

**MINUTES  
of the  
WATER QUALITY COMMITTEE  
Holiday Inn Express and Suites  
Deadwood, South Dakota  
September 15, 2021**

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**MINUTES  
of the  
WATER QUALITY COMMITTEE  
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**MEMBERS AND ALTERNATES PRESENT** (\*via zoom)

<b>ALASKA</b>	<i>Tom Barrett</i>
<b>ARIZONA</b>	<i>Trevor Baggiore</i>
<b>CALIFORNIA</b>	
<b>COLORADO</b>	<i>Jeremy Neustifter</i>
<b>IDAHO</b>	<i>Jerry Rigby</i>
<b>KANSAS</b>	<i>Kenneth Titus Tom Stiles</i>
<b>MONTANA</b>	<i>Anna Pakenham Stevenson</i>
<b>NEBRASKA</b>	<i>Jesse Bradley</i>
<b>NEVADA</b>	<i>Micheline Fairbank Jennifer Carr</i>
<b>NEW MEXICO</b>	<i>John D'Antonio Rebecca Roose</i>
<b>NORTH DAKOTA</b>	<i>Andrea Travnicek Jennifer Verleger</i>
<b>OKLAHOMA</b>	<i>Sara Gibson</i>
<b>OREGON</b>	
<b>SOUTH DAKOTA</b>	<i>Nakaila Steen Jeanne Goodman Eric Gronlund</i>
<b>TEXAS</b>	<i>Jon Niermann</i>

**UTAH**

Erica Gaddis

**WASHINGTON**

*Mary Verner*  
*Buck Smith*

**WYOMING**

Chris Brown  
Jeff Cowley

**GUESTS**

*Sam Massman*, U.S. Forest Service  
*Tracy Streeter*, Burns and McDonnell  
*Karen Vyerberg*, USDA Forest Service  
*Alan Peck*, Bureau of Land Management  
*Susan Rosebrough*, National Park Service  
*Jaron Ming*, U.S. Fish and Wildlife Service  
*Sue Lowry*, Interstate Council on Water Policy  
*Christopher Estes*, Chalk Board Enterprises, LLC  
*Kathleen Ligon*, Texas Water Development Board  
*Jim Rizk*, Texas Commission on Environmental Quality  
*John Paczkowski*, North Dakota State Water Commission  
*Mary Anne Nelson*, Idaho Department of Environmental Quality  
*Kathy Alexander*, Texas Commission on Environmental Quality  
*Charley Palmer*, Alaska Department of Environmental Conservation

**WESTFAST**

*Lauren Dempsey*, U.S. Air Force  
*Mike Eberle*, USDA Forest Service  
*Travis Yonts*, Bureau of Reclamation  
*Mindi Dalton*, U.S. Geological Survey  
*Christopher Carlson*, USDA Forest Service  
*Paula Cutillo*, Bureau of Land Management  
*Rachel Esralew*, U.S. Fish and Wildlife Service  
*Roger Gorke*, Environmental Protection Agency  
*Heather Hofman*, Natural Resources Conservation Service

**STAFF**

Tony Willardson  
Michelle Bushman  
Cheryl Redding  
Adel Abdallah  
James Ryan

## **WELCOME AND INTRODUCTIONS**

Committee Chair Erica Gaddis welcomed members and asked those who were just joining today to introduce themselves.

## **APPROVAL OF MINUTES**

The minutes of the meeting held on June 24, 2021, were moved for approval by Jennifer Verleger second by Chris Brown. The minutes were unanimously approved.

## **PROPOSED AND SUNSETTING POSTIONS**

### **New Position on Abandoned Hardrock Mines**

Erica explained the purpose of the new position, to put some additional attention on abandoned hardrock mine issues, especially as they relate to water quality across the west. The two main asks are additional federal resources and making progress on the liability issues that have been ongoing for some time. She acknowledged members from other states that helped draft this from Arizona, Nevada, and New Mexico. Tony noted that some additions were made after the Executive Committee call at the request of members to included mining on public, private, and tribal lands.

Jennifer Zygmunt expressed some concerns from Wyoming's perspective: (1) does the language in the eighth Whereas clause regarding state review of a Good Samaritan plan for adequacy unintentionally put the states on the hook for liability if the plan fails; and (2) while federal funds for non-profit organizations and the private sector are welcomed, they don't want those funds diverted away from the funds that otherwise would have gone to the states.

