

**MINUTES
of the
WATER QUALITY COMMITTEE
Wild Horse Pass – Gila River Hotel & Casino
Chandler, Arizona
March 21, 2019**

Table of Contents

Welcome and Introductions	3
Approval of Minutes	4
Assumption of § 404 Authority	4
Arizona Water Quality Issues	5
Using Produced Water in New Mexico	6
Clean Water Act § 401	7
EPA Update	8
Waters of the United States (WOTUS) Discussion	9
Draft FY2019-2020 Committee Work Plan.....	9
Sunsetting Positions for Summer 2019 Meeting	9
Other Matters	9

**MINUTES
of the
WATER QUALITY COMMITTEE
Wild Horse Pass – Gila River Hotel & Casino
Chandler, Arizona
March 21, 2019**

MEMBERS AND ALTERNATES PRESENT

ALASKA

ARIZONA

Trevor Baggiore
Einav Henenson

CALIFORNIA

Jeanine Jones

COLORADO

Patrick Pfaltzgraff
Amy Moyer

IDAHO

KANSAS

Cara Hendricks

MONTANA

Tim Davis

NEBRASKA

NEVADA

NEW MEXICO

Greg Ridgley

NORTH DAKOTA

Jennifer Verleger

OKLAHOMA

Doug Woodcock
Julie Cunningham

OREGON

SOUTH DAKOTA

Kent Woodmansey

TEXAS

Jon Niermann

UTAH

WASHINGTON

Buck Smith

WYOMING

Kevin Frederick
Chris Brown

GUESTS

Ward Scott, Western Governors' Association, Denver, CO
Sallie Diebolt, U.S. Army Corps of Engineers, Phoenix, AZ
Dave Castanon, , U.S. Army Corps of Engineers, Los Angeles, CA
Kyle Miller, Arizona Department of Water Resources, Phoenix, AZ
Jeri Sullivan Graham, University of New Mexico, Albuquerque, NM
Virginia O'Connell, Arizona Water Banking Authority, Phoenix, AZ
Caitlin Parker, Arizona Department of Water Resources, Phoenix, AZ
Dave Lelsz, Arizona Department of Environmental Quality, Phoenix, AZ

WESTFAST

Bob Joseph, U.S. Geological Survey, Austin, TX
Tim Stryker, U.S. Geological Survey, Reston, VA
Mindi Dalton, U.S. Geological Survey, Atlanta, GA
Chris Carlson, U.S. Forest Service, Washington, DC
Patrick Lambert, U.S. Geological Survey, Salt Lake City, UT
Doug Curtis, U.S. Bureau of Land Management, Washington, DC
Cherilyn Plaxco, U.S. Army Corps of Engineers, Little Rock, AR
Deborah Lawler, U.S. Bureau of Reclamation, Salt Lake City, UT
Andrew Hautzinger, U.S. Fish and Wildlife Service, Albuquerque, NM
Kevin Werner, National Oceanic and Atmospheric Administration, Seattle, WA
Roger Gorke, U.S. Environmental Protection Agency, Los Angeles, CA (via phone)

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Adel Abdallah
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 Coeur d'Alene, Idaho on October 25, 2018, were unanimously approved.

ASSUMPTION OF § 404 AUTHORITY

David Castanon, Chief, Regulatory Division, Los Angeles District, U.S. Army Corps of Engineers (Corps) gave a PowerPoint presentation on Clean Water Act (CWA) Section 404 State Assumption Process and Administration Streamlining Initiatives.

Other states are looking at this again – Florida and Arizona are the furthest along. Only authority over Waters of the United States (WOTUS) may be assumed by states, not Section 10 Rivers and Harbors Act. In Arizona, mostly that is just the Colorado River. 40 CFR 233.14 outlines the procedures for states to assume the regulatory authority. This Administration is interested in updating these regulations, probably a couple of years' process. The Arizona legislature authorized seeking 404 assumption of authority. Environmental Protection Agency (EPA) also has to approve the program, with ongoing oversight.

Arizona and the Corps entered a Memorandum of Agreement (MOA), laying out a common understanding for transition – maintain cooperation, coordination, effective and successful program. They will probably update the MOA over time. They need to communicate back and forth over projects the Corps is currently covering, how to divvy up the workload, if permit needs to be modified to comply with Arizona law, if a project needs to go back to Corps or transferred to Arizona. Projects with compensatory mitigation banks, in-lieu fee programs will need the Corps to be part of that administration process going forward. Under section 408 modifications that affect civil works projects require permission from the Corps, and engineering review that triggers environmental laws. Not a trivial thing – if state assumes authority and it affects a Corps project, have to ensure Corps gets necessary permits.

All the heavy lifting has been Arizona up to this point, though EPA and Corps have had a role. The Corps ensures correct and factual information for the state/stakeholders, has helped with clarifying issues, identifying pitfalls, being a resource as they go through this process.

