

**MINUTES  
of the  
WATER QUALITY COMMITTEE  
The Coeur d'Alene Resort  
Coeur d'Alene, Idaho  
October 25, 2018**

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**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	Joe Klein
<b>ARIZONA</b>	Einav Heneson
<b>CALIFORNIA</b>	Jeanine Jones
<b>COLORADO</b>	Patrick Pfaltzgraff Amy Moyer
<b>IDAHO</b>	Jerry Rigby John Simpson Mat Weaver
<b>KANSAS</b>	Tracy Streeter Kenneth Titus
<b>MONTANA</b>	Tim Davis Jan Langel
<b>NEBRASKA</b>	Steve Goans
<b>NEVADA</b>	--
<b>NEW MEXICO</b>	Greg Ridgley
<b>NORTH DAKOTA</b>	Jennifer Verleger Garland Erbele
<b>OKLAHOMA</b>	Sara Gibson Raquel Rancier
<b>OREGON</b>	Jennifer Wigal (via phone)
<b>SOUTH DAKOTA</b>	Kent Woodmansey
<b>TEXAS</b>	Jon Niermann

**UTAH**

Kathleen Ligon  
Alan Matheson  
Norm Johnson  
Eric Millis

**WASHINGTON**

Buck Smith  
Mary Verner

**WYOMING**

Steve Wolff  
Kevin Frederick  
Chris Brown

**GUESTS**

Sarah Higer, Idaho Power Company, Boise, ID  
Ralph Myers, Idaho Power Company, Boise, ID  
Tim McHale, U.S. Geological Survey, Denver, CO  
Jama Hamel, U.S. Bureau of Reclamation, Boise, ID  
Albert Barker, Idaho Water Resources Board, Boise, ID  
Darrell Early, Idaho Attorney General's Office, Boise, ID  
Ward Scott, Western Governors' Association, Denver, CO  
Stephen Bartell, U.S. Department of Justice, Washington, DC  
Jordan Bunker, Southern Nevada Water Authority, Las Vegas, NV  
Rosemary DeMond, Idaho Department of Water Resources, Boise, ID  
Mary Anne Nelson, Idaho Department of Environmental Quality, Boise, ID

**WESTFAST**

John D'Antonio, WestFAST Liaison, Murray, UT  
Roger Pierce, Former WestFAST Liaison, Denver, CO  
Chris Carlson, U.S. Forest Service, Washington, DC  
Patrick Lambert, U.S. Geological Survey, Salt Lake City, UT  
Deborah Lawler, U.S. Bureau of Reclamation, Salt Lake City, UT  
Roger Gorke, U.S. Environmental Protection Agency, Los Angeles, CA (via phone)

**STAFF**

Tony Willardson  
Michelle Bushman  
Sara Larsen  
Cheryl Redding

## **WELCOME AND INTRODUCTIONS**

Kent Woodmansey, Chair of the Water Quality Committee, called the meeting to order.

## **APPROVAL OF MINUTES**

The minutes of the meeting held in Newport, Oregon on August 2, 2018 were unanimously approved.

## **IDAHO WATER QUALITY ISSUES**

Mary Anne Nelson, IPDES Program Manager, Idaho Department of Environmental Quality reviewed their process for assuming Clean Water Act authority to issue NPDES permits. The process started with legislation in the late 1990's. In 2014, the changes to Idaho Code Title 39 Chapter 1 finally got enough backing in HB406, and they moved forward with the application for delegated authority. Idaho is 47th in getting this authority, so we're a little late in the game. Benefits include integration, interpretation, protection. Idaho had 3 separate programs for permitting: (1) NPDES; (2) Surface Water; and (3) Waste Water. They hope to integrate and coordinate all of these programs together.

She described "interpretation" of their rules and laws. This is about locals protecting local water for our uses under the Clean Water Act. She described the application process: getting a governor's letter, writing a program description (a 450-page document), rules and statutes, a letter from the Attorney General's office, then they had an MOA with EPA Region 10 which outlined how DEQ will be moving forward with drafting and permits, public comments, tribal consultation. EPA does not go away with the delegation of authority to the state. They are very much involved. The application was completed by Sep 1, 2016. EPA did review and approve the program. Scott Pruitt came and signed the program in July 2018.