A discussion ensued regarding the coordination between state water quality and mining agencies to prioritize mines that impact water quality, and coordination between relevant CERCLA and CWA provisions to clean up impaired waters and protect eligible Good Samaritans and the states from liability. Related issues included state involvement in determining Good Samaritan eligibility, and clear identification of who is taking the lead on a project.

There was also some discussion about language that would maintain or increase existing resources to states, and thoughts regarding Congressional language about \$16B for mining cleanup in the pending infrastructure bill and where and how those funds will be distributed. Jennifer Zygmunt noted that there are allocation formulas established for coal programs, but not for hardrock mining - or even a good definition of what hardrock mining is.

A subgroup agreed to work on some additional revisions to the position language, and Jon Niermann moved forward the position to the Full Council pending those additional revisions. Jennifer Carr seconded the motion.

**Position #426 – supporting State Clean Water Act Section 401 Certification Authority**

Erica noted that the position has been left largely intact from the version approved three years ago. She went through the newly proposed Whereas clauses and Resolved clause, given EPA’s 2020 rule on CWA §401 certifications, and acknowledging that not all states have the same concerns.

Jennifer Zygmunt suggested a minor wording change in the second whereas clause, “federal agencies rejecting reopener conditions,” that the word “waive” would be a little bit more appropriate, since rejecting kind of implies a denial, and that’s not really allowed, but federal agencies can waive conditions.

Jennifer Carr recommended adding the same language about active federal engagement in the state process discussed for other Council positions. There was some discussion about which agencies are involved in developing permitting rules, policies, guidance, regulations, or other administrative actions that trigger or impact CWA §401 certifications.

Chris Brown made a motion to forward the revised position to the Full Council for consideration; Jeanne Goodman seconded; and it was unanimously approved with revisions to forward to the Full Council.

**Position #427 – regarding Clean Water Act Jurisdiction**

Erica mentioned this position was passed in 2018. Based on a lot of debate and discussion from that time, there were a few changes to recognize the impact on the regulated community. I’ll note that number 10 speaks to the need for mapping of jurisdictional waters and so there may need to be something added there. I will open it up to the group. Are there any other comments about WOTUS or changes to this position that you would like to discuss?

Jennifer Zygmunt: One suggestion from Wyoming. Under 6F which talks about features that are excluded, it mentions arroyos, coulees, washes and similar features. We would like to suggest putting the word ephemeral in before features just to clarify that the intent of that is to point out ephemeral features such as a arroyos, coulees, and washes. Just a minor edit that we would throw out to the group.

Trevor Baggio: Can we add something to number 11 that says the effective date allows for EPA to provide the necessary tools for its implementation?

Roger Gorke: Is that edit intended to allow states to include existing tools, or for EPA to develop new tools that would be helpful for states?

Trevor: My suggestion is related to not knowing where the rule is headed. I suspect there will be a combination of existing tools and new tools. Obviously, if the existing tools are already in place, no problem, that delay doesn't need to happen. But any new tools that are going to be needed as the new rule comes into place, that’s what I’m concerned about. We were implementing

the 2020 rule for a year before the Arizona tool came out. We were in limbo until such time as those tools were available.

Roger: Based on you guys earlier discussion, it would be maybe something that we could collaboratively make the tools that you need.

Trevor: Absolutely yes!

Tom Stiles: Just a slight tweak to what Trevor suggested, would this be restricted just to EPA, or applicable to other federal agencies such as NRCS and USGS?

Jennifer Carr: The second to last whereas on the bottom of page one that talks about the issue of the one-size-fits-all national approach does not work for the West. I was really excited to hear Radhika talk about regional differences and the need for flexibility. Could a resolved clause down at the bottom be added to reinforce that concept and provide some additional backing for potentially maybe a regionalist rule?

Erica asked Jennifer to write up something on the resolved clause, as well as some language that asks that states be a part of the agencies' drafting process.

Erica: Going back to number eleven, it reads "includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling states to take such actions as necessary to address any gaps in state law regulation of protection, and to ensure sufficient time for tools to be developed by federal agencies in collaboration with states that facilitate implementation of a new rule." We can tweak that a little bit from a grammar perspective. Any other thoughts, questions, suggestions?

Tony: When we passed the original resolution, there were some states who had concerns abstain from this resolution. I don't know if there's anyone on the line from Colorado or Washington or Oregon.

