're going to go from already having done a certification on those permits that would have covered us for five years, to having a significantly larger workload over the course of the next five years for doing individual certifications. We're trying to sort through all that and have been having ongoing exchanges with the Corps, EPA, and even our congressional delegation. The other side of it is the 40 or so NWP's that the Corps is on track to finalize later this

year. Our indication so far from the Albuquerque District is that they're going to give us no opportunity to remedy what they see as the flaws in our certification for those other 40 permits that we issued in December. That's kind of the end of the inquiry.

I'm hoping that we can move past that and get to a better place. There certainly seems to be time to work through it. I'd be interested to know if other states have "reopener" issues around their NWP certifications. We could maybe connect offline because it's been really helpful for us to connect with some of the eastern states that are in the same boat.

Questions/Comments:

Erica: Rebecca, I just want to make sure I understand this. Because you have a reopener clause, which is probably standard language in most of your permit, that was the reason for a denial?

Rebecca: That's our understanding and that's the explanation that they gave to us. The language is standard, and we have used it before. We were aware of some discussion in the EPA 401 Rule about "reopener" clauses, but we didn't really think that's what we were doing. Because of the change in the Corps' approach of having states certify proposed permits instead of final permits, we and other states that included this type of language did so in part to give ourselves the opportunity to update or modify our certification if there were substantive changes between proposed and final permits. On its face, it seems quite reasonable.

Erica: Any other states experience the same denial?

Jennifer Carr: In Nevada, we had exactly the same thing happen. However, because our "reopener" clause on a general permit would have caused the project proponent to come back to us with more details, we end up at the same endpoint of certifying individual permits. We will probably have different numbers of permits to process. So we're just going to roll with it.

Erica proposed a motion for the Council staff to draft a letter on behalf of Western States Water Council urging EPA to prioritize and accelerate the review of the Clean Water Act, Section 401 certification final rule, and that the letter should clearly express that the uncertainty surrounding this rule is complicating state implementation of the new regulations under state programs and rules. That letter should include as an attachment, the 2019 letter, and WSWC position number 426. Mary Verner seconded the motion.

Roger Gorke: This may not directly relate to your motion, but we started the discussion with perhaps having MOUs or agreements with the state and federal agencies that might be doing some permitting that might get caught up in 401 certification. I'm wondering if it is not a good idea to move forward on that irrespective of what the 401 rule looks like. Having better discussions and engagement at the state level with federal agencies seems like a good thing. That might be something that states want to look at, regardless of the context of the specific rules.

Erica: I agree that we should have states coordinating better with our various federal partners. I think that speaks more to the new NWP reissuance. I think the question is, what is it we are really

asking federal agencies to do differently? Without some clarity from EPA, it's hard to know exactly what we're asking. We started having quarterly meetings with all of our federal partners that EPA organizes just for Utah agencies. That's been really, really helpful as a model. The WSWC workgroup could get back together and maybe coordinate around a more general topic with respect to federal state coordination.

Tony: We would be happy to work on drafting a letter. I don't think there would be an issue, particularly where we have a position.

Rebecca Roose: I fully support this idea. I think a letter is a good idea, especially with the new administration coming in. There are so many competing priorities, but there also will be choices that EPA will make along the way to prioritize things, more or less. If the Council decides to move forward with this type of a letter and gets the language to where people feel really supportive of it, then I think that's an important way to send a clear signal to help them make their prioritization decisions.

Last week, during the ACWA meeting, I let the Acting Assistant Administrator Radhika Fox know we feel a great sense of urgency around 401 in the State of New Mexico based on the way implementation is unfolding already and on the NWP issue. I told her we've heard directly from the Corps leaders that they feel it's EPA's 401 rule that's constraining them into making some of the decisions on state NWP certifications. They are pointing back at EPA and there's many more decisions that are being made every day across the country around how that rule is being implemented. She heard me. She committed to meeting with me in April to talk about our concern. I felt it was a clear indication of her interest to engage on what she was hearing from me and my sense of urgency. That's not a lot of data points to go off of, but something like this could be well-received in a letter. To Roger's points about the MOUs, I'd say it's a good thing to keep in mind. If the Council moves forward and drafts a letter, we'd want to review the letter to make sure that it's not written in such a way that it would make other federal agencies not want to work with states on those MOUs. So it might be good to review the content before finalizing and signing it. I would say the same regarding the time states have to certify and any points about the rulemaking process being long and cumbersome. We want to emphasize Section 401 review as they're prioritizing so many key issues, and to keep in mind states' input on the real day to day impacts of this particular rulemaking.

