

**MINUTES
of the
WATER QUALITY COMMITTEE
Marriott Pyramid North Hotel
Albuquerque, New Mexico
October 19, 2017**

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MEMBERS AND ALTERNATES PRESENT

ALASKA	David Schade
ARIZONA	Trevor Baggione Einav Heneson
CALIFORNIA	Jeanine Jones
COLORADO	
IDAHO	
KANSAS	Kenneth Titus Tom Stiles (via phone)
MONTANA	Tim Davis
NEBRASKA	
NEVADA	
NEW MEXICO	Greg Ridgley Tom Blaine
NORTH DAKOTA	Jennifer Verleger
OKLAHOMA	Julie Cunningham
OREGON	
SOUTH DAKOTA	Kent Woodmansey
TEXAS	John Niermann
UTAH	Erica Gaddis Norm Johnson Eric Millis

WASHINGTON

WYOMING

Steve Wolff
Kevin Frederick (via phone)

GUESTS

Travis Hyer, Salt Lake City, UT
Elizabeth Weight, NIDIS/NOAA, Boulder, CO
Joe Klein, Alaska Fish and Game, Anchorage, AK
Brian Carlson, U.S. Fish and Wildlife Service, Denver, CO
Carlee Brown, Colorado Water Conservation Board, Denver, CO
Jeremy Kruger, U.S. Bureau of Land Management, Washington, DC
Jeff Nejedly, Washington Department of Ecology, Olympia, WA (via phone)
Christopher Estes, Chalk Board Enterprises, LLC, Anchorage, AK (via phone)

WESTFAST

Roger Pierce, Federal Liaison, Murray, UT
Doug Cutis, U.S. Bureau of Land Management, Washington, DC
Jordan Bunker, Southern Nevada Water Authority, Las Vegas, NV
Roger Gorke, U.S. Environmental Protection Agency, Sacramento, CA
Andrew Hautzinger, U.S. Fish and Wildlife Service, Albuquerque, NM

STAFF

Tony Willardson
Michelle Bushman
Sara Larsen
Cheryl Redding
Adel Abdallah (intern)

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 Rohnert Park, California on June 28, 2017, were unanimously approved.

SUNSETTING POSITION

Position #373, the 2014 letter commenting on the proposed rule developed by the EPA and the USACE to clarify the scope of Clean Water Act jurisdiction, will be allowed to sunset and will be a historic document for reference purposes.

Position #377 asserts state primacy on protecting groundwater quality. The Executive Committee did not have any changes to the position. A motion to readopt was offered by Tim Davis. Jen Verleger seconded the motion. The motion to readopt the resolution was unanimously approved.

NEW MEXICO WATER QUALITY PRESENTATION

Erica Gaddis, Utah Director of Water Quality Division filled in for Bruce Yurdin of New Mexico. The two of them have been meeting this week with Colorado, the Navajo Nation, the Southern Ute Tribe, and EPA folks to hammer out a plan for the San Juan River, Lake Powell, Animas River using some funding that Congress appropriated for all those jurisdictions. The meetings have been productive, and developed a sense of trust that the states and tribes and federal agency can work together, with the hope that something good can come from the Gold King Mine spill.

Erica provided a brief overview and update on the Gold King Mine spill in 2015. EPA concluded that the material from the spill now resides at the bottom of Lake Powell. That raises questions about longer-term impacts from all the abandoned mine discharge in the region, around 5.5 million gallons per day. The Water Infrastructure Improvements for the Nation (WIIN) Act (2016) provided \$4M per year for five years to do monitoring and assessment work in the watershed, and to build a collaborative water quality management program. They feel the need to make good use of those funds to demonstrate value moving forward. They have projects planned in the different states and reservations.

New Mexico is in the middle of the watershed, with portions of the Animas River and San Juan River. During the spill they experienced impacts to various uses, particularly irrigation withdrawals along the Animas River that pulled in a significant amount of that orange water so visible on the news. The contaminated sediment is still at the bottom of many of those irrigation canals, and there's concern about contamination of irrigated soils. New Mexico is interested in funding projects to look at those agricultural impacts and provide some assurance to the public that the food grown in those areas is safe to eat. The City of Farmington also takes water directly

out of the Animas River for drinking purposes, and there has been considerable effort to provide good information for them about when the water is safe to take.

