

**MINUTES
of the
WATER QUALITY COMMITTEE
Doubletree Hotel – Washington, DC – Crystal City
Arlington, Virginia
April 6, 2022**

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MEMBERS AND ALTERNATES PRESENT (*via zoom)

| | |
|---------------------|---|
| ALASKA | -- |
| ARIZONA | Amanda Long-Rodriguez Ayesha Vohra |
| CALIFORNIA | Jeanine Jones Joaquin Esquivel |
| COLORADO | Jeremy Neustifter |
| IDAHO | John Simpson Jerry Rigby |
| KANSAS | Connie Olson Earl Lewis Kenneth Titus |
| MONTANA | -- |
| NEBRASKA | Tom Riley |
| NEVADA | Jennifer Carr Micheline Fairbank |
| NEW MEXICO | Rebecca Roose |
| NORTH DAKOTA | Jennifer Verleger Andrea Travnicek |
| OKLAHOMA | Sara Gibson |
| OREGON | Brooke Paup |
| SOUTH DAKOTA | Nakaila Steen |
| TEXAS | Jon Niermann |

UTAH

Erica Gaddis
Todd Stonely
Norm Johnson
Candice Hasenyager

WASHINGTON

Mary Verner

WYOMING

Chris Brown
Jeff Cowley
Jennifer Zygmunt

WESTFAST

Heather Hofman, Federal Liaison
Chris Carlson, U.S. Forest Service
Lauren Dempsey, US Air Force
Roger Gorke, Environmental Protection Agency

STAFF

Tony Willardson
Michelle Bushman
Cheryl Redding
Adel Abdallah
James Ryan

WELCOME AND INTRODUCTIONS

Committee Chair Erica Gaddis welcomed members and guests.

APPROVAL OF MINUTES

The minutes of the meeting held in Deadwood, South Dakota on September 15, 2021, were moved for approval by Jennifer Verleger second by Chris Brown. The minutes were unanimously approved.

PROPOSED POSITION

Erica Gaddis reviewed the changes made to Position No. 472 on Clean Water Act jurisdiction, during the discussion in Deadwood. You may recall that we made some significant

changes in terms of reducing some of the exemptions and that we decided to work on this position and refine it further. Since then, we've had a couple of calls and have worked on a couple of additional changes. You should have all had an opportunity to see those over the last few weeks. On the screen is a clean version following the edits that we made. However, we do have a few proposed edits that have come in since then that we will go through today.

The first proposed edit is to remove the Maui decision from the list of Supreme Court cases that interpret the jurisdictional scope of the Clean Water Act. Tony had indicated that Maui is not quite a jurisdictional decision. Does anyone have any concerns with striking that from the list in the Whereas clause? (No one expressed concerns.)

The next is a new proposed whereas clause by Jeremy Neustifter (CO), who thought it might be worth discussing given the additional burden put on the states without additional funding. "WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government." Erica verified with Jeremy that the intent was to note that by limiting the amount of surface water protected under federal jurisdiction, the burden—including enforcement costs—shifts to the states to protect those waters through state authority. Jennifer Zygmunt argued that the current proposal expands the water that the Administration wants to draw into their jurisdiction, which could also increase the burden on states.

Jeremy: I do think cost could be implied in responsibilities. There are additional costs continuing to be incurred on the State of Colorado for a myriad of other reasons, including our state legislature and so were just very cost sensitive at this point.

Jennifer Zygmunt: We understand the concerns, we would share the same general principle about unforeseen impacts to states particularly for costs, but I think we've already kind of captured this in another whereas when we say any federal efforts to clarify clean water jurisdiction will inevitably affect each state differently thus underscoring the need to involve states. I would adhere to that rather than adding a new whereas. With the new whereas clause, I'm having trouble connecting the first thought than with not altering distribution of power and responsibilities between states and the Feds. I feel like we could get rid of the whereas clause and still make those tweaks.

Jeremy: I think there might have been confusion in my email. We're not proposing a new whereas clause. We thought that this whereas clause might be the one to amend to include some sort of language related to cost.

Erica: Got it. So your suggestion is to take this existing whereas clause and add the concept of cost?

Jeremy: Right. It was more of just having a discussion, but we do not need to take this up if other states have concerns.

Erica: Maybe there is a way to somehow insert the term "cost" into this list of distribution of power responsibilities.

Jeremy: That would have been my proposed simple amendment.