They are in transition, assuming delegated authority in stages. In 2018 they are dealing with municipal; 2019 will be industrial (mining, food processing, etc.), 2020 will be general permits such as CAFOs, and the fourth phase will include stormwater and biosolids.

Idaho will now be issuing individual and general permits. They will be monitoring compliance, which is challenging and exciting, and they are trying to be as progressive as possible as they get started. There are reporting requirements, inspections and enforcement. The types of permits are individual (municipal and industrial), and general (stormwater, aquaculture, groundwater remediation, recreational dredging, etc.) Elements they are taking over include: discharge, pretreatment, sludge storm water.

We had to outline for EPA what our program will look like. We've dealt with the water quality standards, but the enforcement side is new to us. Idaho has just under 2,000 dischargers currently, though they anticipate this number will grow with the transfer to IPDES. They have 1,125 construction general permits, etc. They did a breakdown of hours to accomplish all this work,

and decided they would need 29 FTEs on staff (7 administrative, 8 for permitting, 14 for compliance).

The overall cost is \$3.1 million. Some of that will come from the State General Fund, but about one-third of the program costs will come from fees. We've been learning to calculate budgets, fees, setting up accounts. Everything is being done electronically (reports, non-compliance, fees) except 24-hour reporting, which has to be done by phone by federal statute.

There is a 120-day period to object to Idaho's assumption of delegated authority. The Idaho Conservation League filed a petition. They have 3 main concerns: (1) Idaho's criminal intent standard. EPA told us they did not like gross negligence, despite fitting EPA regulations. The court standard is ordinary negligence. Darrel Early drafted a 5-pg letter that is very useful; (2) the Idaho statute of limitations is 2 years. EPA was concerned about the processing of these, but Idaho has tried to show they have been successful with the 2 years, and that it is simplified by the state agencies co-located in the same building; and (3) CAFOs and contracting inspections. Nutrient management plans have to go to public comment and they have to be reviewed. DEQ will go through a legal process and is filing a petition on November 5. IDEQ will file on EPA's side. This has been a 4-year process. It requires a lot of planning and holding people accountable for deadlines, and implementation requires staying focused through the bumps and hiccups. Data is really important, and Idaho appreciates the assistance of Washington, Nevada, Kansas, Alabama, and other states that provided helpful information so Idaho didn't have to reinvent the wheel.

Steve Goans: What happened to the 106 funding?

Mary Anne Nelson: We kept the 106 funds on the wastewater engineering side.

### **CLEAN WATER ACT SECTION 401**

Ward Scott, Western Governor's Association, provided an update on Clean Water Act Section 401 activities. The Senate is taking several actions based on perceived abuses by the states of their Section 401 authority. Two projects in New York and Washington that were denied 401 certifications appear to be the source of concern, and have led to hyperbolic rhetoric ignoring the reality that states are seeking to protect their waters. A WGA-led coalition (Western States Water Council, Association of Clean Water Administrators, Association of Fish and Wildlife Agencies, Association of State Wetland Managers, Conference of Western Attorneys General, Council of State Governments, CSG-West, Western Interstate Region, and the Western Interstate Energy Board) sent a letter to Congressional leadership on August 9. WGA hosted a webinar addressing the importance of Section 401 to the states on September 24. Darrel Early and Jeanne Christie were the presenters at that webinar. EPA announced action will be taken to reform policies or guidance relating to Section 401, but was vague on the form the actions will take and they would not give details about any plans to engage with the states. The Western governors strongly admonish states can use 401 authority to protect their waters, and waters of the U.S. as co-regulators under the Clean Water Act. Ward expressed appreciation for WSWC's engagement on the 401 certification issue.

Tony mentioned the coalition letter is under Tab M. In August the WSWC also sent a letter to the Environment and Public Works Committee. WSWC did a survey in 2014 on their Section 401 programs, which is included under Tab M. Tony also provided testimony on S. 3303, the Water Quality Certification Improvement Act, the legislation introduced by Senator Barrasso to modify the authority of states. Historically, the state authority issues western states have dealt with under section 401 are usually related to hydropower. The answers to the questions of the committee subsequent to Tony's testimony are also included in Tab M. The vast majority of 401 are on actions on 404 permitting. Tony described some scenarios the two available options. It can be a convoluted process. As Ward mentioned, there is an October 4 letter from members of the Senate asking EPA to review their 401 guidance.