Jeremy Neustifter: Colorado would likely be voicing concerns and abstaining from this provision regarding excluding ephemeral waters and wetlands.

Tony mentioned that here will be time for states to look at it more closely before members vote on it tomorrow.

Roger Gorke: The expectation is you guys will adopt this at tomorrow's Full Council Meeting? That way I can get it to Radhika soon after.

Mary Verner: I definitely will want to review this specific language. There is a specific definition of the ephemeral streams in Washington state that I would want to coordinate as well. So please give Washington a chance to circulate this internally and we may have comments as it comes on to the floor.

Erica: Moving down to number 12, Jennifer Carr from Nevada has suggested as a new resolved clause, that the new rule “recognizes the unique landscapes and flow regimes in various regions of the nation and the need for flexibility and implementation, or a defined regional nature of the rule.” Any concerns with this?

Tom Stiles: Does anybody read 6c to include something like a larger Corps or Reclamation reservoir when they talk about man-made impoundments? I view the entire sentence in the context of small impoundments, but I think someone else might take more liberal interpretation to include some of our larger reservoirs, and Kansas wouldn’t support that. So I want to say smaller man-made impoundments.

There was some discussion regarding farm ponds and PL566 watershed structures on ephemeral and intermittent streams and concerns about whether they would be jurisdictional, and Tom noted that this was a significant concern in Kansas. There was also some concern about how to phrase exclusions for impoundments to be internally consistent, because they are for water supply purposes, whether large reservoirs or small ponds, for municipal or irrigation supply.

There was some discussion regarding the new paragraph 13 and including states in the drafting process, to share drafts and provide direct and effective feedback on the co-regulator implementability of a proposed rule. Rather than limiting the number of states, there was a suggestion to include a representative number of states with diverse perspectives, from diverse regions, to be involved in the process in an integrated way. Tony noted that for the 2020 rule, the states weren’t involved in the drafting, but the discussion and feedback was more conceptual. Chris noted that the requirements of the federal rulemaking process may not allow direct involvement in the drafting phase, but it may be useful for the states to have the opportunity to provide feedback prior to publication of a proposed rule. Jennifer Carr suggested substituting “rule development” in place of “drafting.” Tony added that those discussions would be with co-regulators and not stakeholders or members of the public.

Jeremy noted Colorado concerns with the language in paragraph six regarding the limits to the CWA consistent with the Rapanos plurality opinion authored by Justice Scalia, and wondered where Oregon and Washington stood on that issue. Jennifer Zygmunt noted Wyoming concerns if that language was removed, but was willing to consider edits.

Erica recommended some additional discussions outside of the Water Quality Committee prior to the Full Council meeting tomorrow. Jennifer Verleger made a motion to propose the Full Council consider the edits to the positions. Jeanne Goodman seconded the motion. Erica noted that the Council would also deal with any abstentions as needed.

## **EPA UPDATE**

Radhika Fox, Assistant Administrator, EPA Office of Water, expressed appreciation for the state regulators, and noted the importance of water to the development and growth of the West. She provided an update on EPA priorities and funding.

She said she is prioritizing partnerships with states and grounding decisions in the wisdom of those who locally experience the stressors of drought, sea level rise, flooding, and poor water quality. Water infrastructure has been elevated to the forefront of national dialogue, and she referenced President Biden's American jobs plan and the bipartisan infrastructure bill working its way through Congress. "I really think that part of that is due to all of you and the strong and vocal support you have historically had as the western states in calling for more investment in water infrastructure and water resources." The current proposal for the water portion of the bill includes about \$55 billion to the EPA Office of Water to invest through existing programs – such as \$15 billion for removing lead service lines, another \$10 million for addressing PFAS. Then a range of other support to improve drinking water, wastewater and stormwater infrastructure. The bill is investing in proven programs that state leaders and EPA have partnered on, such as the Clean Water and Drinking Water State Revolving Funds (SRFs).

She talked about President Biden's focus on equity and environmental justice for sustainable infrastructure investments, and the Justice40 Initiative to deliver 40% of the overall benefits of certain federal investments flow to disadvantaged communities. This includes the SRFs and the lead removal grants. She said EPA stands ready to collaborate with the states to identify and address any of the structural biases in the current funding and financing programs.