Tony noted that the 10th item under the Now Therefore Be It Resolved, was part of the intent to say that continues to access appropriate technical and financial assistance to the states to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations. That it does express the concern, that regardless of whether it's under state or federal jurisdiction, it should not result in a reduction in that support to the states for their programs.

Jeremy was fine with that.

Erica: Okay, let's leave that then and take that amendment out. Moving on. So you will see here, there's a jump from number five to number eight because there's internal referencing to these paragraphs. So once we settle on the language we'll clean that up. The proposal here is to change the language related to specific exclusions. If you recall, at our Deadwood meeting, we limited that to groundwater and then we added back in during our recent conversation, the phrase historically recognized agricultural exemptions. Colorado's proposal is to change that language to continued agricultural exclusions, recognizing that there's a difference between an exemption and an exclusion. Jeremy, I'll let you explain.

Jeremy turned it over to his colleague Jojo La, Policy Advisor.

Jojo La: Colorado, in its last proposed language recommendation, was aiming to protect agriculture by supporting the 2020 Rule language for cropland. Because we are further defining what agricultural is in those exclusions, we think that by including the words "historically recognized" that it actually limits the ability to further clarify agriculture, using the 2020 definition. I want to make it very clear that we are supporting historical agricultural exemptions. That's not the intent of this language change, but to better clarify the language because the 2020 Rule did make some great strides to better define what agriculture is included. That was our intention for proposing deleting the words "historically recognized" and replacing it with something such as "continued agriculture exclusions." Maybe we don't even need a qualifier there. Maybe it could just say "and agricultural exclusions."

Lauren Driscoll (WA): Washington did not necessarily agree with the 2020 Navigable Waters Protection Rule's approach to abandonment of PCCs. We do recognize and want to support those exemptions that have been on the books and that have been in practice over these years. I would settle on the historically recognized. Or if you want to take out both quantifiers and just have agricultural exemptions, or exclusions, I'm fine with that too.

Jeremy: I'm perfectly fine with just getting rid of the qualifiers.

Tony: I think that would be a good solution. I'd like to remind folks that there was an attempt under the 2015 rules to specify the precise agricultural practices that would be exempt. That was met with I think, bipartisan, almost universal opposition. While many of those had been historically recognized, some may not have been listed, which then led to the question of if it's not listed, is it

covered? Or is it not? I think removing the qualifiers and just leaving the agricultural exemptions, or exclusions would be a good suggestion.

Shelley Lemon: Could we just end that sentence at Clean Water Act jurisdiction? Or do we need the including but not limited to clause?

Erica: We intentionally added the agricultural exclusions, exemptions, etc. after some good conversation from the last couple of meetings. My only concern in taking out the qualifiers is, does that suggest that we are seeing all agriculture as exempted from all Clean Water Act jurisdiction? I want to be careful about making it so broad.

Lauren Driscoll: Statutory or is it more regulatory?

Jennifer Zygmunt noted that if we take out all qualifiers then perhaps that sort of dilutes our message, because we don't know what this Administration is going to include in this new rule. Leaving it wide open may create additional uncertainty.

Erica: Would another solution be to include both qualifiers, "historically recognized" and "existing or current" exemptions? Colorado, do you have a concern with historically recognized as long as we also make sure that we recognize current exclusions as defined in the 2020 definitions?

Tony: My recollection is that this has always been guidance and that an effort to clarify which practices might be excluded was a joint effort between EPA and the Natural Resources Conservation Service. There may still be some guidance from USDA that relates to this, but I couldn't say at this time if it's current. I think there are some historically recognized, but the question became, are there other practices that may still be excluded, which argued against what those specific practices were. I would also note, I think when we mentioned the features outside the scope of the Clean Water Act, last September, we deleted many of those that were included in the 2015 rule that included prairie potholes, arroyos, and other features that were specifically referenced in our prior position.

Erica: Right, and so I think we tried to accommodate that deletion by pushing towards a completely different type of original definition. But what I've heard from states is, at a minimum, we need to recommend some form of agricultural exemption.

Jennifer Carr: What if we included "specifically identifies waters and features outside the scope including, but not limited to, groundwater and addresses agricultural exclusion?"

Erica: Oklahoma's suggestion is that maybe we say certain agricultural exemptions. Colorado, is there a way to capture both? Could we call out sort of being recognized for those that find that language to be important, and call out what was in the 2020 rule?

