

**MINUTES
of the
WATER QUALITY COMMITTEE
Grand Hyatt Washington
Washington, DC
March 22, 2016**

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

MEMBERS AND ALTERNATES PRESENT

ALASKA	Dave Schade
ARIZONA	Cindy Chandley Einav Heneson
CALIFORNIA	--
COLORADO	Trisha Oeth
IDAHO	--
KANSAS	--
MONTANA	Christian Schmidt
NEBRASKA	Jeff Fassett
NEVADA	--
NEW MEXICO	--
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	JD Strong Brittnee Preston
OREGON	--
SOUTH DAKOTA	Kent Woodmansey
TEXAS	Jon Niermann Robert Mace

UTAH

Norm Johnson
Walt Baker
Eric Millis

WASHINGTON

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WYOMING

Chris Brown (via phone)
Kevin Frederick (via phone)

WESTFAST

Patrick Lambert, WestFAST Liaison, Salt Lake City, UT

GUESTS

Jim Rizk, Texas Commission on Environmental Quality, Austin, TX
Dwane Young, U.S. Environmental Protection Agency, Washington, DC
Allison Wiedeman, U.S. Environmental Protection Agency, Washington, DC
Prasad Chumble, U.S. Environmental Protection Agency, Washington, DC

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding (via phone)

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 Manhattan, Kansas on October 8, 2015 were moved for approval by Jennifer Verleger, seconded by Walt Baker, and passed unanimously.

DRAFT FY 2016-2017 WORK PLAN

Behind Tab H are the proposed changes to the revised work plan. Our chairman admonished during the Executive Committee to get rid of any items that are out of date, etc.

#1 Hydraulic fracturing – regarding EPA’s study on the relationship between hydraulic fracturing and drinking water, “Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources,” EPA’s Science Advisory Board is still completing its process, and may modify or update its report on hydraulic fracking. Oklahoma and Colorado are still concerned about this issue. Continue to monitor and update as part of the work plan.

Regarding the WSWC summary of states’ experiences with hydraulic fracturing, and how state programs and regulations ensure that hydraulic fracturing does not impair water resources, we could send around a survey to gather information from states, but this may not get done within this year. If we can get our states’ staff to dig into the details, we may be able to extend our resources a little. The Groundwater Protection Council did a review/survey and put out a report. Maybe this could be circulated and states could add any additional info to fill in some of the gaps.

#2 WQ2 Nexus – We may want to revise some of the next steps, drill down into a particular issue or two, and focus on how we can resolve quantity-quality issues in tandem.

J.D.: Do we want to drop out the public interest exercise? It’s difficult to identify a definition of public interest from a legal standpoint. Still, we may want to catalog what we do know, what the states call it or how they define it, the government’s ability to regulate what would otherwise be a private property right.

Norm: Utah has no definition of public interest for water quantity, although we know it deals with hydrologic considerations, which has been raised for the Parks. In a pending case for water rights for a nuclear power plant in Utah, there’s an argument that nuclear power is not in the public welfare, but it would come as a great surprise if the court rules that the public interest criteria could be used to block the water right.

Walt: In the water quality arena we talk about net environmental benefits, but for quantity there is no consideration relative to those benefits.

Jennifer: In North Dakota there is a list of considerations for permitting from the State Engineer, including the public interest, but none of the factors laid out in the statute are determinative.

Dave: Alaska has statutes requiring us to look at public health, fish and game resources as one of four factors to consider before granting a water right, and there are in depth reviews for controversial projects.

The USGS-EPA Draft Technical Report: Protecting Aquatic Life from the Effects of Hydrologic Alteration may be a useful springboard to rally around and take a closer look at quantity-quality issues, and the collision between state and federal water regulations and water rights. Pat Lambert noted that he has never seen a USGS report go out for comment, and suggested it would be helpful to understand the intent and motivations of the report. Walt noted that this is not a new issue, that diversions do impact quality. States grapple with this issue when dealing with §401 certifications on federal water transfers. Most states will increasingly have to face this concern as it comes to the forefront. It would be helpful if we could find a way to reduce the surprises and train wrecks relating to this issue. There are some real opportunities here to strike a balance, and the discussion and communication would be welcome.

We also want to develop our Toolbox by adding materials and templates of MOU's, informal agreements, and examples we can use to learn from each other, in particular to bridge gaps, open dialogue, and disseminate information between state partner agencies. Utah has an MOU between state agencies, recognizing the importance of defining how we do business with each other over the scarce water resources. Colorado has an MOU between the state engineer and water quality folks, with a statute delegating groundwater quality. Wyoming doesn't have any MOUs dealing specifically with the quality-quantity nexus, but has examples (one existing, one pending) where the state engineer notified DEQ of potential appropriations that could impact water quality. In South Dakota, the state engineer's office is in the same department as the water quality program, and the current state engineer was the former head of the surface water quality program, so there's ongoing awareness and communication about pending applications that impact both; no MOU because they're in the same agency. We can work to bring some of these examples together at the state level, and then reach into the state-federal agency realm.

