

MINUTES
of the
WATER QUALITY COMMITTEE
Holiday Inn, Riverwalk
San Antonio, Texas
October 11, 2012

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

MEMBERS AND ALTERNATES PRESENT

ALASKA	--
ARIZONA	--
CALIFORNIA	Betty Olson
COLORADO	Jennifer Gimbel Paul Frohardt (via phone) Steve Gunderson (via phone)
IDAHO	Jerry Rigby
KANSAS	Tom Stiles (via phone)
MONTANA	--
NEBRASKA	Brian Dunnigan
NEVADA	--
NEW MEXICO	Scott Verhines DL Sanders
NORTH DAKOTA	Todd Sando
OKLAHOMA	J.D. Strong
OREGON	Phil Ward
SOUTH DAKOTA	Garland Erbele
TEXAS	Carlos Rubinstein
UTAH	Norm Johnson
WASHINGTON	Stephen Bernath (via phone)

WYOMING

Pat Tyrrell
John Wagner (via phone)

GUESTS

Perry Fowler, AGC of Texas, Austin, TX
Mike Norris, U.S. Geological Survey, VA
Veva Deheza, NOAA/NIDIS, Boulder, CO
Jon Schnautz, Office of the Speaker (House), Austin, TX
Tom Iseman, Western Governors' Association, Denver, CO
Robert Mace, Texas Water Development Board, Austin, TX
Dave Mitamura, Texas Water Development Board, Austin, TX
Melanie Callahan, Texas Water Development Board, Austin, TX
Curtis Seaton, Texas Commission on Environmental Quality, Austin, TX
L'Oreal Stepney, Texas Commission on Environmental Quality, Austin, TX

WestFAST MEMBERS

Eric Stevens, Federal Liaison
Dwane Young, Former WestFAST Federal Liaison
Lee Koss, Bureau of Land Management (via phone)
Jean Thomas, USDA Forest Service, Washington, DC
Becky Fulkerson, Bureau of Reclamation, Washington, DC
John D'Antonio, U.S. Corps of Engineers, Albuquerque, NM
Eric Monschein, Environmental Protection Agency (via phone)

STAFF

Tony Willardson
Nathan Bracken
Sara Larsen
Cheryl Redding

WELCOME AND INTRODUCTIONS

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

APPROVAL OF MINUTES

The minutes of the meeting held in Seattle, Washington in June 2012 were presented. Stephen Bernath requested a clarification to the portion of Kelly Susewind's presentation regarding Washington's road maintenance and abandonment programs. Carlos Rubinstein moved to approve the minutes as amended by Stephen. Norm Johnson seconded, and the motion passed unanimously.

INFRASTRUCTURE UPDATE

a. WSWC August 24, 2012 SRF Letter:

J.D. Strong reported that the WSWC sent a letter to Senate leaders in August, urging them to ensure that the FY2013 Interior and Environment Appropriations bill (H.R. 6091) provides states with sufficient flexibility to manage the Clean Water and Drinking Water State Revolving Funds. The WSWC issued the letter in support of WSWC Position #330.

Stephen Bernath asked about how the recently approved continuing resolution, which President Obama signed on September 28, 2012, would impact the SRFs. Nathan responded that the resolution essentially maintained funding at current levels and would therefore maintain the current status quo for the SRFs.

Stephen then asked if any members of the Committee had insight about the sequestration and what impacts it may have if it were to go into effect on March 1, 2013. J.D. responded that “everyone is still in the dark” about the possible impacts.

b. WSWC Western Water Infrastructure Symposium:

J.D. explained that the WSWC and the Western Governors’ Association will hold an infrastructure symposium on November 14-16 in Phoenix, Arizona. J.D. will moderate a panel during the symposium that will discuss water quality infrastructure needs and financing, including the impacts of federal restrictions on the SRFs. J.D. then asked the Committee for additional insight and suggestions as to possible topics for the panel to discuss.

Stephen suggested that the panel include some discussion on the challenges of securing financing for rural communities, which often lack the resources and tax structures to support infrastructure improvements.