Jeremy: I don't want to make this too complicated, but what would folks think about including, but not limited to groundwater and historically recognized and/or clarified agricultural exemptions.

Erica: Do you think the word clarify clearly points to that 2020 rule?

Jeremy: I don't really think so.

Jennifer Zygmunt: Would it be simpler to just say "new" agricultural exemptions or "newly defined." We want historic agricultural exemptions to be taken into consideration but if there are new ones that could be considered, I don't think we would have a problem.

Jeremy: I think our only concern with that is it might suggest the expansion of the definition as opposed to just clarifying the definition.

Lauren: This is going to throw a wrench in it, but I'm going to put it out there and you don't have to do anything about it. It seems non sequitur here to go specifically identifies waters and features outside the scope and you got groundwater, but then you say agricultural exemptions, but those aren't really waters or features. Like I said a wrench, sorry.

Tony: That is true. Would it be easier to give it a new number? A separate number that excludes or exempts historically recognized agricultural practices, something like that.

Erica: I remember this from the 2015 conversation where people were confusing practices and features. They are separate. The CWA jurisdiction just defines what is jurisdictional. Then there's a whole other conversation about which practices are actually subject to CWA regulation. These are separate but related issues. I think we're confusing things here. I think what we mean, it's historically recognized agricultural features that are exempted from jurisdiction, and then there's a whole separate conversation about practices. At least that's my recollection. As Chair, I would not support that. It's confusing the purposes.

Micheline: I agree with that because when you think about jurisdiction of WOTUS, defining what that physicality of what constitutes jurisdiction, not what ultimately percolate or is transmitted to... so I do think that eliminating the practices...

Erica: I think if we leave it this way, we're going to have a little bit of imperfect grammar with respect to water and features in agricultural exemptions. I think there is a meaning there that agricultural features have been previously exempted. This is separate from practices that may be exempted from jurisdiction. How do we feel about historically recognized and newly clarified agricultural exemptions/exclusions?

Jeremy: I don't know that "newly" is really that helpful, but I think we'd be okay with it.

Erica: Maybe we should just refer to the rule that you're talking about.

Tony: Erica as far as wording, Section 404 does relate to exemptions and activities. I'm not sure this is the precise wording, but it is from EPA and it says established agriculture, established farming ranching and silviculture activities.

Erica: Right, but just like 402 permitting, there's activities that require a permit and activities that do not, which is a separate question from what is a jurisdictional water? Unless I'm really missing the boat there, I don't think that WOTUS is about redefining which kinds of activities that is captured.

Jennifer Carr: I don't know that all the agricultural issues were clarified in the 2020 Rule. The 2020 rule punted on a lot of things that were in the statute and therefore weren't addressed

Erica: I'm going to propose that we move on to the next one and come back to this. We had some wording changes to number 15 that came out of our conversation that we didn't quite finalize in our last discussion. The first change is using the word "considers" a regional approach. Does any state have a problem with the word considers? (No concerns were expressed.)

Next, there was some discussion about whether to limit the phrasing to just foundational waters or foundational and categorical waters.

Jennifer Carr: I remember the discussion from the last call that might have been because foundational is sort of a new thing in the 2020 rule. There were a lot of other categories of waters and prior rules and so those categorical waters might come back. Categorical waters could vary depending on region and should be protected in this statement.

Jennifer Zygmunt: Wyoming generally supports categorical waters. It creates certainty and clarity.

Erica: Maybe we just keep it in and say "any categorical waters." The clause will be, "Considers a regional approach to the definitions of terms for foundational and any categorical waters..." Any concerns with this edit? (No concerns were expressed.) The next edit was from Colorado which I will let them explain.

Jojo: The first edit, which is to just improve readability is deleting "included." I think there are too many "included" in the sentence. The next one is similar to the previous comment where we do strongly support the existing classification systems. However, with our recent comments, we are suggesting "building upon" the classification systems, specifically addressing soil, biological, and ecological classification systems. In order to capture that, instead of using the word "using," which may limit the existing classification system, replace that with "building upon."

Erica: Great explanation. Any concerns with that change? (No concerns were expressed.) We're done with 15.

Jennifer Zygmunt suggesting that perhaps we're still being too descriptive and maybe we shouldn't remove the word existing.

Erica: Part of that was to not have EPA have an easy out, but be able to say that there's already a lot of this work that has been done, but we've captured that. We are running out of time and so we are going to leave number 15.