EPA is in the process of developing a revised definition of Waters of the United States (WOTUS), which I know this is a huge and important issue for the western states. I think as we're developing a rule like this, we have to acknowledge the very significant regional differences in water and really have to craft a rule that is adaptable so that it can be implemented and protect our water resources across the country. The science is evolving. These water features are really evolving very rapidly in the face of a climate crisis. I think for us at the EPA, thinking about a durable definition of WOTUS, it is one that can also be adaptive to the ways in which our water landscapes are changing. I will just say, our total commitment at the EPA is to partner with all of you, the state coregulators, tribal coregulators to really arrive at that durable definition.

Another big priority for the western states is where we are headed with the CWA §401 rule. In our opinion, the 401 rule that was promulgated in the previous administration took away fundamental rights that states and tribes have to protect the quality of their waters from adverse impacts related to federally licensed or permitted projects. We completed our review of that 401 rule in May, as directed by President Biden's executive order and we determined that the rule needs to be revised in a manner that fundamentally restores the authority that states and tribes have long had under the Clean Water Act, and so that really is our focus. Over the summer, we completed early outreach with stakeholders regarding EPA's intention to revise the 401 rule, and we intend to propose a new rule in the early part of 2022. We'll look forward to having ample discussion with the states once we have that proposed rule for consideration. I also know that for a number of states, there's a concern that the 2020 rule will remain in place and we've been hearing a lot about the implementation concerns that you all have. EPA and the Army are trying to address those implementation concerns as we hear about them from you. For example, we recently issued a joint memorandum regarding the implementation of the 2020 rule, where the Army directed the Corps to provide a maximum time allowable before finalizing 41 nationwide permits. That memo also address multiple implementation challenges that we have been hearing about from states across the

country. We are happy to share that memo with you if you haven't seen it. We want to hear from states not only on this rule, but on any other water issues.

I wanted to talk a little bit on water quality standards for Indian country, but I know Roger Gorke was going to speak later and so he can probably answer some of your questions around where that work is heading. But it is an area that I'm really excited about and really feel that some of the work that we're going to be doing around that, as well as tribal treaty rights is very consistent with and helping deliver on President Biden's commitment to strengthening the nation's relationship with tribes.

As we think about the regulatory agenda within the Office of Water more broadly, we want to stop the ping pong that has created so many challenges for states and local stakeholders. We are deeply invested in crafting enduring policy. We can't only focus around promulgating a rule, we have to think about the creation of it, but also the implementation and adapting of that policy. Right now, when we think about durable policy of the EPA, we're following the science and the law and are hyper focused on grounding our understanding in what we do, and the lived experience of those who are impacted by the rules that we make. That includes those who historically have not been able to participate in these kinds of issues, such as lower income people, communities of color, rural America. After we create that policy or regulation, we have to focus more on implementation. This is something that I have heard from many states since I joined the Administration in January – what you want to see from EPA is more resources and tools that really support states and tribes in implementing these rules. That is something we're very focused on right now at EPA, as well as recognizing the rapidly evolving nature of water features all across the American landscape. We also need to write these rules in ways that can adapt to different situations and changes over time.

### **Questions:**

Jennifer Carr: I appreciate your time with us today. A lot of your points, I'd like to tie a couple together with a request. You talked about implementability of the regulations that are coming out with both WOTUS and the 401 and other rules that you're working on. One of the things that we've had really good experience within the drinking water program is inserting the states into the rule drafting process. We firmly believe that it's beneficial to have the states at the table during the drafting process before the proposal comes out. The drinking water rules are not litigated as much because of that process. I would ask that you would really consider that with the 401 rule.

Radhika: Thank you for that feedback I will take that back to our team and get back to you on that.

### **ARIZONA NPDES TOOLS**

Trevor Baggio, Director, Arizona Water Quality Division (AWQD) spoke about the 2020 Navigable Waters Protection Rule (NWPR), Arizona's 2021 Surface Water Protection Program - which takes effect beginning September 29, 2021 - and the recent vacatur in *Pascua Yaqui Tribe v. EPA* in the U.S. District Court of Arizona, which returns Arizona to a pre-2015 regime.