Tom Stiles: I would speak in favor of the motion. Kansas' 401 certification process is fairly benign and doesn't cause a lot of issue. The Corps accepted our 401 on the 16 Nationwide's, but we didn't have a reopener clause in it. I do not like this new 401 rule, as 401 is the only authority given to the states by the Congressional act [CWA]. Everything else is delegated to us. I don't know how we can stand and complain about times when EPA doesn't respect cooperative federalism and engaging us as co-regulators, and then just passively say that we're willing to let the Feds trample over the authority that we already have, and will look away and let it erode. As a matter of principle, I think we have to actively defend the sanctity of the states exercising their respective 401 authority to reflect appropriately our water quality standards and to influence and condition projects to not impose what we see as an undue impact on our respective state waters.

Chris Brown: We would like to have a chance to look at the letter before it goes out. Otherwise, I don't think we have any general concerns.

There was no further discussion on this motion. Erica also suggested drafting a letter to the Army Corps of Engineers to prioritize and accelerate any review that they intend for the reissuance and modification of nationwide permits that was finalized in January 2021.

Kevin Frederick: I was under the impression that both the Corps and EPA were developing implementation guidance, and I've kind of lost track of that. Has anything been finalized yet?

Roger: I haven't heard that the guidance is forthcoming anytime soon.

Erica: Kevin, would it help if we included in the letter that if it is EPA's decision to retain this rule, that states would like to see implementation guidance very quickly?

Kevin: It's a little bit of the cart before the horse on some of this. We seem to be struggling with certain elements of the rule that some states certainly want to have revisited. On the other hand, without having a sense of how the current regulation would be implemented, it puts us in a position of really trying to comment on something that actually may be in our best interest.

Rebecca: The letter would be consistent with past WSWC statements and the existing position. However, we're directly responding to the fact that the Biden Administration has very clearly stated that the 401 rule from the last Administration is under review. So we're responding to the fact that they've already said they're going to revisit 401 and we're weighing in saying that, as long as there is uncertainty, from a policy standpoint there are real implications at the state level. Maybe if we frame it that way, thinking about the impetus for the letter isn't so much what we like or dislike about the existing rule, but the fact we're weighing in on the fact that it's a moving target.

Erica: I know there's not necessarily total agreement on the desired outcome of the rule, but I think what we can probably all agree on is that the uncertainty created by this Executive Order that requires review of the rule is problematic. I like the idea that we, as a Council can say, "Get on with it!" And at a minimum, make a decision of which track you're going to go down. If you're going to go down the track of retaining the rule, we need implementation guidance, ASAP. If you're going to go down the track of revising the rule, we need to know that soon, and we want to be expressly consulted.

Rebecca: If we tee up the letter that way, we should ask for them to prioritize interim guidance for what happens in the meantime. We don't want to have no guidance for the next two years while they go through the rulemaking.

Erica, Jessica, Tony, Rebecca, and Jennifer worked on the draft letter during the meeting to get it out for everyone to review.

IMPACTS OF MAUI GUIDANCE – Roundtable Discussion

Erica stated that this item will be put on the radar for an upcoming meeting. In the meantime, if anyone wants to look at the guidance themselves, refer to Tab P, page 200 of the briefing materials.

REGULATING PRODUCED WATERS

David Galindo, Deputy Director, Water Quality Division, Texas Commission on Environmental Quality (TCEQ) shared a presentation on addressing regulatory authority for oil and gas facility discharges. He discussed the process his division went through applying to EPA to be granted delegated authority to manage Texas' oil and gas NPDES program.

The effort began with House Bill 2771 in the 86th Legislature in 2019. It required TCEQ to submit a request to the EPA for regulatory authority for oil and gas discharges, as well as a transfer of state regulatory authority from the Railroad Commission of Texas (RRC) to the TCEQ. This allowed TCEQ to issue one consolidated permit for wastewater discharges to meet state and federal requirements.

We were given until September 2021 to complete our application and so we had to move pretty quickly once the bill passed. TCEQ adopted federal oil and gas effluent limitations guidelines; revised the memorandum of understanding (MOU) with the Texas Railroad Commission regarding oil and gas jurisdiction; and the memorandum of agreement (MOA) with the EPA, which was put in place in 1998 for the National Pollutant Discharge Elimination System (NPDES) Program. We added an addendum to the MOA rather than opening it up entirely. We looked at our compliance and enforcement readiness to make sure they were teed up for site visits and investigations. We also updated our general hydrostatic test channel permit, and are currently working on replacing two oil and gas general permits for stripper wells, coastal discharges and territorial seas with one general permit.

There are additional discharges where you're not eligible for coverage under any of the existing general permits, or any of the general permits that we're going to be developing. For those dischargers, individual NPDES permits are required for facilities that do not meet these requirements. We've updated our NPDES application to obtain information applicable to oil and gas facility discharges. We encourage a pre application meeting with anyone that's interested in obtaining an individual permit through TCEQ.