Coordinating with federal agencies and other organizations with common quality-quantity interests sounds worthwhile, so keep that in the Next Steps. We may want to tee this up for WestFAST. We might co-host a watershed summit to look at things on a watershed scale in invite stakeholders. We could hold a virtual brown bag discussion on wastewater reuse, for example.

Add to the list of Next Steps: (4) a focused effort to review and share comments on the USGS-EPA report on aquatic life; and (5) a more focused review of the WSWC 1997 WQ2 report and where we are headed for the next 20 years.

#3 CWA Issues – For the most part we want to continue to monitor and report any changes or new concerns, so we can weigh in as needed and appropriate. There are several court cases pending on WOTUS, EPA's water transfers rule.

Regarding SRFs, WSWC has taken a strong position on this issue and has been heard. We want to continue to push, keep current on congressional actions. Some SRFs are being used to improve irrigation efficiency, providing deposits on hand to allow the banks to make lower interest loans and finance projects with loan guarantees. Flint, Michigan was a disaster, and it currently dominates the discussion on infrastructure. The city was in receivership and took the least cost alternative. Infrastructure replacement is costly and the path forward is unclear –

whether to wait until failure, like in Flint, or have a plan to keep up with maintenance and sustainability of the infrastructure. We ought to look at what comes out of the White House Water Summit and see how the Flint situation plays out, and determine whether we need to make any modifications to our work plan. One concern is the potential for regulations we do not want, a top-down approach that may not be helpful, or taking funds away from one SRF to fund another – the offsets can hurt us.

Regarding pesticide permits and NPDES, the issue is still hanging out there, with recent legislation passed by the House. We may have assumed this was going to be a bigger concern than it has turned out to be. There's been a general permitting process for the past five years. This issue doesn't come up often in the states, although they would like to either see it go away or see the necessary resources. WSWC has a position on this. This may be dead wood that we can remove from the work plan.

EPA UPDATE

A. Remand of Forest Roads Case

Allison Wiedeman, Chief, Rural Branch, EPA Office of Water, provided an update. She introduced Prasad Chumble, the team lead on forest roads at the Office of Water. EPA is under a court order to respond to the remand in *Environmental Defense Center, Inc. v. EPA* (2003) by May 26, 2016. The remand requires EPA to address whether section 402(p)(6) of the CWA requires regulation of stormwater discharges from forest roads.

I read the comments from the WGA. They basically said, we've got it covered, federal government stay out. Did I get that right? We received similar comments from 25 states, many of which were the Western states, as well as the National Association of State Foresters, and the National Association of Counties. We have plenty of comments to that effect, and we thank you for your comments. Also, the comments talked about how the NPDES permit program should not be used to regulate forest roads. We wanted to make sure that you know that is not an option EPA any more. The 2014 Farm Bill revised the CWA to say that NPDES permits are not to be used to regulate forest roads. That option is off the table.

Section 402(p)(6) of the CWA allows some flexibility in defining what kind of regulatory program, including a non-permitting program, or stating that current state programs are sufficient, or developing a national guidance document on BMP implementation. We have been actively looking into the issue since 2012, but have yet to make a decision about whether we should regulate. The 9th Circuit issued a Writ of Mandamus that gave us until May 2016 to make the decision.

In May, a *Federal Register* notice will be issued that will describe EPA's decision. If EPA decides that regulations are required under 402(p)(6), the notice itself won't be a regulation, just information about the decision. EPA would then have to develop a rule, publish it for public comment and then finalize the rule years down the road.

Questions:

Is this process based on the court's decision in 2014 that EPA did not adequately respond to the issue in the court's ruling?

Alison: In 2003, the 9th Circuit remanded back to make a decision. EPA has not made a decision yet...which is indicative of whether or not EPA wanted to make a decision. In 2014, the court said a decision must be made by May 2016. Whatever we do, it will be made in consultation with the states. Section 402(p)(6) actually tells EPA that anything that would require regulation must be done in consultation with the states. Regardless, we would make sure that we consult and work very closely with the states. If any of you are familiar with the pesticide general permit that EPA developed in 2011, and is soon to reissue in 2016, because it has to reissue every five years, we worked very closely with the states. The states are the ones with the expertise. The states are the ones that have already been regulating forest roads and pesticide discharges. We literally rolled up our sleeves and met with the states for two two-day working sessions, and asked what they thought was the best path for pesticides. We have that kind of close working relationship for any forest roads regulation as well.

Pat: So that would be pre-rulemaking outreach, after making this decision, but prior to EPA coming out with a proposal, if that is the decision?

