

**MINUTES
of the
WATER QUALITY COMMITTEE
Talking Stick Resort
Scottsdale, Arizona
October 9, 2014**

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

MEMBERS AND ALTERNATES PRESENT

ALASKA

ARIZONA

Mike Fulton
Michael Lacey
Cynthia Chandley

CALIFORNIA

--

COLORADO

Trisha Oeth
James Eklund

IDAHO

--

KANSAS

Tom Stiles (via phone)

MONTANA

--

NEBRASKA

Jesse Bradley

NEVADA

Roland Westergard

NEW MEXICO

Greg Ridgley
Amy Haas

NORTH DAKOTA

Jennifer Verleger
Michelle Klose
Todd Sando

OKLAHOMA

J.D. Strong

OREGON

Tom Byler

SOUTH DAKOTA

Kent Woodmansey

TEXAS

Carlos Rubinstein

UTAH

Norman Johnson
Eric Millis
Walt Baker

WASHINGTON

Stephen Bernath (via phone)

WYOMING

Kevin Frederick

WESTFAST

Patrick Lambert, WestFAST Liaison, Salt Lake City, UT
Jean Thomas, U.S. Forest Service, Washington, DC
Becky Fulkerson, Bureau of Reclamation, Washington, DC

GUESTS

Carlee Brown, Western Governors' Association, Denver, CO
Curtis Seaton, Texas Water Development Board, Austin, TX
Alex Davis, Colorado Parks and Wildlife, Denver, CO
Bruno Bowles, Southern Nevada Water Authority, Las Vegas, NV

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 Helena, Montana in July were moved for approval by Kent Woodmansey, the motion was seconded by Carlos Rubinstein, and the minutes were approved unanimously.

SUNSETTING POSITION

The Committee discussed sunsetting Position # 337 on protecting groundwater quality, which had had been revised to include proposed language from Texas, stating:

Whereas, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact.

Greg Ridgley asked for more information about the reasoning for the new whereas clause. Carlos Rubinstein, who proposed the language, explained that the change is intended to make the position consistent with WSWC Position #340, which asserts state primacy over groundwater and includes identical language.

Carlos moved to recommend that the WSWC adopt the resolution, Mike Fulton seconded, and the motion passed unanimously.

TMDL UPDATE

Tom Stiles gave a remote presentation via telephone that described the vision the Environmental Protection Agency (EPA) and the states have developed regarding the Total Maximum Daily Load (TMDL) program under Section 303(d) of the Clean Water Act (CWA). He said the vision is intended to: (1) ensure that state-EPA collaboration is the “way it was meant to be;” (2) emphasize “product and progress over process and pace;” (3) focus on the “probability of successful implementation” when setting priorities; (4) diversify restoration approaches; (5) support state assumption of long range priorities; and (6) “do less with less but do what’s most important.”

Among other things, Tom said the vision focuses on making state water quality priorities the most important. “Let each state set their own water quality priorities and emphasize the results of restoration and protection,” he said. “Provide flexibility and adaptability, especially as each state has their own set of standards and geography. Extend the planning horizon – think 5-10 years down the road, and quit worrying about what can be done in the next two years. Push for efficiencies while recognizing uncertainties (weather, etc.) There’s a better way to doing TMDLs without changing the CWA rule. EPA [is] in lock-step with the states on this process.”

Tom also said the vision includes six components, the first being prioritization. “There are many options for how to set priorities,” he said. “Pollutant, water body, public or agency interest, administrative, implementation, and other. The key...is to have a plan, be flexible to address changes over time, and reserve capacity. This is not a new concept, but it is a new focus. Hopefully this would make our workload doable.”

Alternatives are the second component of the vision. “TMDLs are one way to get there,” said Tom. “There are other ways, such as direct to implementation, TMDL surrogates, cooperative agreements and [the National Pollutant Discharge Elimination System (NPDES)]. The key concepts are adaptive management, flexibility, accountability, and TMDLs if other options don’t work.”

Engagement is the third component. “Improve outreach, communication and involvement with state environmental agencies, other federal and state partners, the public, stakeholders, and the regulated community,” said Tom. “The key concept is to have a plan, build partnerships, and to improve reporting.”

Integration is the fourth concept. “Engage implementation programs to achieve water quality goals,” he said. “TMDLs are not self-implementing.... The key concept is to build partnerships, improve outcomes, follow a project through until water quality restoration or protection is achieved.

Assessment is the fifth component, which Tom said requires “appropriate data and modeling.”

Protection is the sixth component. “The vision formally endorses actions centered on protection in addition to restoration,” he said. “The key concepts are to support CWA goals to restore, maintain, and protect while also preventing impairments and being consistent with a watershed approach. This would carry a new focus if a state chooses to do this, although the concept is not new.

WATER QUALITY ISSUES IN ARIZONA

Mike Fulton gave a presentation on brine management in Arizona. He said brackish groundwater is a potential water source, but noted that there are questions about how to discharge desalinated brine.