The Arizona case was filed by six different tribes seeking to repeal and replace the NWPR. When the Biden Administration took over, EPA asked the court to remand the rule without vacatur. Judge Marquez decided that NWPR had fundamental and substantial flaws that cannot be cured without revising or replacing the definition of WOTUS and so the judge tossed out the rule. She did not rule on all of the other pieces - she did not rule on what the repeat repeal and replace process was. She did not opine on what rule now remained, but ultimately felt that it was appropriate to toss out the NWPR. This created a circuit split. South Carolina's decision had followed EPA's recommendation or requests, where they remanded the rule to EPA, but they did not vacate the rule. Many of the other court cases are still ongoing. California just last week had some additional hearings on their case. There's uncertainty about whether this vacatur applies nationwide and what rule is now in effect. We don't expect EPA to appeal but there were a few intervenors to that case, including the Arizona Mining Association and the Arizona Rock Products Association. EPA has put out a statement regarding this case. "In light of this order, the agencies have halted implementation of the NWPR and are interpreting WOTUS consistent with the pre-2015 regulatory regime until further notice." EPA has interpreted that the vacatur applies nationwide.

Arizona's 2021 State Surface Water Protection Program, will shrink what our state waters program will actually cover. Due to the court's ruling, there's a little less clarity now over which waters are federal and which waters are state. Of course, some additional waters will come back into the CWA program. Most permittees will have no change. Arizona's program requires us to create a list of protected surface waters. The WOTUS list will grow. We are required to put a map together of all WOTUS waters and those under the state Surface Water Protection Program. We will have a map of what is regulated in Arizona as a state water and what's regulated as a federal water and what is not regulated at all. This will benefit my staff, as well as the regulated community, because they'll know what's regulated. Agree or disagree with the NWPR, but there was clarity. That's one of my hopes for the new rule that the Biden Administration is working on - that it contains clarity so that we can make sure we know what's regulated, and the regulated community knows what's regulated as well.

### **Questions:**

Erica Gaddis: This map is something I'd love to have for Utah as well. We've struggled because that pre-2015 determination is a core decision. Many of our waters haven't been evaluated. They're evaluated on a case by case basis. Are you making those determinations? Is the Corps on board with your map?

Trevor: If the Corps opines we will need to be in line with them, or we will need to have conversations to make sure that we're aligned, but we believe we have the authority to make determinations. We do run them by EPA. Sometimes EPA pushes back and disagrees, but we do believe we have the authority to make those determinations.

Jennifer Carr: Does your new rule affect waterways, like ephemeral waterways, dry washes, or does there actually have to be water in your waterway for it to be protected?

Trevor: No, ephemerals are not a part of the program, except for a select few ephemerals that we identified in the statutes. State waters do not cover waterways, they cover perennial or intermittent waters of the state.

Tom Stiles: Not a question, just something for people to think about. Is it possible to have two maps? One for 402 and one for 404?

Trevor: I would have to give it some additional thought. Interesting question. It's a fun topic to consider.

Roger Gorke: It might take a statutory change. It makes sense, but it is not the way the Act is structured.

Tom: There could be a hybrid map for Kansas on 402. Any water is covered, not necessarily by 402, but by state permitting authority for discharges, like what Trevor said for 404. In Kansas it is a little more defined since we don't have any 404 authority. It may be two maps that basically govern state regulation of discharges through 402, or respective state permitting programs, and then the 404 application map. It may not necessarily be two federal maps, but one that's almost pure federal 404 and one that's either state or hybrid, governing 402 type discharges.

Next, Trevor gave a presentation on ADEQ NWPR Screening Toolkit.

The toolkit is designed to help us understand what our flow regimes are in our waters, which was critical under the NWPR, because ephemerals were not included. In fact, when that rule was proposed, I told my staff they would have to become really good at determining ephemeral and perennial waters. It also helps us identify WOTUS. Obviously, flow regime is important. Under our state program, as I mentioned after Jennifer's question, because it does not include ephemerals so that's something that we're going to have to get through as well. 23% of our waterways have a known flow regime in Arizona, which is a very low number when you're trying to regulate waters across the entire state. We've gotten data from various sources and continue to look for additional sources so that we can update this map. In the absence of an army of employees that I can send out to do observations and do research and do study - instead, we've done a couple things to try to infer the flow regime of some of these waters. We do have a lot of data associated with gauges. We have water level gauges across the state on many of our waterways. The question comes down to whether those gauges are showing stormwater flow or base flow. Especially on an intermittent water, it's hard to tell the difference. We've done some digging and found some USGS research that talks about the number of days of flow by eco region. Using that approach, we can take our gauge data and do some analysis on it to determine whether those water bodies are flowing based on storm events, or whether they're flowing based on non-storm events. On our intermittent waters, we have that as a GIS algorithm. For waters that have gauges, that tool allows us to quickly determine whether they're intermittent ephemeral, or even perennial, because they've got water all the time. Not all of our waters have rain gauges on them and so we put together what we call our screening toolkit. Based on NWPR, the very first question we ask is: Can we trace flow to a known terminal basin? Or does it go to a traditional navigable water (TNW) or another WOTUS? If it flows to a terminal basin or doesn't flow anywhere, then it's not a WOTUS. If it does flow, and here's where the change is going to have to be made, if there is a path that is purely perennial or

