

**MINUTES  
of the  
WATER QUALITY COMMITTEE  
Virtual Summer Meeting  
(due to COVID-19)  
July 22, 2020**

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**MEMBERS AND ALTERNATES PRESENT**

<b>ALASKA</b>	--
<b>ARIZONA</b>	Kyle Miller Ayesha Vohra Kelly Brown
<b>CALIFORNIA</b>	Jeanine Jones
<b>COLORADO</b>	Becky Mitchell Patrick Pfaltzgraff
<b>IDAHO</b>	Jerry Rigby Mary Anne Nelson
<b>KANSAS</b>	Earl Lewis Kenneth Titus
<b>MONTANA</b>	Tim Davis
<b>NEBRASKA</b>	Jesse Bradley
<b>NEVADA</b>	Jennifer Carr Micheline Fairbank James Bolotin Adam Sullivan
<b>NEW MEXICO</b>	John D'Antonio Greg Ridgley
<b>NORTH DAKOTA</b>	Jennifer Verleger
<b>OKLAHOMA</b>	Julie Cunningham Sara Gibson

**OREGON**

Tom Byler  
Doug Woodcock

**SOUTH DAKOTA**

Kent Woodmansey

**TEXAS**

Jon Niermann  
Jim Rizk  
Kathy Alexander  
Kathleen Ligon

**UTAH**

Todd Adams  
Norm Johnson  
Erica Gaddis  
Todd Stonely

**WASHINGTON**

Mary Verner  
Buck Smith

**WYOMING**

Steve Wolff  
Chris Brown  
Kevin Frederick  
Sam Swartz

**GUESTS**

Christopher Estes, Chalkboard LLC  
Ward Scott, Western Governors' Association  
Jolene Walsh, Eastern Municipal Water District  
Jordan Bunker, Las Vegas Valley Water District  
Dave Tuthill, Recharge Development Corporation  
Cindy Loeffler, Texas Parks and Wildlife Department  
Earl Lott, Texas Commission on Environmental Quality  
Marlo Berg, Texas Commission on Environmental Quality  
Jill Csekitz, Texas Commission on Environmental Quality  
Kim Nygren, Texas Commission on Environmental Quality  
Lori Hanilton, Texas Commission on Environmental Quality  
Krista Osterberg, Arizona Department of Environmental Quality  
Scott Van Winkle, Texas Commission on Environmental Quality

**WESTFAST**

Deborah Lawler, Federal Liaison  
Pat Lambert, U.S. Geological Survey

Chris Carlson, USDA Forest Service  
Michael Higgins, U.S. Fish and Wildlife Service  
Cherilyn Plaxco, U.S. Army Corps of Engineers  
Kevin Werner, National Oceanic and Atmospheric Administration

## **STAFF**

Tony Willardson  
Michelle Bushman  
Adel Abdallah  
James Ryan  
Jessica Reimer  
Cheryl Redding  
Joseph Brewer, Intern

## **WELCOME AND INTRODUCTIONS**

Due to COVID-19, this meeting was held virtually. Kent Woodmansey, Chair of the Water Quality Committee, called the meeting to order.

## **APPROVAL OF MINUTES**

The minutes of the meeting held in Breckenridge, Colorado October 17, 2019, were unanimously approved. Due to COVID-19, the WSWC Spring 2020 (192nd) Meetings and Washington, D.C. Roundtable were cancelled.

## **SUNSETTING POSITIONS FOR SUMMER 2020 MEETING**

Position No. 410 was superseded by Position No. 427, which was adopted on October 26, 2018. There were no other sunsetting positions up for discussion.