Last year they worked with EPA to get some sensors - 3 in Colorado, 4 in New Mexico, 2 in Utah - for a network of real-time water quality data to inform decisions on turbidity for drinking water purposes, and they hope to get the data to a point where they can inform decisions on recreation and agricultural uses as well.

They're also looking at doing a robust study on Lake Powell. EPA has put \$10M into monitoring the Animas and San Juan Rivers, but no money into looking at the impacts on Lake Powell.

As a group, they're interested in looking at their respective water quality standards. During the spill, the water was crossing three states and three tribes with different standards, and that resulted in mixed messages going out to the public. They're looking at opportunities to revise or develop new standards, particularly with the agricultural and recreational uses, to bring them up to date with the science.

They're also looking at communication strategies, how to be more cohesive. Every jurisdiction has their own website on the Gold King Mine spill, with information about their piece of the watershed. They're looking at the watershed as a whole, to work together to improve water quality and messaging. For now the data collection is focused on monitoring, but over time they hope to use the data for watershed modeling, source identification, and targeted reductions of various contaminants to make collaborative management decisions across jurisdictions if possible.

Kent: Walt presented on the monitoring at the Nebraska meeting. What kind of inventory work is being done in the watershed for those historic drainages?

Erica: That is one of the projects we would like to fund, as well as an inventory of all the abandoned mines in our state. It's a problem in our state, and we know where they are, but we don't know which mines are discharging. The Bonita Peak area has been designated as a Superfund site, so the inventory of mine discharges in that area of Colorado is certainly much more understood than other parts of the watershed. Part of what we agreed to in the past day and a half was that first, we need to identify what and where the real problems are, and then we can move into identifying the sources, and ultimately control those sources.

EPA UPDATE

Roger Gorke, stated there was nothing new or late-breaking on the WOTUS 2.0 to report. We do have a continuing request for any comments or suggested language to replace the 2015 rule, or any questions that need to be answered, or different approaches to take or exclusions to make. We are still in drafting mode, so the more input we can get from you all the better. It is not too late to provide at this point.

The EPA Water Finance Center hosted a workshop in September about the idea of a water innovation fund. We had some folks from Oklahoma, Texas, Colorado and California there. We brought this up during the Nebraska meeting. At this point it is not even an EPA “thing.” This is purely philanthropic, exchanging ideas on alternative uses of the cash balances that the states have sitting in their SRF funds in between projects. Rather than putting them into short term bonds for interest, leveraging them with private sector funds to help small and medium utilities get innovative technologies in a way that minimizes the risks to the SRFs, the communities, and the utilities. We’re doing state outreach before we even develop a proposal so that we can get input at the front end--looking at how the state laws, restrictions, leveraging, verification and technology needs differ--and continuing as full partners through any proposal that goes forward.

EPA was approached by a group in California that wants to do a Good Samaritan abandoned mine clean-up using tools from 2007. An internal EPA team is looking into this. After 10 years, we have to dust off the “tools” and figure out how to protect Good Samaritans. This is based on an administrative order, Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites (2007), and on EPA’s Model Settlement Agreement and Order on Consent for Removal Actions at Orphan Mine Sites. This just happened recently, but you all might be interested in those discussions as well.

EPA Region 8 in Colorado has a new Administrator appointed.

DICUSSION: SRFs AND WIFIA PROJECTS

EPA’s WIFIA program accepted applications for western projects in Oregon, Washington, California, and Nebraska. Kent invited any of those states to share their experiences with the development of the project application.

Jeff Nejedly, Financial Management Section Manager of the Washington Department of Ecology’s Water Quality Program, participated by phone. Washington was one of the recipients of the first round of WIFIA loan application opportunities, for the Georgetown wet weather treatment station in King County. The County comes in every year with an application or two for the Clean Water side of the SRF program (Drinking Water SRF is handled through the Department of Health), generally for some fairly large projects that they try to meet with a combination of bonds and SRF loans. King County applied for \$150M from the SRF program for this project. Our maximum loan each year to any one applicant is around \$30-\$35M. They usually request as much as they think they need, and they know that we have a maximum loan amount. WIFIA has been able to provide a larger loan amount, and can fund up to 49% of the project. They asked for \$129M through WIFIA, and they’ll try to make up the rest through bonds and SRFs and other means.