Carlos mentioned that Texas Water Development Board Executive Director Melanie Callahan will speak at the symposium. She will discuss the impacts of SRF restrictions on water infrastructure efforts and programs in Texas.

TEXAS TOTAL DAILY MAXIMUM LOADS

L’Oreal Stepney, Deputy Director of the Texas Commission on Environmental Quality’s Office of Water, explained Texas’ total daily maximum load (TMDL) program. She said TMDLs and implementation plans in Texas are often developed together, which can reduce the total project time by one to two years. Texas also uses a robust public engagement process focused on using “good science” and “buy-in” from the public to create actual water quality improvements, which can be a time-intensive process. L’Oreal also said that it is impractical to develop TMDLs that produce actual water quality improvements, while also focusing on de-listing impaired waters and revising water quality standards. Ultimately, Texas is happy with their program, as well as stakeholders.

With respect to challenges, L'Oreal said some of the Environmental Protection Agency's (EPA) timelines have been impractical. She also said EPA Region 6 is requesting a waste load allocation for each municipal separate stormwater system (MS4) in a TMDL, and that EPA lacks authority to make this request. As a result, EPA's requests have resulted in stakeholder objections to the Phase II MS4 permit.

Carlos added that Texas is very pleased with their TMDL process and the efforts of L'Oreal and her staff. He also said EPA has held up a large number of permits in Texas but has not provided a reason for the delay. He also expressed concern about EPA's use of an unpublished rule to reject a TMDL in Vermont because it did not address climate change.

Stephen asked for more information on how Texas develops TMDLs and implementation plans at the same time.

EPA UPDATE

a. EPA Good Samaritan Memorandum:

Roger Gorke reported that EPA is developing a memorandum to encourage clean up activities at abandoned hardrock mine sites. EPA's regulations require operators of sites that continue to discharge pollution after cleanup to obtain National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). Prior court decisions have also raised concerns that Good Samaritans, or third parties who voluntarily clean up abandoned mines, could inherit liability for the site under the CWA. The memorandum is aimed at addressing some of these concerns by clarifying that EPA will not hold Good Samaritans liable if they complete clean up efforts pursuant to specified policies. The memo should be released shortly.

Since the memorandum is focused on administrative actions, Roger acknowledged that it will not address some concerns that require Congressional action, namely amendments to the CWA to provide Good Samaritans with protection from third-party lawsuits. Nevertheless, EPA hopes that the memorandum will encourage voluntary clean up efforts administratively while the legislative process "moves at whatever pace it takes."

Paul Frohardt thanked Roger for his efforts and said that he hopes the document will help advance legislation. However, he noted that the dynamics in Congress regarding such legislation have not changes much over the years and appear unlikely do so in the future. Consequently, he said he hopes the memorandum will be successful in encouraging Good Samaritan clean ups.

b. Section 303(d)/305 (b) Update:

Eric Monschein with EPA's Office of Wetlands, Oceans, and Watersheds gave a joint presentation with Tom Stiles on a collaborative effort with the Association of Clean Water Administrators (ACWA) to improve the TMDL process. They noted that the program has historically focused on producing TMDLs and that there is a desire to focus more on outcomes that lead to actual water quality improvements. The effort began last year and included outreach

to the States. It has produced a vision on “what the program wants to become” that EPA and ACWA will continue to refine and develop over the next year.

Eric also noted that there are about 50,000 TMDLs across the country and that there are a significant number of waters to be assessed at a time when resources are stagnant or declining. He also said EPA hopes to “go operational” in the next month or so with goals for managing the program at headquarters and for providing a framework for the states in running their programs as well. States may develop more “meat on the bones.”

Tom identified three “strong drivers” for states to participate in the effort. First, there is a consistent push to produce paper and write TMDLS but not enough time to produce a quality product. The goal is to move from a focus on pace to a focus on results. Second, states have made some notable successful improvements and there is a desire for them to receive some credit for these efforts. Lastly, Tom said there is a “real sense” of developing a strategy that determines what states want their TMDLs to do. As a result, states sent in a “wish list” and have provided suggestions about what the TMDL program should look like.