Alison: Yes. It would be pre-proposal, designed in consultation with the states.

J.D.: So the 2014 Farm Bill precludes you from regulating forest roads under NPDES, and court decision is about whether or not you should regulate under 402.

Alison: Precisely. Interestingly, in that 2014 Farm Bill, Congress did recognize 402(p)(6) as an option for regulation.

Which way are you leaning on the decision?

Alison: I can't answer that question, but you can ask. Really, we haven't made a decision. This is a tough one. We received a lot of really good comments. We are still struggling with this, as we have been since 2003.

B. TAS - 303(d) process - Michelle

EPA issued a proposed rule to establish a TAS process for the CWA §303(d) Program, enabling eligible tribes to carry out CWA program responsibilities. Oklahoma, Colorado, South Dakota, Utah and several other states submitted comments. Many of the comments focused on concerns regarding the use of the outside boundaries of a reservation to delineate tribal authority, particularly where there are checkerboard lands with varying ownership, or an absence of reservations where there are allotments. Other concerns included the order of events and the need for water quality standards, as well as procedures that would allow states to have early notice of the tribal process.

EPA issued a Guidance for Discussing Tribal Treaty Rights, a policy on consultation and coordination with Indian tribes. It is a short document under Tab S in your briefing materials. Under the guidance, prior to taking proposed action in a specific geographic area, EPA is required to ask the tribes in an affected area if a treaty exists, and also if there are off-reservation treaty rights, such as forests near the tribe's land. For proposed actions that are national in scope, the consultation is optional. EPA does not have an equivalent guidance for the states as far as Michelle knows.

GOOD SAMARITAN/HARD ROCK MINE REMEDIATION

Trisha Oeth, Administrator, Colorado Water Quality Control Commission, provided an update on recent efforts to provide Good Samaritan liability protection. There's been some CERCLA exploration as alternative to CWA. Previous efforts have all been focused on CWA changes, and it has a lot of history and baggage. Recent discussions have centered around the idea of what if we don't touch CWA so we don't bring in the baggage, and try to modify CERCLA instead. The Colorado Congressional delegation has been working on a consensus bill for the Senate EPW committee. They want to set up a separate program where Good Samaritans would apply for a permit and show their viability, and the permit would shield them. The EPW Committee held a hearing on March 2nd, and they were receptive to the concept. There were concerns relating to the Gold King Mine and third party liability and exposure, especially if something goes wrong during the cleanup. The delegation is working on revisions to the bill.

Regarding the Gold King Mine, Colorado has received a Notice of Intent to sue from Utah and New Mexico. I cannot comment much more than that. Colorado is working with the other states and tribes and EPA on a preparedness plan, spring runoff response plan and long term plan. Colorado has been gathering information and looking at all of our options. The local government sent letter to Governor, requesting that the Upper Animas River be place on the Superfund National Priorities List, and Governor Hickenlooper sent a letter of support for the listing to Region 8 Administrator Shaun McGrath.

Walt Baker, Director, Utah Division of Water Quality, provided his perspective on the August 5, 2015 event. The Gold King Mine spill was certainly highly covered, and everyone has seen the mustard colored water that flowed into the Animas, which ended up in Lake Powell. He noted EPA's estimated 3 million gallons of mine contaminants from the spill, relative to 750 million gallons in the system from abandoned mines. There are an estimated 8.6 million tons of tailings in the river system. Utah's perspective is that the Gold King Mine spill happened, but now let's look forward to determine how to make things better.

As Trish said, the three states and tribes convened in Denver for path forward. EPA presented monitoring plan, with EPA monitoring over the short term, and the states and tribes monitoring over the long term. For the short term, EPA will monitor what is going on in the Animas and San Juan Rivers. With 70% of the sediment load still floating there's a concern about spring runoff and storm events moving the sediment. We need to be ready to mobilize over the short term, and we're working with USGS to deploy sensors in nine locations to collect

information, including turbidity, to create an early warning system. We cannot afford to wait for data to come in to notify folks that they should not drink or use the water from three weeks ago. We're in the process of finalizing the emergency plan and sorting out \$319 funding. EPA's insistent that there's only \$2M to split for everything. It takes Utah over \$2M to implement its program, sediment traps, etc., so we're trying to get EPA to bring more money to the table. We're also working on approval for the long-term monitoring plan, setting protocols between three states for warning levels, and an action plan to convey alerts to the public.

Pat: Do we have data for the pre-spill sediment load? Do we believe the metals from high precipitation events can be distinguished from the background levels?

Walt: The answer is, Yes, we can tease out the difference between normal background and EPA's data, but we need to drill down a bit more to determine the effects. Our concern in Utah is the ongoing legacy and public safety issues, not just the Gold King Mine, but the ongoing contamination from abandoned mines.

OTHER MATTERS

There being no other matters, the meeting was adjourned.