Michelle noted this is not a sunseting position, so any state can move to hold this to the next meeting.

Erica: I would really love to make at least some of the changes that we've worked so hard on. Let's scroll back up to the agricultural exemptions for those states that are kind of in this debate and discussion. Can you give us a sense of where your concerns are about the language?

Lauren: Washington didn't support the PCC definition of abandonment, as far as that exclusion and so we weren't fully on board with everything in the 2020 rule. So I think leaving it back to historically recognized exemptions without citing the 2020 rule would fit better for us.

Jojo: Colorado's main concern is with the cropland conversion. The language in the 2020 Rule clarifies what a cropland is, and that you can follow the cropland the next year, and it's not considered a Waters of the United States. If we think that just having the word clarified helps actually protect agriculture and doesn't put them vulnerable if they want to follow one year. Given that, we think that just adding "and clarified agriculture" would be better, but we would be okay with just leaving it as "historically recognized."

Erica: Are there any other thoughts from states who have a strong opinion on this?

Jennifer Zygmunt: Wyoming would just like historically agricultural exemptions taking into consideration in this rule. It almost seems like we're having two different thoughts here. For us, that's the message to carry, but then it sounds like another thought is, could agricultural exemptions be clarified?

Erica: What I'm going to propose as Chair, is that we put this one back to the phrasing we had and then Colorado I'd like to work with you over the next little while and perhaps we can add a new whereas clause that recognizes that 2020 Rule or get something about prior converted cropland more clearly expressed in the resolution I think this includes all of the proposed edits. Are there any other edits to the CWA jurisdiction resolution that any state would like to propose?

Tony: Erica, I would just add that I think that was a good point raised that you may want to include in looking at this again that these are not features and you may want to include activities as a separate bullet as a new whereas clause or under this resolved clause.

Erica: We will revisit that question of agricultural activities in the future and we will revisit the question of cropland definition.

Erica read out #14: "Recognizes the need to balance definitional clarity with flexibility in implementation to address the unique landscapes, flow regimes, and legal frameworks in various regions of the Nation." The question is, do we want to include this additional language, which reads "and appropriately weighs all factors of science, law, and effective policy to draw jurisdictional conclusions that are appropriate, and that do not impinge on the rights of States." It may not be the most concise paragraph, but it captures all the ideas that all the states would like to be reflected. Does any state oppose to including this in its entirety recognizing we may need to edit

it again? With no further comments, I would like to entertain a motion to adopt this amended version of this Position 472. Motion moved by Jeff. Second - Jennifer Zygmunt. Approved.

EPA FEDERAL BASELINE WATER QUALITY STANDARDS FOR TRIBES

Mary Lou Soscia, Baseline Water Quality Standards Tribal Consultation Lead, EPA Region 10, provided an update on the federal baseline water quality standards (WQS) for Indian reservations.

The potential benefit of this rulemaking is to establish water quality goals for water on Indian reservations. We have approximately 200 reservations in the United States that do not have WQS for their reservation waters. We also see this work effort as facilitating tribal participation in helping tribal governments manage their water quality, and it provides a basis for EPA-issued NPDES permits and other discharge permits in Indian country.

Baseline WQS would apply to Indian reservation waters (including tribal trust and Pueblo lands), and where EPA has not: approved tribal WQS; approved state WQS (a few cases); promulgated other federal WQS. Baseline WQS would not apply to: off-reservation allotments; or other circumstances identified by tribes.

In 2015-2016, EPA worked on an advanced notice of this proposed rulemaking. Tribal governments provided comments and we received comments from 10 state agencies. Seven of those are members of the WSWC. I want to emphasize the input from the states has been really important and has helped shape the work that we're doing as we move forward in this proposed rulemaking process. When we combined the tribal government comments with the state comments, it gives us a very strong basis. The Western States Water Council provided comments on legal authority and administrative issues, the boundaries of tribal lands and jurisdiction and dispute resolution. A really significant comment that we received from state governments is that folks asked us to double check our legal authorities that we have available and explore flexibilities in the differences of water bodies. Also, to take into account the work that states and tribes are actually doing together to address some of these differences. That has definitely played into that step.

We're in a deliberative stage now with our rulemaking, so we are unable to discuss the details of the draft proposal, but we're open to ideas and suggestions that you may have. You can take a look at the more detailed PowerPoint and can come back to us later on.