CLEAN WATER ACT LEGISLATION AND LITIGATION UPDATE

Nathan provided a brief update on notable legislation and litigation involving the CWA. In particular, he reported on the status of litigation involving EPA’s water transfers rule, which clarifies that water transfers do not require NPDES permits. The rule was then challenged in multiple circuits and two federal district courts, namely the Southern District of Florida and the Southern District of New York. The circuit court cases were consolidated by lottery in the 11th Circuit. The district court cases were stayed pending the outcome of the 11th Circuit’s decision. The 11th Circuit subsequently stayed the consolidated rules challenge case pending the outcome of a related case that was also before the court, commonly known as the “Lake Okeechobee Case.” That case upheld the rule in 2009 as a reasonable interpretation of the CWA entitled to deference. The U.S. Supreme Court subsequently denied certiorari in 2010, allowing the consolidated rules challenge to proceed.

In August, a three-judge panel of the 11th Circuit heard oral argument on the consolidated petitions. The panel addressed two arguments made by the petitioners: (1) whether the Court of Appeals has jurisdiction under the CWA to review the rule; and (2) whether the rule is valid. A decision is expected in two to three months.

Based on the panel’s comments during the hearing, some reports have indicated that the panel appears likely to find that it does not have jurisdiction to determine the validity of the rule. If the panel makes such a ruling, it would also likely dismiss the consolidated rules challenge, which would leave jurisdiction over the challenges to the two district courts. This could mean that the Southern District of New York might strike down the rule under the 2nd Circuit’s decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, which rejected the reasoning that underlies the rule, while the Florida district court could uphold the rule under the Lake Okeechobee decision. These decisions would likely be appealed and could lead to a split among the circuits, which could set up an appeal to the U.S. Supreme Court.

Nathan also noted that he included a more detailed summary under Tab M in the briefing books. Carlos and Jennifer Gimbel mentioned that the summary was helpful and asked Nathan to prepare similar updates for each WSWC meetings.

HYDRAULIC FRACTURING ROUNDTABLE

Oklahoma: J.D. Strong said hydraulic fracturing has existed in his state since the 1950s and that the state is comfortable with the process. The biggest issue pertains to the drought because some farmers and ranchers that do not have fracking operations on their lands are concerned that the process will dry up their water supply.

Texas: Carlos said Texas is “very comfortable” with the science and process. In particular, he mentioned that the state has conducted a number of reports and that not a single water quality impact can be linked to fracking even though the practice is quite common. In terms of economic impacts, he noted that fracking supports 47,000 jobs in the state.

Wyoming: Pat Tyrrell reported on the results of a recent U.S. Geological Survey study that Wyoming paid the agency to conduct near the town of Pavillion. The study responds to an earlier EPA study involving two test wells that showed a potential link between fracking and groundwater contamination in the area. Pat said the USGS study showed lower levels of Benzene and that EPA will resample the wells and produce a new analysis. John Wagner also cautioned that the study pertains to a fairly unique situation and that the fracking was really shallow – about 1,000 feet – relative to fracking operations in other parts of the country. The hydrocarbons at issue appear naturally and questions remain about whether the test wells were constructed properly. No one knows exactly at this point.

Colorado: Jennifer reported that her state’s Oil and Gas Commission passed rules in December that require companies to disclose “what’s in their fracking fluids.” There has also been some discussion about setbacks for fracking operations. In addition, the city of Longmont enacted a ban on fracking and the state is now suing the city, claiming that the state has the authority to establish the rules regarding fracking.

New Mexico: Scott Verhines reported that New Mexico’s experience has been very similar to the experiences of Texas and Oklahoma. He also noted that there are some concerns related to food security given the amount of agriculture water being sold or leased for fracking operations. DL Sanders added that some small towns in the state that want to prevent fracking are arguing that they have authority to prevent the practice. While fracking has historically been confined and “well-done” in New Mexico, he noted that the “newness of it” in some areas has created a fear of the unknown for some.

OTHER MATTERS

There being no other matters, the meeting was adjourned.