They are still working on the preliminary award, providing much more substantive information on the entity, project, and financial details than was required for the letter of interest (to the tune of several hundred pages more). They have a year to provide all the necessary information and to execute the loans. This is a direct federal loan at the going treasury rate, and the term can be up to 35 years.

The State of Indiana took a unique approach and applied for a WIFIA loan as the finance authority under the SRF program to fund several smaller projects within their state. Washington talked with EPA extensively and considered a similar approach prior to the letters of interest, but decided to let their proposal play out and see what it looks like with the process and the paperwork and covering the significant cost of \$400k-\$700k in fees to EPA. Those amounts seemed excessive to the managers of the SRFs, but the amounts worked out at current Treasury rates.

Jeff said that the WIFIA program is still new, so there are plenty of unknowns to work through, but if the Congressional funding is there, he expects EPA's next round requesting interest letters will open up next spring.

Tony met earlier this month with the Interstate Council on Water Policy in Baltimore, MD, where another project was approved, and during their presentation they said that WIFIA did offer them some flexible repayment terms. They were able to take advantage of that to provide a more level repayment of some of their bonds. In other words, when some of their existing bonds come due, they can make greater payments on those bonds and lesser repayments on their WIFIA loan, creating a more level base for all of their debt obligations.

Kent said in talking with other states there was some concern that WIFIA would supplant the SRF programs. Jeff noted that the states' SRF managers and the Council of Infrastructure Financing Authorities were concerned that Congress might see WIFIA as a replacement for the SRF programs. EPA continued to reassure folks that WIFIA was for big projects over \$20M. Realistically they should probably be much larger than that to be financially feasible with the high fees, and it seems to be more of an augmentation. WIFIA will never be able to meet the needs of the small to medium size projects, whereas the low interest rates of the SRF programs can meet those needs. Some states (Ohio, Minnesota, others) have been successful in bonding their SRF programs and meeting the bulk of the needs in the state. There is ongoing concern about WIFIA and the perception that Congress will see the success of WIFIA and decide that they don't need to provide the grant subsidies to the SRF programs any more. Those grants allow SRFs to offer lower interest rates, probably 1-2% lower than WIFIA, and also meet the needs of small hardship communities by offering additional subsidization that came through the 2009 American Recovery and Reinvestment Act, which helps offset the costs of the small rate-based utility systems.

Julie Cunningham agreed that Oklahoma has had some of the same concerns. They're a leveraged state that is able to leverage their SRF program. They have new security backing from the state. So far none of their communities have applied for WIFIA funding. Their SRF programs have been able to meet of the requests that have come in so far, in some cases \$20-\$30M projects. She said that Oklahoma would be interested in learning more about WIFIA, and keep an eye on what's happening to make sure that it's not going in a direction that they wouldn't like. With their leveraging and cross collateralization between the Clean Water and Drinking Water SRFs, they're able to offer 20-30% below market interest rates on AAA rated bond issuance. If everything remains the same, they don't see the SRFs in competition with WIFIA. And if WIFIA can supplement some of their projects above and beyond what the state can provide in leveraged financing, then they would be interested in that.

Kent said that South Dakota with such a small population base, the SRF program is very successful. When the WIFIA criteria first came out, they didn't think they would have any projects that would qualify, because they are too small for a WIFIA loan. He didn't know if that had the potential to change in the future, but he assumed if any big projects arose, it would probably be very rare.

Tom Blaine said New Mexico has been concerned that WIFIA would be seen as a replacement for the SRF program. Most of their projects are \$20M or less. There would be very few projects that would qualify for WIFIA. If it did become a replacement program, the projects wouldn't be able to compete with the larger states, or on a project-by-project basis. He said they've heard the assurances that WIFIA won't replace SRFs, but until something is finalized, the potential still makes them a little nervous.