### **PROPOSED POSITIONS**

The Committee discussed the proposed position on Section 401. Jon Niermann wanted clarification on the word integration in the last paragraph "strongly supports integration of state and federal..." He was concerned that the phrasing might require states to subordinate or harmonize their 401 requirements with federal requirements.

Tony noted that the intent of the paragraph was to emphasize that the state's 401 certification process should come into the discussion with the federal agencies early in the application process, allowing, for example, state environmental reviews to coordinate with NEPA reviews and reduce regulatory burdens on applicants.

Jon wanted to replace the word integration with the word application. Raquel offered the word coordination. Also to add at the end of the sentence – "without diminishing state authority."

Kevin Frederick pointed to the second-to-last paragraph, the Now Therefore Be It Resolved clause – Kevin quoted from the WGA letter's closing paragraph on that topic regarding "curtailing state authority." Concern about designated uses and minimum stream flows, going beyond water quality for 401 certifications. He proposed striking everything after water quality in the second to the last line. Tony addressed the history of the water quality certification program, and the concerns of states to protect state water quality standards whether they involved designated uses or streamflows, fish bypass requirements, and mentioned the Rock Creek case, and the PUD No. 1 case. The position was written to emphasize both CWA 101(g) and 101(b), the right of states to allocate water, for water quality or aesthetics or instream flow.

Kevin talked about how Supreme Court supported Washington because fish passage was a designated use under CWA.

Tony said this position is intended to acknowledge state authority to protect state waters for whatever purpose. It was more than just the water quality aspects. It was a states' rights issue.

Kevin: I agree with what you're saying, but I'm not seeing that in the position. Maybe we need to embellish a little more to include the point you're making.

Kent asked if everyone was okay leaving the sentence the way it is.

Steve Goans and Tony discussed whether 401 dealt only with water quality, and water quality standards, or if discharges from projects, species habitat, and other things could be addressed, and whether that was an appropriate use of that authority to protect what the state deems important within their own laws and water quality standards.

Pat Pfaltzgraff: Would it be okay if we changed that first resolved paragraph to read: “the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows and the protection of water quality and designated uses.”

Kevin: In the first whereas, it seems like we're talking almost exclusively about 401 and state water quality statutes. Tony's point is that there may be appropriation related state statutes separate from 401. Would it make sense to acknowledge that?

Some discussion about paragraphs that address CWA 101(b) and (g) and Federal Power Act Section 27, which may provide sufficient acknowledgement of state water management concerns beyond just water quality.

Kent: I think we should move the minimum streamflows earlier in the sentence as Pat suggested, for clarification, and if anyone has further suggestions for the position, we can handle those changes in the Full Council meeting tomorrow.

Motion by Tim Davis. Pat Pfaltzgraff, second. Approved to move to the Full Council.

### **WATERS OF THE UNITED STATES (WOTUS) DISCUSSION**

The Committee discussed revisions to the Council's position #410 on the scope of Clean Water Act jurisdiction. Michelle Bushman noted that Acting Administrator Andrew Wheeler made a statement that EPA is going to give us a WOTUS 2.0 Rule sometime in the next few weeks, which could put the comment period deadline before our next Council meeting in March 2019. Our existing position relates to the previous 2015 Clean Water Rule, and may not be as applicable to the direction this Administration appears to be taking the new rule. In particular, #410 talks a lot about the consultation process, and does not thoroughly address some of the substantive issues about jurisdiction over certain bodies of water of concern to our members. We do have some language about excluding groundwater, prairie potholes, playa lakes, ponds, and ditches, but conference calls with our members over the past several months have raised additional concerns about isolated waters, water supply conveyances, stormwater systems, and ephemeral and intermittent streams. We may wish to wait until the proposed rule is published and hold conference calls to reach a consensus, because there may be important issues raised in the rule that we don't anticipate. If we take that route, we would need to have our Executive Committee vote on it, followed by submitted the position to the Governors for their approval. Obviously individual states can still comment on those issues important to them if we are unable to reach a consensus. We may not be able to agree on everything that is in the proposed position right now, which you should

be able to see under Tab C. There are yellow highlights for changes we have added and things that have been taken out are crossed out in blue.