David also addressed a media report that the duration of CWA 404 construction permit 67% longer in Arizona, suggesting that this is why Arizona is seeking 404 authority. This information came from a report in the Journal of Environmental Planning and Management – factors that might affect processing time. The study looked at less than 5% of the permitting workload (only SIPs), ignored regional or NWP, RGP, LOPs. What drives the complexity is the amount of WOTUS in the project. It involves consultations with other agencies, based on public notice - they are required by law to make that notice within 15 days, so that only contains preliminary information.

Questions:

Patrick Pfaltzgraff: Have you kept the efficiencies you've gained from initiatives over the last few years?

David: Finding efficiencies has been a standard now for years. It has been a matter of survival under a limited budget and with a small staff. We look for better ways to do things. In our LEAN 6 Sigma efforts, we work with other agencies. The relationships you build are really important in speeding up the applications. It builds up trust. We have funding from non-federal entities to help facilitate the work. With a single project manager, you get to know where the opportunities and constraints are on both sides, and that common understanding really speeds up the process. We have 22 funding agreements.

Kevin: Cost estimate?

David: 10 FTEs, and there were a lot of things that went into running the operation. \$9 million for whole district.

ARIZONA WATER QUALITY ISSUES

David Lelsz, Project Manager, Arizona Department of Environmental, provided Arizona perspective. Arizona has authority for all assumable CWA programs except 404, and Arizona would like to change that. Dams, levees, highways, mining projects – no permit can be issued if the project would cause degradation of water quality, if it threatens endangered species, other criteria. Arizona would like consistency.

The Central Arizona Project Tonopah, Soldier Wash project will reduce frequency of floods and flows overtopping banks. Why assumption? In an enforcement action, it would be more efficient if handled all within the same action, 404 violations and all other violations of Arizona regulations. There is the potential for inconsistencies between state and federal decisions, otherwise.

Regarding the state-federal partnership during this assumption process, he quoted Bob Gibbs of Ohio, this is the essence of cooperative federalism. There has been a robust stakeholder process, and tribal consultation as required by state law.

Questions:

Pat Pfaltzgraff: What happens with funding, and with ESA issues?

David: The permits pay for the program, and we evaluate everything, it's still our mission to protect the waters. On a life cycle scale, it's worth it to our stakeholders. We metricize almost everything we do every day. We have found improvements in our programs with the LEAN program.

Pat Pfaltzgraff: Your LEAN program is impressive. How do you stand up your 404 process?

David: The Governor and Director have to make that decision.

Trevor Baggione: The customers value clarity and timeliness. They weigh those two components by their customers.

Amy Moyer: Did you get funds through the Arizona Legislature to get thru this process, or how did the process get started?

David: No additional state funding, we carved out a piece to pursue this. It is getting quite expensive for agency-level general funds, but we can also use CWA 106 funds to pursue this.

Tim Davis: We were directed to look at this process a few years ago. We didn't go as far as Arizona, because start-up costs were so much, and the staff increases that were needed, so legislature pulled the plug. I'm curious to see where Arizona lands.

David: Florida has a state-level 404 program already. Arizona and Montana do not. We create a public document by posting everything (minutes, meeting info, etc.) on the process on our website.

John D'Antonio: Commented on "be careful what you ask for" from the Corps, because it does come with a burden for the states.

USING PRODUCED WATER IN NEW MEXICO

Jeri Sullivan Graham, Research Professor, University of New Mexico Center for Water and the Environment, talked about recent efforts in New Mexico to consider reuse of produced waters.

The oil and gas use of fresh water for operations is considerable relative to other non-agricultural fresh water uses. New Mexico and EPA looked at possible uses for produced waters and held a conference to bring together those interested stakeholders. We considered how to influence policy changes with technical expertise helpful to New Mexico. We already had reports from 16 years of studies. Then a drought prompted a task force to look at available water sources. The EPA-NM Memorandum of Understanding enabled us to look more closely at produced waters and work that had already been done, technology that was available to treat those waters. We drafted a conference summary report, available on the EPA website.

Under New Mexico law, there is no water right tied to water that you have cleaned up and added to the system. How do we define the water, whose jurisdiction depending on where it goes? How do we deal with the waste when cleaning it up?

Some suggestions came out of the conference. Treating produced water to reuse on site and eliminate fresh water for oil and gas production. Tying incentives to reduce freshwater use. Vetting treatment technology that works. Developing a resource recovery master plan. Use of P3s. Need for staff – train new people as retirement wave exits. If there was money to treat produced water to any water quality standard you want – does the regulatory framework allow this? Both state and federal regulators needed more info about produced water.

Pat Pfalzgraf said Colorado has looked into how to cost effectively clean the water to be able to put it to use.

Julie Cunningham said Oklahoma is looking at not only treatment but also transportation costs, both for water and for the salts extracted as part of the treatment process (no local interest/market). They've also faced the challenge that oil and gas companies haven't wanted to share information. They would like to reduce energy costs, part of the energy-water nexus.