Roger Gorke noted that internally, there's been no talk in EPA about using WIFIA as a replacement for SRFs. The program is meant to take pressure off the SRFs so that large projects don't drain all of the SRF funds. He thought he recalled that the states sent letters about these kinds of concerns, as well. He was wondering what EPA could do that would alleviate the concerns that have been expressed, and said that he would pass those concerns on to the EPA Office of Water.

Kent added that the concern arises with proposed federal budgets, where the SRF programs have often been zeroed out at the start, and then were funded anyway by Congress. That was not the case this fiscal year, but it has happened in the past. He said this is something we're going to want to continue to watch, as the current proposed projects get funded and how they go through the process.

DISCUSSION: STATE WATER QUALITY AUTHORITIES

Kent referenced the letters in Tab I that WSWC sent to EPA regarding cooperative federalism and Clean Water Act jurisdiction.

Michelle: We have included this topic on our agenda for several meetings in an effort to discuss a perceived lack of regulation over non-navigable waters that are not subject to federal jurisdiction under the Clean Water Act. The Council's position is that those waters are subject to state jurisdiction, but we haven't explicitly identified what authorities our respective states have to exercise jurisdiction and regulate water quality in the absence of delegated authority from EPA under the Clean Water Act. EPA raised this question during their outreach to states as they develop WOTUS 2.0. In an effort to facilitate federalism communications with EPA, we want to identify those statutes, regulations, and state constitution provisions that provide legal authority to regulate and enforce water quality over the waters of the state.

Tony: Erica, Walt and I have been back and forth about Utah's authority. I grew up in the Sevier River Basin, a closed basin that is not navigable, and without the migratory bird rule it is

one that would not qualify as a water of the U.S. even under the Obama Administration's WOTUS rule. Walt has issued 200 discharge permits under Clean Water Act Authority.

Erica: I know our Attorney General has told Walt that they believe our state statutes provide authority and that the federal permit is also a state permit.

Tony: So they overlap.

Erica: Yes.

Tony: And I think that is one of the questions that EPA is asking of the states, is if it is not a Water of the United States, does the state have authority to step in and to regulate. I think obviously there is constitutional authority for each of the states. Some of the states have specific statutory authority. California's State Water Resources Control Board says that the extent of federal jurisdiction makes no difference to them because their state permits are more stringent than EPA's permits. Talking with Jennifer Wigal from Oregon, it sounds like the Association of Clean Water Agencies (ACWA) has already started a compilation of those authorities.

Michelle: What ACWA sent to us consisted of a summary of the responses to one survey question, "Does your state have statutory language preventing your state from having more stringent environmental protection regulations than the federal government?" I don't know how useful that is for our purposes in communicating with EPA. It's nice to have that information.

Tony: I guess that could create issues, because many states have done that. So if there is no regulation, does that mean the state cannot regulate.

Jen Verleger: I don't think North Dakota is particularly unique that we have statutes that cover all waters of the state. So we regulate all waters of the state. Do you want us to send you that? We've told EPA that through our own comments. Is that something your looking for so that you can put it into a WSWC comment? What do you want from us?

Michelle: That would be great. Then we can say North Dakota has this specific statute, please contact them if you have additional questions.

Trevor Baggione: I think it would be best to put that in a standard form for us to fill out, so that you don't get a variety of answers. But if you can send that, I think we can easily answer those questions. I'd be very specific, though, because Arizona has several statutes that preclude us from regulating beyond what the Clean Water Act does, or what the federal government does. We do have a definition of waters of the state, which is very expansive. But the only program we have associated with that is our groundwater program. What that means is that we are waiting for the Waters of the U.S. definition to come out, and we will then advocate for a program that fills the gap that will exist. Assuming they go with perennial or intermittent waters only, we'll need to fill the gap in for the rest of Arizona, but we don't currently have a surface water program.

Michelle: But you have the ability.

Trevor: When the legislature gives it to us, we'll have the ability to do that.