Tony Willardson stated that the sense of the Executive Committee was that we should move forward and try to come as to as much consensus as we can on this position given the fact we will be addressing a proposed rule soon. Almost all of our positions have been adopted by consensus, but occasionally we will have a state that will abstain if they felt they could not approve the position. Tony reviewed briefly our Rules of Organization.

Tom Stiles (via phone): This new position is a masterful blend of state concerns. Consensus falls apart when you get too technical in terms of what is in and what is out. Right now the way it is written, Kansas could not support it. Wherever you say "intermittent" and "ephemeral," maybe just put in "perennial" (the 4th and 7th resolved clauses). If you get too thin to the line, things become problematic.

Tony Willardson: Tom has highlighted the challenge we face, and has made a good point. We essentially took Justice Scalia's position, that a jurisdictional water must have a relatively permanent surface water connection to a navigable water. If it is not relatively permanent, if it is intermittent or ephemeral, then according to this position it would fall under state jurisdiction. The former director of the California State Water Resources Control Board essentially said, we don't care where the feds draw the line because they're all waters of the state, and our rules are more stringent than the feds are anyway. So Tom has made a good point, and that's where the division is between our states in the discussions. The question of process is whether we want to presume certain waters are jurisdictional under the CWA unless you can prove it does not have a significant nexus with a navigable water, or vice versa, assume that certain waters are waters of the state, and it would be up to EPA or a third party to prove a significant nexus, that a body of water really has a meaningful water quality impact on a navigable water and should be regulated as a water of the U.S.

Tim Davis: I agree with Tom's approach as well. We should back away from the specifics and policy and focus on the broader policy statements that we can. Even if we don't get to a new policy by tomorrow that the Council can adopt now, to work fully on identifying those changes we'd like to see that we could turn around relatively quick and have the conversation given from the new definition that comes out to put together a policy that the Executive Committee could vote on, support and get to WGA and then we can take our individual positions as states on those specific topics where we don't agree. Let's work on the areas where we have larger policy agreement. Pull out the specifics.

Patrick Pfaltzgraff: I would echo both of those comments. We need a much broader statement. I don't know that Colorado agrees with the rebuttal presumption. I think it should be left up to the states to make those determinations, but not in a binding statement.

Tony Willardson: I think Tom identified number 4 on rebuttable presumptions, and 7(f) and 7(g) as points of concern. Everything above f and g was pretty much in our #410 position. It's just been rewritten. Perhaps with the exception of b, which went into more detail as to what

are man-made conveyances. Then yes, other references to what is ephemeral or intermittent. The last four paragraphs, 9-12, were something that I think there was general agreement on: (1) that EPA should continue to provide financial assistance to the states for the water quality programs whether or not it is a jurisdictional water; (2) there needs to be a clearly delineated process for resolving differences of opinion with respect to jurisdiction between states, and between states and tribes; (3) mapping jurisdictional waters for greater clarity; and (4) whatever rule is proposed, or adopted, there needs to be a period of time to allow states to adjust to the new rule. I think we could excise the language about perennial, ephemeral, and intermittent and still have most of the resolution in there.

Pat Pfaltzgraff: I think we are good with the provisions we talked about - 9-12. Those seem to make sense. It's just those ones proceeding that there are issues with some of the changes that are proposed. Tony, if it would be helpful, I have my staff working on a redline of this language. I'm hoping we can have that completed by the afternoon so I can get it out to the Committee. I would take those on in terms of trying to line out those areas where it seems to be a little too technical and leave the policy stuff that is in there so that we could have some language that we all agree.

Tony Willardson: Is there a sense then if we take out 4, 7(f), 7(g) - is there an agreement on that?