intermittent all the way to a TNW, it's clearly a WOTUS. If it's unknown, we've put together three tool pieces to try to determine whether it is likely a WOTUS or not: riparian vegetation tool; the groundwater tool; and the snowpack tool. On the riparian vegetation tool, if you have 50% vegetation, we determine if the water is an intermittent or perennial water. There are some infrared vision tools that help us gauge whether that riparian vegetation exists or not. The groundwater tool is another way for us to look at the indicators of whether this is intermittent or perennial or ephemeral. The last one is snowpack, which project whether waterbodies will have flow. This one is pretty easy for us to determine. Here's an example. The water body in this particular case [see powerpoint] has riparian corridor of greater than 50% so it's saying that the flow regime is probably intermittent. The depth to groundwater says it's potentially ephemeral because it is a deeper groundwater than our study. Snowpack doesn't apply, because it's not at the threshold, it doesn't hit the requirements to actually have snowpack. The purpose of putting this up here is that the tool is a screening level tool. Additional study would be needed for us to be able to determine what the intermittent or perennial flow regime is. I mentioned before, this doesn't cover whether the raindrop tool shows that there's a direct path to regulated downstream water. Here's some additional information. I know I covered that very quickly. This is all on our website at <https://azdeq.gov/ScreeningToolkit>, with all of the explanation of how our tools work and how we use them.

### **Questions:**

Tony: To what extent did you include the regulated community?

Trevor: We kept them involved. Industry felt the toolkit was helpful.

Erica: Have you had input from the Corps? What are their thoughts?

Trevor: We've kept the Corps apprised and for most part they appreciate our tools and I think they've shared them internally; it's been more of EPA that we've had to work with. In this case, EPA has disagreed with a couple of our determinations. We've submitted some of them for EPA to opine on. It's actually been a good discussion because we have the science behind how we're doing this and so it's been great to see EPA try to counter that with their own science, so that way we can incorporate their science into our process.

### **EPA UPDATE**

Roger Gorke provided an update on EPA's efforts to promulgate Federal Baseline Water Quality Standards for Tribes. In 2001, EPA developed a proposed rulemaking of water quality standards (WQS) for Indian country, but that didn't really go anywhere. Then in 2016, EPA published an advanced notice of proposed rulemaking (ANPR), soliciting public comments for the baseline WQS and trying to do extensive outreach with tribes and with states. We're going to continue to encourage tribes to obtain TAS, under the Clean Water Act so the tribes can establish those WQS and to administer their own water quality programs. We're trying to consider ways of incorporating, relying on neighboring states standards where appropriate. EPA renewed outreach with the tribes in 2021, and the government consultation with tribal governments ended

September 13th. We're going to continue to have that direct and focus communication outreach with you all and the tribes moving forward. One thing that I think is important to clarify is that this rulemaking will complement, but it's distinct from the tribal reserved rights rulemaking that we also intend to pursue. That tribal reserved rights rulemaking would protect the tribal rights in waters where the states are responsible for establishing and maintaining the water quality standards. Whereas this baseline water quality rulemaking is what established water quality standards for reservation, where only tribes or EPA can establish those water quality standards. You can reach out to me, or Deborah Nagel, Director, Office of Science and Technology if you have questions or comments, or any of our technical staff that are working on it.

**Questions:**

Michelle and Chris asked for a little more clarification on the tribal reserved rights rulemaking and what EPA is looking at doing with that. Roger will get clarification. It is not reserved right for water *quantity* rights. These are reserved rights under the CWA.

Tony and Roger discussed CWA 518 and the authority and ability of tribes to administer the CWA under TAS, and the interest of some states for the default WQS to match the surrounding state until the tribe obtains that TAS authority, rather than a one-size-fits-all nationwide WQS.