Erica Gaddis: I think it might be helpful to think about what we mean by "regulate." Utah is similar to Arizona; we have the same kind of statute that says we can't be more strict than the federal statutes, unless appropriate under other provisions. When we say regulate, are we talking just permitting? Right now Utah's permitting program is broad enough to cover all waters of the state, which is much broader than waters of the U.S. But some other CWA functions such as the assessment or integrated report, some of our 303(d) TMDL work, is not captured in state statutes, and that isn't a federal program that we administer. In the Sevier Basin we may have permits that are applicable, but would we be able to develop a TMDL there? Because that's not part of our state authority, that's coming through the federal statute. So it would be helpful to let us know if you're interested in the permitting authority, water quality standards, assessments, TMDL, our entire CWA programs. Those will differ by state, because they may not have primacy for every single program.

Kent Woodmansey: In South Dakota we have the same broad statutory definition, and prohibition against being more stringent than the federal government. We're in the middle of a rulemaking process that proposed making some changes that could address this in the future, but public comments we received caused us to narrow down that part of the rule. They wanted very specific examples of when it would apply, and I didn't want to provide that yet, not knowing what the federal definition will be. So we might have to go through another rulemaking process. If we did that, there could be pushback at the legislative level that could change our definition of waters of the state.

Tony: The Administration indicated that the new version of the rule may come out during the first quarter of 2018. We may have to make some substantive comments on how we want the program to run. We have a couple of standards from the Supreme Court under Rapanos. The Scalia standard is whether there is a direct physical connection. I think we all agree that those are waters of the U.S. The Council's resolution has taken a position to exclude waters such as groundwater, prairie potholes, playa lakes, ephemeral streams. The question then becomes, what waters are in between, and do you use Justice Kennedy's significant nexus rule? But it seems to me there would be some sort of presumption that if it appears to meet Scalia's test it's in, otherwise it's out unless there's a preponderance of evidence that it has a direct connection. We've said we don't like the old proposal. Now they've asked us what we want, and we really don't have a clear answer at this point.

Tim Davis: Did we ask for a negotiated rulemaking for WOTUS? I'm trying to remember if we did or ECOS did.

Michelle: We asked them for substantive consultation, but not specifically for negotiated rulemaking.

Tim: Okay. I was just curious, because I basically got the feedback that they're not going down that path. In a meeting with the Region 8 states, it seemed clear that they're still trying to figure out what they want it to be, other than not what they had before, or how to codify Scalia's

opinion. I would be shocked if they had anything out before the end of the year. Michelle, can you send out a template of what you're looking for, how you'd like to have it broken out, with Constitutional rationale and statutes. Then I can send it to my legal staff and they can plug in the appropriate language and we can send it back to you.

Michelle: If I send it just to our Water Quality Committee, you would be able to get it to the appropriate folks in your states for a response? And would a month turn-around time be long enough?

Dave Schade: Alaska has a working group on this, so I can give the survey to them to work on.

Tony: Another concern we've raised is not extending or delaying the time to issue a permit. Some of you may be more aware than I, but the Corps has some sort of database of where they've issued permits in the past. One thought I had was dealing with this on a permit-by-permit basis. If a jurisdictional determination has been made for a particular permit in a basin, isn't everything in that basin or HUC-12 going to be a water of the U.S.? That would provide some certainty. Can we generalize some of this?

Erica Gaddis: I don't think it's quite that simple at the HUC-12 level. Administrator Pruitt came to Utah in July on his Waters of the U.S. tour, and this was something I raised with him and his staff, that we need an online database so we can at least know where JDs have been made and applicants can take a look. They got back to me right away, and apparently there is such a database that EPA and the Corps maintain. I had never seen it before. But knowing that it's electronic information and not stuffed in a shoebox somewhere makes it a useful tool.

Trevor: The challenge for Region 9 is that we are constantly battling EPA on projects, because even if the Corps determines it is not a water of the U.S. for 404 purposes, it may still be WOTUS for purposes of 402. We would argue that it's the same definition for 404 and 402, but under the current process it's not that simple.

Tony: My perception is that EPA finally woke up after pushing 404 to that extent, and I think that was the Supreme Court's conclusion. If it's not jurisdictional for 404, I can't see how it's jurisdictional for 402.