Tim Davis: The way you read a and mostly b, the specific sub-set there seems like an exclusive list and I wonder if there aren't some things we've unintentionally left out - so what I have in mind is groundwater augmentation in the streamflow - I think the idea is that something like that is covered, but kind of the weird fuzzy line of could it ever turn into something that needs a permit. I just worried about leaving stuff like that out. If you take out man-made conveyances and just put a period after flood water management. Or make sure it's not an exclusive list, so we cover things we aren't thinking of.

Jennifer Wigal (on phone): Tony, one question I have relative to the bigger picture, one objective of this new position is to kind of pave the way for the Council to submit whatever kind of comments and not constrain us to the existing position #410, giving us the latitude to address some key issues.

Tony: Yes.

Pat Pfaltzgraff: Tony, the two clauses before the resolved clause that reference intermittent and ephemeral - if we could strike those as well. I'll go back and look at notes, but I think those four clauses are going to be problematic.

Jennifer Wigal: Tony, I know Oregon would not be able to agree with the statement that they do not significantly impact the physical, biological, or chemical integrity of WOTUS. I think in Oregon we would see a lot of our intermittent or ephemeral waters do have connections to waters that are a navigable in fact.

Pat Pfaltzgraff: Colorado has the same concern.

There was some discussion over whether arroyos, coulees, washing and similar features were, or should be in the position. Tony noted that the proposed exclusion of ephemeral and intermittent streams is related to the exclusion of groundwater, as those streams may only flow on the surface for short periods of time due to temporarily elevated groundwater levels. Jennifer Wigal didn't feel Oregon would agree with that. She needed to get off the call, but said Raquel would let her know if there was anything she needed to weigh in on between tonight and tomorrow.

There was some discussion about striking the 4th Whereas clause. Raquel and Amy Moyer pointed out that it was worth continuing to emphasize not only our appreciation for how the agencies engaged this second go-round, but express a desire for them to continue to do that into the future. Roger Gorke asked a clarifying question about perennial streams with a "relatively permanent surface water connection" and whether it would continue to be jurisdictional if it went underground then returned to the surface.

Tim Davis: Tony, may I make a process recommendation? Instead of walking through all of this, knowing Pat's staff is going make the changes we already recommended, can we move this forward to tomorrow with the understanding that with the direction of maybe Michelle, Pat, or other people who want to work on a new proposed draft will come forward with it to the Council meeting tomorrow and walk through what those changes are, with the idea of following Tom's suggestions of stripping it down to a broader policy position that we can agree on?

Tony: You don't need to make a motion, this is just a discussion and obviously we don't have anything to recommend at this time. I think we have gone through and we've talked about striking 4. On 5, the language references Justice Kennedy's application of a "significant nexus" and not a *de minimis* connection, applied to individual waters on a case-by-case and not watershed basis. We've already talked about 7(a); 7(b) was the clarification from some of our discussions on man-made conveyances; 7(c) we will have to talk about that; 7(e) isolated waters is one that was really from the *Rapano's* decision, but that is just a restatement of what is already in our position; 7(f) and 7(g) we are going to strike those. Then there didn't seem to be really any objections to 9,10,11, or 12. That pretty much covers it.

Another draft will be marked up, circulated and discussed tomorrow.

### **EPA UPDATE**

Roger Gorke, U.S. Environmental Protection Agency, provided an update on EPA activities via phone. EPA is conducting research and working with stakeholders on drought resilience and water conservation on a watershed scale, seeking solutions to help communities with water quality concerns. Interest continues on Good Samaritan abandoned mine clean ups and moving forward with workable policies and programs. It may be worth having additional discussions on this. EPA is partnering with the Department of Energy to hold a workshop on the Water Scarcity Grant Challenge. They will be discussing oil and gas, using wastewater, lower cost desal, etc. Roger will send links to John D'Antonio to share. They are working on regular webinars

and other forums to discuss WIFIA and the SRFs, to show how the programs work together and work through the perspective that there is conflict between the two programs.

**SUNSETTING POSITIONS FOR SPRING 2019 MEETING**

There are no sunsetting positions within the committee to review for the Spring 2019 meeting.

**OTHER MATTERS**

There being no other matters, the meeting was adjourned.