Deep well injection is one possible option and the state is convening a stakeholder group to: (1) analyze statutes and rules with respect to deep well injection; (2) examine potential control technology criteria; (3) discuss the minimum depths of injection; (4) analyze possible injection to zones of existing high salinity ground water; (5) evaluate injection well technology (drilling, casing, testing, etc.); and (6) monitor well technology and monitoring

In giving his presentation, Mike noted that current water supplies are meeting demand and there is no immediate crisis. However, he noted that Arizona is not currently accessing brackish water resources on any scale and may want to in the future. He further noted that Arizona reuses a great amount of reclaimed water, but increasing salt in raw water and other factors can limit the uses of that water without advanced treatment.

UPDATE ON COLUMBIA RIVERKEEPER V. U.S. ARMY CORPS OF ENGINEERS SETTLEMENT

Nathan gave a brief overview of a recent settlement between U.S. Army Corps of Engineers and Columbia Riverkeeper, an environmental group. The settlement requires the agency to apply for NPDES permits for pollutants leaking from the gates, turbines, and other equipment in eight dams along the Columbia and Snake Rivers in Oregon and Washington.

While the Corps admits no wrongdoing, it agreed to disclose the amount of pollutants coming from the dams and to pay over \$140,000 in attorney's fees. The settlement will resolve a lawsuit Columbia Riverkeeper filed over the oil spills, which the group argued require NPDES permits pursuant to the CWA. The settlement marks the first time the Corps has agreed to monitor and disclose the chemicals released from its dams. Nathan also noted that some legal experts, including Columbia Riverkeeper, have opined that the settlement has implications for dams that are currently operating without NPDES permits.

WSWC DRAFT COMMENTS ON THE PROPOSED "WATERS OF THE U.S. RULE"

The Committee discussed a draft comment letter the WSWC's CWA Workgroup has prepared for the WSWC to submit to EPA and the Corps regarding the agencies' proposed CWA jurisdiction rule. The comments are based on WSWC Position #369.

After some discussion, the Committee agreed to the following changes.

First, the Committee agreed to include the below clarification as the second paragraph on the first page:

Please note that the WSWC's comments are applicable to all 11 sections of the Code of Federal Regulations (CFR) that are proposed for revision. However, for the purposes of this letter, the WSWC's comments are keyed to the version of the definition of "Waters of the United States" that pertains to part 230.3 of the CFR and appears on pages 22268-22269 of the Federal Register notice dated April 21, 2014.

Second, the Committee agreed to changes in Section II of the comment letter to modify previously proposed language in light of EPA's recent finalization of a scientific report regarding the connectivity of different water bodies. Instead of urging the agencies to wait until the report is final before moving forward on the rule (as originally proposed), the revised language states:

While the WSWC appreciates the agencies' decision to extend the public comment period for the rule, we note that the WGA requested in its August 27 letter (attached) an 89-day extension of the comment period. Such an extension would allow states to formulate thorough and thoughtful comments on the draft rule and its possible impacts, effects and implications, and also would allow the review and consideration of the Science Advisory Board's comments on EPA's scientific report regarding the connectivity of differing waterbodies.

As stated in the WSWC's November 5th letter (attached), "the overriding question in the rulemaking is not one of science, but of legal authority, namely the extent of federal authority over water resources under Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in *Rapanos*." Therefore, while it is

important for the rule to be scientifically sound, the report should not be used to support a rule that improperly asserts that the scope of the CWA is unlimited.

Third, the Committee agreed to include the following language in Section IV(E) of the comment letter, which pertains to terms in the rule that require further clarification:

In addition to these terms, further clarification is needed regarding the terms “floodplains” and “riparian” as used in the rule.

Carlos Rubinstein moved that the Committee recommend that the WSWC approve and sent the comment letter as revised. Walt Baker seconded the motion, which passed unanimously.

OVERVIEW AND DISCUSSION OF WSWC CLEAN WATER ACT ACTIVITIES AND POSSIBLE NEXT STEPS

Nathan gave an update on two proposed EPA rulemaking efforts: (1) an interpretive rule that will outline the process by which tribes obtain treatment as states (TAS) status; and (2) a separate formal rule that will establish a program for tribal administration of the TDML standards, as set forth in section 303(d) of the Clean Water Act (CWA). Nathan stressed that these rulemakings are currently only proposals, noting that EPA has contacted the WSWC about holding “pre-proposal” calls with the WSWC and its members to discuss the rulemakings. WSWC staff is working to schedule the calls by October 15, and it is expected that the calls will take place in the fall. Nathan also asked members to provide him with any specific questions they would like to discuss with EPA. Kent Woodmansey indicated that he had a process question and a question about how the rules will work on “checkerboard areas” of reservations where non-tribal interests own property.

Nathan then discussed litigation involving EPA’s water transfers rule, which clarifies that certain transfers are not subject to NPDES permitting requirements. As noted in past meetings, the Southern District Court of New York recently vacated the rule. EPA is defending the rule and has appealed the decision to the Second Circuit. At the same time, eleven western states that intervened in the action to defend the rule have also appealed the decision, along with a coalition of western water providers.¹ The parties have filed their opening briefs and will file their response and reply briefs in December. Oral arguments will take place later in 2015. The WGA and the WSWC support the rule.

OTHER MATTERS

There being no other matters, the meeting was adjourned.

¹ The 11 states include Alaska, the Arizona Department of Water Resources, Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming. Notably, Washington has joined with the coalition of eastern states that is suing to overturn the rule.