Jon Niermann: Under the U.S. Constitution, the powers not enumerated are reserved to the states, so the state exercises police power to regulate in the interest of public health and safety. This is a background proposition. Texas has a broad definition of state waters. We also have a delegated program, and I believe we issue permits for both state waters and waters of the U.S. I don't know our status, whether we have a statute that prohibits us from regulating more stringently than the federal standards. If we do, that would be an open question for me whether that would prevent us from regulating state waters outside the federal jurisdiction at the federal standard. I have a framework for thinking about this, but I don't know the answers to that. But if you send me the survey, I'll get it to the people who can answer those questions.

Tom Stiles: Every state has their own definition of waters of the state, so that universe is much greater than whatever the feds can dream up in terms of jurisdiction. First, inventory the states on of what is your definition of waters of the state. Getting to the question of authorities, let's not use the language about being more stringent, because some of the states do have statutory prohibitions on being more stringent than the federal government. What we want to say is, we have authority that supplements the federal authority, that goes beyond the waters not covered by the CWA. The CWA governs the discharge of pollutants. It doesn't touch pollution, which is left to the states under 101(g). Many of our state regulations are pollution oriented, which gets into habitat, flow management, etc. We can also inventory the states on what other programs we have that are parallel to or supplementing NPDES, WQS, etc. In Kansas, we regulate CAFOs that are under the EPA threshold. We also permit at the state level for non-discharging lagoons. Then it comes down to 404 authority, and only two states have assumed 404 authority. The other 48 of us are essentially at the whim of the Corps. That's where the battle has to occur. So we can take the broad issue of WOTUS and distill it down into what the real issue is. Then we can consider surgical adjustments to that aspect, and leave our very robust water quality programs alone, because they've been fine and have no real issue. We are no different than the State Engineers with their water rights authorities. Our authorities come out of the 10th Amendment of the Constitution, powers reserved to the states.

Jen: I've had a lot of people reach out to me from other states. In North Dakota, we put together a work group of several agencies that regulate water in some way. Our approach is that, instead of addressing the different exclusions like current rule, we were going to come at it like a zero-base budgeting perspective. Here are the things we think are waters of the U.S., so build a rule that would encompass just these specific waters.

Michelle: I will send out a survey or a form to be completed, so we can compare apples to apples, but if you have other suggestions or thoughts you'd like to add in that aren't covered, please do so. We'll compile that together and make sure everyone has a chance to review it before it goes out, and hopefully we'll be able to send that to EPA to provide them with some substantive feedback.

Roger Gorke: If you could do that as expeditiously as possible so those thoughts are part of the internal discussion—particularly how Tom described it as supplementing rather than whether state rules are more or less stringent than federal rules—that would be of great value as fingers are put to keyboard.

DISCUSSION: BLM HYDRAULIC FRACTURING RULE AND STATE AUTHORITIES

On September 25, 2017, the Council submitted a comment to the Bureau of Land Management on the proposed rescission (82 FR 34464) of the 2015 Hydraulic Fracturing Rule, which was intended to add federal regulation of hydraulic fracturing on federal and Indian lands. The Rule was finalized but never implemented due to a nationwide injunction issued by the U.S. District Court of Wyoming. The proposed rescission acknowledges the long experience and role

of the states in regulating hydraulic fracturing, and noted that BLM is particularly interested in information that would improve BLM's understanding of state and tribal regulatory capacity.

One of the Committee's Workplan items has been to prepare a summary of the applicable states' experiences with hydraulic fracturing, including water quality and water resources used for fracking, economic benefits, state-federal interactions, and the relationship of taxing or revenues to fund water management, regulation, or protection. The Committee briefly discussed that a survey, similar to the WOTUS survey, would be a beneficial use of time to complete this item.

Doug Curtis noted that BLM's comment period on the proposed rule has ended, and that he understood that they are planning to rescind their regulation.

SUNSETTING POSITIONS FOR 2018 SPRING MEETING

There are no sunseting positions to review for the 2018 Spring WSWC meeting.

OTHER MATTERS

Kent noted that the Water Quality-Quantity Nexus Workgroup is planning to hold a conference call in the next couple of months to address the review of the 1997 WSWC report on Water Quantity/Water Quality Interrelationships: Western State Perspectives.

There being no other matters, the meeting was adjourned.