## **NAVIGABLE WATERS PROTECTION RULE ROUNDTABLE DISCUSSION**

Michelle Bushman discussed the survey WSWC emailed to the Water Quality Committee in January 2018 to collect information on state authorities to regulate state waters. While not all states responded, WSWC staff researched missing state statutes and began to compile them with the survey responses into a report. This report is still in draft form, and was emailed to the Water Quality Committee earlier this month. If there is specific information states want to know from each other, please let us know. Staff anticipate changes as states update their regulations or statutes to

respond to the change in the definition of “waters of the United States” (WOTUS). We set aside some time on the agenda to discuss what our states are doing to address the gaps.

**Arizona:** Krista Osterberg, Senior Environmental Program Manager, Arizona Department of Environmental Quality, is leading the charge on trying to determine how the navigable waters protection rule will impact Arizona, but also what to do to fill the gaps. They have been working with stakeholder groups since the Fall of 2019 to get them accustomed to the concept of the new rule and new definition of WOTUS. They are trying to get some feedback on what they thought the critical components of a state program to fill the gaps should be. Arizona’s “waters of the state” definition is very inclusive. State authorities are limited, but standards are set under the Clean Water Act. Arizona has authority to monitor and enforce, but has no permitting authority. The department will be working through the spring on the key concepts for a program.

From a regulatory perspective, the department is working to protect waters for important uses and wants to regulate with a tiered approach that focuses on the impact of an activity on downstream use. It is currently a conceptual idea. Since June 22, 2020, when the WOTUS rule was published, they have “pumped the brakes” to figure out how to address incoming permits. The vast majority of waters in Arizona are ephemeral, so they need to determine how discharges to ephemeral waters may need to be permitted. They have pulled back on the new state program development to develop interim state screening tools to make permit decisions and identify key waters. They are trying to use available tools and can share what they have developed with other states.

**Nevada:** Jennifer Carr, Deputy Administrator, Nevada Division of Environmental Protection stated that she was happy with what is happening in Nevada. However, Nevada initially struggled with press perceptions of how the new WOTUS definition will affect the State. There was hyperbole in the media, stating that Nevada was going to lose 85% of protection for its waters. This number came from the National Hydrography Dataset (NHD). However, there are identified problems with assumptions within NHD regarding stream reaches and valleys. Specifically, every line/crease is counted as ephemeral and therefore overestimates the waters affected. They are trying to find another way to quantify affected waters to understand the shift from federal to state protection. They have a comprehensive “waters of the state” definition, so anything that falls outside WOTUS is covered by the State. To inform this effort, staff went back 12 years to look at CWA Section 404 and 401 permits. About 44% of the permits were for intermittent and perennial streams and lakes that are still included in the WOTUS definition. They found that this represented 58% of state waters that are still covered under the Clean Water Act. About 36% of existing permits for projects and waters are no longer included, but will be picked up with state regulations. Wetlands were another source of hyperbole, and only 4% of past 404 permits and 401 actions were related to wetlands and springs, which averaged one or two per year. The division was able to use that information to dampen down the narrative that “all was lost.”

The Attorney General’s Office worked up an unofficial memo to give assurance of the division’s jurisdiction and stating that the agency can prevent fill discharge under Nevada statutes, protect waterways, and has the ability to manage projects and permits. One piece of missing authority is the ability to establish a mitigation banking system. It is a complex idea and not

authorized in Nevada's program. Only time will tell if the legislature will fill that gap. Nevada has creative staff that are trying to use the current permitting system to require mitigation through schedules of compliance. They are happy to share ideas with other states.

Currently, the division is developing a §404-like permit, including a Work in Waterways permit that still needs clarification on what it can and cannot be used for. They will have to charge fees for the program, which is different from a §404 permit now. They also may need to increase staffing to handle the additional work and are working with the Association of State Wetland Managers to develop a training for staff on wetlands permitting. Under the CWA §402 National Pollutant Discharge Elimination System (NPDES) program, some may still be covered, but may fall into end of pipe permits that are already issued. Nevada permits cover activities above the high watermark, while the Corps handled activities below the high watermark. We need to modify our program to include both in our state permit program and cover rerouting a waterway or impacting a wetland.