**WESTFAST WILDFIRE AND WATER RESOURCES WEBINAR SERIES**

Chris Carlson provided an overview of a WestFAST-hosted webinar series on the intersection between wildfires and water supply, included in WestFAST's 2021-2022 workplan. Through the webinars, they are hoping to foster additional collaboration across the federal family and with the states. The National Cohesive Wildland Fire Management strategy addresses mutual aid and cooperative efforts during wildfire incidents, which are now happening year-round with more extreme behavior across multiple jurisdictions. Their focus for the webinars will be pre-fire and post-fire efforts. In the coming months, webinars will highlight the challenges and extensive ongoing work across the federal family to better understand: wildland fire and its impacts; how to prepare for it; how to reduce risk of extreme fire; and how to respond following the fire.

We want to explore what drives forest management pre fire, what is missing and what could be measured that would be useful, and then what drives the post fire process, including burned area emergency response. In the Department of the Interior, there is the burned area rehabilitation program. Congress is proposing to reinstate that in the Forest Service through the infrastructure bill. There are state level programs that are addressed at post fire response and we'd like to explore how those programs work and what might be done to enhance, or facilitate federal-state cooperation.

We also want to explore options and opportunities to set ourselves up better in a pre-fire situation with hazardous fuels, treatments and prescribed burns to lower the risk of extreme fire, and what might we be able to do differently or better in the post fire setting, when we're trying to put the pieces back together, return our green and gray infrastructure to functional status, those kinds of things. One opportunity is the Wildland Fire Leadership Council, which includes members

from the federal land management agencies, state, tribal forestry agencies, the Department of Homeland Security, the Western Governors Association, National Governors Association, National Association of Counties, the League of Cities, and local firefighting organizations. Their goal is daylighting concerns opportunities with wildland fire processes and procedures, policies, etc. I think there's potentially some opportunity to raise awareness of water supply issues on both federal and non-federal lands associated with wildland fire.

The federal Burned Area Emergency Response (BAER) program creates assessments of immediate risks to federal resources and makes recommendations. The program is Congressionally-limited to federal resources for those wildfire suppression funds, but a number of states have set up alternative systems to assess non-federal lands. We want to explore how those work and whether there can be additional collaboration. For example, USGS and the Forest Service collectively develop Burned Area Reflectance Classification (BARC) maps to assess burn severity for fires that intersect with the federal landscape. Are there opportunities to develop BARC maps to help non-federal assessments? And how might that be funded? One note for the Council is that those BARC maps are generated in large part on data coming from Landsat and so another reason why Landsat is so important to us in the water resources community. Another example is BAER treatment implementation challenges within the federal contracting process and the limited availability of contractors to implement those treatments. With the increase in fires needing post fire treatments, and the lengthening fire season, are there alternatives to this standard process that states might be able to engage through good neighbor authority, or maybe there's another path that where there's a nexus between federal and state interests to get some of these contracting barriers addressed.

Following wildfires, many communities face substantial risk of flooding. There is an existing program to install temporary warning systems but that funding generally often runs out before the risk dissipates. That's something we saw in the in the 2019 fire season leading into 2020 with the lack of precipitation in the southwest. What opportunities are there to identify long-term support for flood warning following the initial completion of treatments?

Chris asked a few questions for the Council to help inform our path forward: How do state address post fire response? We know that Colorado, Oregon and California have strike teams similar to the federal bear teams. But what about other states? What kind of collaboration exists with the State Engineer's Office, the State Water Quality Agency and the state Forestry and Fire Response Agencies to ensure or help ensure that water supply issues are captured in both firefighting response but then in post fire recovery? We're also wondering what would be helpful for us to focus on from your perspective. What's your priority in the wildfire post wildfire/pre wildfire universe? I'm interested in your thoughts and feedback.

Erica Gaddis: In Utah, we have some work to do to integrate our state agencies in the post fire response. Our Drinking Water Division is certainly involved in any impacts to the public water supply, but the water quality side hasn't been as engaged in evaluating the impacts of fire. It's a priority for us. I attended a shared stewardship tour, and it seemed to be a great model for how states and the Forest Service could collaborate on forest management to prevent catastrophic wildfire. I would welcome a presentation on that on that model, perhaps for other states too.