We worked with stakeholders on the front end as we were going through the process of applying for delegation. We had meetings to keep them apprised of what we were doing, and we had a website set up for when the information was available. We also had an email where they could submit questions to us. We did this for the delegation application. We also did this for the enforcement side for anyone with questions on how enforcement was going to be transferred from the Railroad Commission over to TCEQ. A number of different stakeholders attend those meetings. Due to the pandemic, all of these meetings were done virtually.

We were granted delegation in January of this year. We had done a lot of coordination, not only with Region 6, but we also included headquarters in the discussion. Our public participation process met all of the federal requirements. When the application was submitted, there were no surprises and EPA had no questions. Now that we've got delegation, we're now looking at implementation. Is there anything that we need to do with our water quality standards potentially, or implementation procedures to accommodate these discharges? We do have a long history of permitting multiple different types of industries in Texas, but this is something new for us. And we're going to need to learn and adjust our procedures as we move forward.

INNOVATIVE WATER SUPPLY PLANNING

Wendy Ridderbusch, Executive Director of CalDesal, presented to the Committee on desalination in California. She highlighted the current trends in desalination, which she described as "not your Grandma's desal anymore!" The California Water Resilience Portfolio is the blueprint for equipping California to cope with water supply and management challenges, and includes brackish water desal, seawater desal, salinity, and management. The desal industry is constantly innovating and focusing on sustainability. Most importantly, we're communicating the changes of that innovation to regulators and legislators in California. We're always presenting and informing folks on the cutting edge of the state of the art technology advances. These advances have often been developed in conjunction with university researchers.

James Golab, Hydrologist, Texas Water Development Board (TWDB) gave an overview of the water desalination program in Texas. Since its inception, the desalination program in Texas has funded five seawater desalination projects at \$3.2 million, including three physical feasibility studies and two pilot plant projects. In addition, \$2.1 million has gone towards 11 brackish groundwater desalination studies, which include preparation of guidance manuals and several research studies.

Despite a history of several desalination projects in Texas, currently, there are no operational seawater desalination plants. There are several proposed projects along the Gulf Coast. The City of Corpus Christi is the most active and it has five potential projects, all within the planning or permitting phase. Groundwater desalination is much more common in Texas. We have what is called the Brackish Resources Aquifer Characterization System (BRACS), which was established to map aquifers with up to 10,000 milligrams per liter total dissolved solids (TDS) and key aquifer parameters. It is updated every five years, most recently in 2020.

Since 1999, the use of desalination within Texas has been growing steadily. Currently it is growing at a rate of 157,000 acre feet per year. Most recently published in the State Water Plan, there are currently eight out of 16 regional planning groups across Texas that recognize desalination as a potential groundwater source for their areas. There is a potential recommended management strategy totaling 111,000 acre feet per year of groundwater desalination, and 116,000 acre feet per year of desalination within the State Water plan.

One of the main considerations or factors that has prevented desalination from being a larger portion of water is the cost of water within Texas. Groundwater desalination is estimated in Texas to cost about \$713 per acre foot and seawater desalination \$1,431 per acre foot (much more expensive than other sources). However, new technologies may be changing that in the future.

STAFF UPDATE

Jessica Reimer reported that a draft of the Water Reuse Report had been circulated for review. The final draft will be published on our website soon.

The Administration Update can be found under Tab T in the briefing book. This is a new section that has been added to complement our legislative and litigation update. It includes new rules or other actions taken by the Administration within the Federal Register.

WESTERN GOVERNORS' ASSOCIATION POLICY RESOLUTION

Kevin Moss, WGA Policy Analyst recently took over the water policy portfolio at WGA. This spring WGA be updating both their water management and water quality resolutions. He encouraged everyone to look at Resolution 2018-12. A number of the issues discussed today are referenced in the resolution, including Clean Water Act 401, WOTUS, and a handful of others. If you have inputs or updates to that resolution, mainly in a federal context, as that's where WGA tends to focus, he encouraged folks to reach out to their respective Governor's Office.

DRAFT FY2021-22 WATER QUALITY COMMITTEE WORK PLAN

Chair Erica Gaddis noted the Committee should give the draft work plan a good review. It can be found under Tab H. This will be taken up for consideration at our Summer meeting.

SUNSETTING POSTIONS FOR THE SUMMER 2021 MEETINGS

Erica recommended members review Position #424 - Water Transfers and National Pollutant Discharge Elimination System (NPDES) Discharge Permits, which will be discussed during the summer meetings.

OTHER MATTERS

There being no other matters, the Water Quality Committee was adjourned.