**New Mexico:** Rebecca Roose, Director, Water Protection Division, New Mexico Environment Department, provided an update on the current status of things with respect to the Navigable Waters Protection Rule (NWPR). New Mexico is the only western state without delegated NPDES [National Pollutant Discharge Elimination System] permitting authority, which creates unique challenges for the State. They do not have as many resources dedicated to water permitting, no permit fees or other dedicated funding source and no ready-made regulatory framework. Some statutory authorities are available for the division and Water Quality Control Commission. Imagine all the things needed to demonstrate competent Section 402 NPDES enforcement authority (enforcement mechanisms, managing reports, identifying standards, public comment, etc.). Even if New Mexico still foregoes 402 NPDES permitting under the NWPR, permitting "waters of the state" would still be a heavy lift. There is a possibility that there are statutory gaps that need to be filled. They are currently working through the state procurement process to get a contractor to do the gap analysis, and are working to meet deadlines for the upcoming 2021 legislative session. The funding piece weighs heavily, with no staff to pick up the gap in water quality protection under the new WOTUS rule. They are talking about a significant ask of the legislature for a significant budget increase in a tough fiscal environment. The reality of funding a new surface water discharge program is going to be a critical, if not primary, driver of development. Looking at what Arizona is doing is helpful, as well as learning from Nevada and Colorado. New Mexico estimates that 80% of rivers and streams will not be federal jurisdictional waters. There are uncertainties over how the NWPR will be implemented that can have really significant impacts.

**Utah:** Erica Gaddis, Director, Division of Water Quality, Utah Department of Environmental Quality, asked a question of Nevada.: In Utah, we feel like we are okay. For the most part, our authority allows us to regulate waters of the state and the definition is broad enough to capture all of our permits, as we currently see them. I do think it is helpful to be able to explain to the public and to our stakeholders what this change means, especially from a 404 permitting perspective. What Nevada did is very interesting going through all of your 401 permits. She asked, "I wonder, if we were going to go down that same path, were you able to get data for all of the 404 permits that were issued through a nationwide permit and therefore acted as kind of a blanket 401 certification?"

I think that is how the bulk of our wetlands are permitted. We see the big ones, but we do not see a lot of the smaller 404 permits. That might help put some bounds around some of those wetland numbers. I think our biggest gap in Utah will be the loss of some Section 404 protections. We do not have authority, as I see it today, to fill that gap. I am interested to understand from other states where you have as in your Work in Waterways permit. Is that something that is housed in your Water Quality Division? In Utah, we have a stream alteration permit that is managed by our State Engineer's Office. I am wondering how that works in other states, and maybe I need to explore expanding that authority with the State Engineer instead.

Jennifer Carr: I would have to follow up with staff on specifics. Over 12 years, there were 537 state certifications total, but I will ask that question [regarding the nationwide permit data]. The Work in Waterways permit is housed in the Bureau of Water Quality Planning, which is done through the Bureau of Water Pollution Control, which handles all state permitting. We are separate from our State Engineer's Office.

Roger Gorke: I guess what comes to mind, especially when Krista was speaking, is the way Kansas runs its program if there is a discharge. If a discharge occurs, it automatically makes that water body a "water of the state," which then requires a permit. I do not know if it is exactly an NPDES permit or just a state permit. I am wondering if that is an option for either Rebecca in New Mexico, if you were to develop a state permitting program, if you could go that route, or if that is even available for Krista in Arizona. Or is the opposite is an option? If someone is discharging, do you need a permit irrespective of whether a water is a "water of the state" or not.

Krista Osterberg: Tom can correct me if I am wrong, but my understanding of how Kansas treats things, at least prior to June 22, was that ephemeral waters were considered to be classified waters once they had a discharge. They treated them as WOTUS and gave them NPDES permits. For Arizona, we do have the "no more stringent than clause," but no authority to permit those discharges for state waters. I think that is one of the things that we will be looking for in a legislative act. Arizona supports the new rule and many people in Arizona support the new rule, but are not looking forward to more regulations at the state level. We are looking to build a case for justifying the need for some kind of permitting ability at the state level.