Mary turned the time over to James Ray, Office and Science and Technology, to talk about the framework that EPA is using for these potential tribal baseline WQS. James talked about the framework of designated uses, water quality criteria, anti-degradation requirements, implementation, and potential impacts on dischargers.

Designated uses: Considering for all waters - a full suite of designated uses that provide for protection of uses such as fish propagation, fish consumption, and recreation. This was suggested by many tribes in 2016 consultation. Protection of cultural and traditional uses of water and aquatic resources. We are considering whether or not to designate public drinking water supply use for all fresh waters.

Water quality criteria: Exploring use of narrative criteria and numeric criteria, EPA could describe waters as needing to be “free from” certain adverse conditions in order to ensure protection of applicable designated uses. Establish procedures for EPA to translate narrative criteria into numeric values and allow use of neighboring state standards. Provide for limited location-specific tailoring to better protect tribal waters (e.g., fish consumption rates). Include downstream protection narrative.

Antidegradation requirements: Complement designated uses and water quality criteria by providing a framework for maintaining and protecting water quality that has already been achieved, providing three tiers of maintenance and protection. Tier 1- existing in-stream uses for all Waters of the United States. Applies a minimum level of protection to all waters even when another tier is also assigned. Tier 2 - high quality waters (where water quality is better than the levels necessary to support uses such as recreation, fish propagation, and fish consumption). Provides a public review process prior to deciding to allow a lowering of water quality. Tier 3 - Outstanding National Resource Waters (ONRW) generally prohibits any lowering of water quality.

Implementation: Standards could include implementation flexibilities (e.g., mixing zones, WQS variances, compliance schedule provisions). Tribal engagement opportunity in EPA’s implementation actions such as implementing NPDES permits. EPA would also engage in public participation with states and the regulated community in accordance with existing regulations. He reviewed a map depicting how the potential rule would expand coverage of WQS for tribal waters from 47 tribes to over 300 and from locations in 14 states to a total of 31 states.

Potential Impacts on Dischargers: Approximately 164 NPDES individual discharger permits (including 7 major dischargers) are located within reservations potentially covered by baseline WQS. Approximately 280 (57 majors) are located within 5 miles upstream from waters potentially covered by the baseline WQS (nationally there are over 50,000 individual NPDES permits). Further analysis is underway to evaluate the potential costs and benefits of the Tribal Baseline WQS rule.

They finished up consultation with tribes in September 2021 and also had a meeting with ACWA in September. It was really helpful to get some feedback, then after a presentation similar to this, and we intend to actively engage with states and tribes once the rule is proposed in summer 2022. Ryan pointed out the contact information and links listed on the PowerPoint to get some additional information on the rule.

WESTFAST WILDFIRE AND WATER RESOURCES WEBINAR SERIES

Chris Carlson, USFS provided an update on the WestFAST wildfire and water resources webinars held since the last meeting in Deadwood, South Dakota. Topics include: why it matters; where we are now; and what can we do about it. Webinars held since October 2021 include: Droughts and Wildfires Be Dammed: How Beavers Help Build Landscape-scale Climate Resilience (10/20/21); Denver Water’s Post-Fire Lessons Learned: Why It’s a Smart Business Decision to Invest in Forest and Watershed Resilience (11/18/21); Relationship Between Wildfires, Geologic

Hazards, and Climate Change (01/05/22); In the Burned Area Emergency Response (BAER) Program (01/27/22); and then Does Community Driven Strategic Planning Reduce Impact of Large Wildfires? (03/02/22). We have two more webinars currently planned. One on soil moisture and wildfire that is tentatively scheduled for later this month. The second one is on NASA's wildfire program that is tentatively scheduled for May. We are scheduling a couple more during the June-July timeframe. We have started conversations with the Council staff on planning a workshop that will tackle the "What can we do about it?" part of the plan. That workshop will either be at the Council summer or fall meeting depending on schedules. All these webinars are recorded and posted on the WestFAST webinar website.

DRAFT FY2022-2023 WATER QUALITY COMMITTEE WORK PLAN

Erica Gaddis pointed committee members to Tab J and asked people to review and consider any additional items that the Council should prioritize.

SUNSETTING POSITIONS FOR SUMMER 2022 MEETINGS

Erica asked members to review Position No. 436 regarding Hydraulic Fracturing.

OTHER MATTERS

We will schedule a planning call for WOTUS regional implementation workshop to be held in connection with the Summer meetings.

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