CLEAN WATER ACT § 401

Ward Scott, Western Governors' Association (WGA), provided a Powerpoint presentation on The Importance of State Authority Under Clean Water Act Section 401. He noted that Western Governors are very protective of state authority. There is a lot of rhetoric from this Administration about a couple of instances where a permit or project was denied, ignoring the bigger picture of how states are implementing their authority.

Clean Water Act Section 401 requires state certification of any federal license or permit for any activity that may result in a discharge into any water of the United States. It gives states their own congressionally - delegated authority over federal projects. State decisions generally receive judicial deference. This applies to a wide scope of activities.

Under Section 401, state review may result in: certification - federal license/permit may be granted; denial - federal license/permit cannot be granted; certification with state-imposed conditions - conditions must be included in the associated federal license/permit (or license/permit cannot be granted); or waiver of state authority - may be express or due to state's failure to act within a reasonable amount of time. The timeline for State certifications is determined by the federal licensing agency, and must be "reasonable" but not to exceed one year. If a State does not act timely, it loses its right. When does the timeline for review commence? Some say this is determined by the State, other say it is receipt of request for certification. Scope of state review and conditioning requires a nexus to water quality. The discharge itself triggers the state review, but the activity as a whole must comply with appropriate requirements of state law.

Definition of terms need to be clarified. *If the State, interstate agency, or Administrator, as the case may be, fails or refuses to action a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.*

These ambiguities raise questions. EPA gets to define the terms. Many of the answers are included in the EPA 2010 Handbook. There is a constant struggle between EPA and how this authority is supposed to work. The states are on an even playing ground as the Federal agencies. Ward reviewed the history of the correspondence, beginning with a letter in 1991.

Recent Administration announcements indicate a potential Executive Order directing EPA Rulemaking/2010 Handbook revisions and new Corps Policy Guidance.

A coalition of associations led by WGA and joined by WSWC and others sent a letter to congressional leadership shortly following the WSWC 2018 Summer meeting. Latest effort by the coalition was a letter sent to the Corps and EPA with a list of process considerations for the federal agencies and states to consider together. We want to be a good faith partner with the federal agencies. The states should be encouraged to develop their own best practices. The states should be working with the federal agencies early in the project application process.

Ward thanked the WSWC for continuing their discussions on this issue. We are waiting to hear from the agencies. There is room for a constructive conversation. State authority needs to be preserved.

EPA UPDATE

Roger Gorke, U.S. Environmental Protection Agency, provided an update on EPA.

On February 27, Dave Ross announced development of a Water Reuse Action Plan, meant to be an integrated approach with other federal partners. He is coordinating efforts with Tim Petty from DOI, Adm Gaulladet from NOAA, Bill Northey from USDA. EPA want input from states and stakeholders to develop an action plan that we all can use. The plan will outline and describe actions federal agencies can take to advance water reuse technology, putting existing financing to better use (financing with P3s, maximizing water reuse opportunities under WIFIA, etc.), improving public education and acceptance of reuse, consideration of wetlands and infiltration of treated waters into the system.

One example, the City of Los Angeles Mayor announced goal of meeting 100% water reuse by 2035. Currently the plant is discharging 250M gal/day – which raises questions about what the NPDES permit will look like, dealing with concentrated brine discharge in 2035. New Mexico's produced waters are another example.

Roger want to set up a discussion with WSWC and states to identify what those reuse issues are. A draft WRAP is going to be released in early September. Looking forward to state input. That's the biggest thing on the radar.

WOTUS DISCUSSION

Kent referred folks to the draft comment letter to EPA in Tab Q. South Dakota sent around some comments. We've heard about the complexities and costs of state assumption of CWA 404 – States may have to do some 404 work if waters are not under federal CWA jurisdiction, and they may not want to. Also, the Section 106 criteria for dividing those funds among states means that if some waters are not under federal jurisdiction, the allocation of those funds will change. Kent also expressed concerns about the predictability of the proposed rule.

Pat Pfaltzgraff: We had similar concerns as South Dakota raised, as well as some additional concerns. I think it would be nice to shrink down the letter and refer to the resolution and the other State comments.

Tim Davis: I agree with winnowing the letter back and let each state submit their own perspectives. Just provide a cover letter that talks about the Council and the position. I would avoid rehashing that and creating a broad letter.

There was some discussion of interpreting the position from October in light of the new rule itself, which causes some heartburn for some of our members, particularly when it comes to wetlands and ephemeral streams. The provision about the resources is one that could be explicitly included in the letter. Don't spend too much staff time trying to find a more thorough letter that works for everyone. The position stands by itself and represents the broad position of the Council.

DRAFT FY2019-2020 COMMITTEE WORK PLAN

Kent Woodmansey reviewed the draft Committee Work Plan.

If you have anything to add to the changes for the work plan, let Michelle know.

SUNSETTING POSITIONS FOR SPRING 2019 MEETING

There are no sunseting positions within the committee to review for the Summer 2019 meeting.

OTHER MATTERS

There being no other matters, the meeting was adjourned.