Chris Carlson: Most of the western states and WGA have a shared stewardship agreement with the Forest Service. That opens up avenues and opportunities for collaboration.

Erica: Maybe that's something we could consider for a future agenda item to bring some examples. I'd be interested to hear from other states now or later on about their experiences.

Jennifer Carr: There are a couple of major fires just over Nevada's border in California. The Dixie fire, which is generating a tremendous amount of smoke and then the Caldor Fire. I think some really interesting things are going to come of this. In the Lake Tahoe Basin Management Unit, we're already starting to hear about the benefits of the treatments that had been done in the wildland urban interface for fuels reduction. There's still much to be learned from this fire because we're still in the "during" phase. We haven't gotten to the post-fire phase yet.

The Tahoe Science Advisory Council, which is part of a bi-state partnership under the Nevada California Compact is seeking a couple hundred thousand dollars to provide research funding on the after effects of wildfire smoke, and ash on water quality. The air quality index in the basin was in the hazardous range for a very long time due to really thick smoke. In Nevada, even though it didn't make it across the state line, I'm still concerned about the ash fall in our watersheds and what that might mean for runoff of that material into the water body and its potential impact to our drinking water supplies. I think it's also important to not just look at the burned areas, but to also look at the areas impacted by ash fall and what that might mean for the watersheds.

The only thing that comes to mind with post-fire activities, is helping to fund things in a creative way – for example, seed purchases. The Nevada Division of Forestry can apply native seed mixes to burned areas to try to implement the recovery of that. We've actually used our supplemental environmental project funds from enforcement actions that have resulted in fines and penalties and redirected that money to the purchase of seed to improve burn areas, and improve wildlife and habitat. If I think of anything else, I'll let you know.

Chris: That is a creative way to use the funds.

Roger Gorke: WestFAST has some subgroups on this issue, and to have some state participants would be helpful. If some state volunteers would like to engage, we would welcome them.

Jennifer Zygmunt: I would just to add for Wyoming, that we have coordinated with our Forest Service crews pretty extensively. We have a working MOU that we renew every five years to have annual discussions, annual meetings on various water quality issues, coordinating permitting activities, but also monitoring. This year, our water quality monitoring crews in coordination with the Forest Service went out to monitor the Mullen Creek burn area, which burned right around Cheyenne's water supply. In Wyoming, our water quality monitoring crews are interested in helping with post-burn efforts and understanding changes to water quality. Especially when drinking water supplies are involved. So we can absolutely help with that.

Erica: Individual states that would like to be involved in the workgroup should contact Roger, Heather, or Chris.

### **STAFF UPDATE**

Michelle Bushman provided a brief update referring to the litigation and legislation updates in Tab R. She noted several pieces of legislation introduced regarding WOTUS definitions and SRFs; wildfire legislation, including forest management; water use legislation; hydraulic fracturing. Drinking water and wastewater infrastructure may end up in an infrastructure omnibus bill on the horizon. The Tribal Access to Clean Water Act is related to our recent position.

On the litigation front, she discussed cases relating to the Corps' Nationwide Permit 12; cases in California involving several of our states regarding the 2020 CWA §401 Certification Rule, and another on hydraulic fracturing on BLM lands; several WOTUS lawsuits around the country; and the Gold King Mine case.

For regulatory activity, there is a WOTUS federalism consultation comment deadline of October 4. WSWC staff drafted a comment letter for review by the members, to be modified to acknowledge the changes to the CWA Jurisdiction position during this meeting.

Jennifer Verleger suggested sending WOTUS letter out to Council members and those who are interested in it, will certainly take notice and contact you with their comments.

### **SUNSETTING POSITIONS FOR THE SPRING 2022 MEETINGS**

There are no sunseting positions for review for the Spring 2022 WSWC Meeting.

### **OTHER MATTERS**

Erica asked members for their thoughts relating to the meeting topics for the next Water Quality Committee meeting.

Chris Brown and Jennifer Zygmunt mentioned a Wyoming concern with the way EPA deals with waters and national parks. In Yellowstone particularly, the state has historically handled 401 certifications, but EPA Region 8 is now stating that they have jurisdiction over 401 certifications within park boundaries. This seems to extend to other Western national parks.

Jennifer Carr said Nevada is tracking EPA's 303(d) visioning program change in the TMDL arena, and EPA is going to develop new metrics for states. It might be helpful to have EPA come and talk to us about what all that is about.

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