Tom Stiles: Kansas has been pretty chill about this version of WOTUS, because it lines up pretty closely to state law. Our standards protect perennial and intermittent, but not ephemeral streams. If someone has a permit that discharges into a stream, that act makes it a classified stream and we permit it. We have adequate permitting coverage to protect our streams. It just has not created a lot of concern on our end. We do not have 404 authorization and there may be some gaps, but we are aware of some of the exclusions. An important issue is where the line is between federal jurisdiction and state jurisdiction. In our mind, state jurisdiction was up to the task to equal whatever protection the EPA authorities had provided us. The real debate I think, from this point on presuming this rule prevails, will be the technical debate over whether a stream is intermittent or ephemeral. At first glance what seems like an ephemeral stream in Kansas is actually intermittent. It is hard to find an ephemeral stream except for probably in the extreme western part of the state. We are adamant about excluding ephemerals, as we do not want to have to deal with them. We are just as adamant that we want to protect our intermittent streams because that constitutes the majority

of our stream systems in our ecosystems. Following the Scalia opinion and the logic behind it that he described in his dissent during *Rapanos*, we do not think there are any work arounds for a discharger in Kansas to get around having to get permitted and get on our radar. For us, it has just been by luck and circumstance that the legislature gave us the authority to have that Ace card up our sleeve. We are guarding it with our lives because it has been a critical piece for us to stay a little bit above the ongoing debate over the level of protection provided by the current rule.

### **CLEAN WATER ACT SECTION 401 ROUNDTABLE DISCUSSION**

Ward Scott, Policy Advisor, Western Governors' Association: I talked to the Committee on this in Breckenridge last Fall. EPA issued their proposed rule back in August 2019. Having anticipated this regulatory action, WGA, WSWC, and several other groups submitted letters, testimony and other communications, expressing concerns about what it might do to state authority under the 401 program. The public comment period was just 60 days, which ended in October. In that limited window, they received over 125,000 public comments on the proposed rule, including several from states, tribes, and local governments. The rule was finalized the beginning of June of this year. I would say that it does not address a lot of the concerns that we have expressed, just some of the top line items that are still real big issues. I would say for standard authority under 401 is the scope of state review and conditioning. The timeline has been constrained from historic practices. The new rule takes authority away from the States and gives it to the federal permitting agency to enforce state impose conditions on 401 certifications. I do not mean to sound entirely negative about the new rule, as there were some very important improvements from the proposed rule. Notably, the Federal veto authority of those permitting agencies was stripped back a bit and so now it is focused on procedural of State certification rather than the substance of what is included in the certification.

There is a new requirement for pre filing consultation on the part of the applicants with the state certifying authority. This is a voluntary exercise for the states. They do not need to participate if they do not want to.

Looking into the near future, there is still quite a bit of action, even though this rule has been finalized. Notably, the other Federal permitting agencies have been directed to develop guidance and regulations if necessary, for their implementation of this kind of new dynamic of a 401 program. We are certainly going to be watching that and stay engaged as we can to ensure that State concerns are being identified and incorporated into conversations as those new policies are being developed.

There are two Congressional actions that we are watching right now. There was an amendment in HR 2 that would closely mirror a lot of the provisions in the EPA rule, but at a statutory level. Then in the house, an Interior environment appropriations package that just came out last week. There is language precluding EPA from using any funds for implementation of the new final rule. We are seeing quite a bit of conflict at the congressional level, both in support of and in conflict with the DPS new rule. There have been some lawsuits already filed in Federal court over the final rule. It was just announced that several attorneys general filed suit, and there are also some environmental NGOs that have done the same and in various federal jurisdictions.

Jessica posted the following questions: How do you anticipate the new real impact in your 401 permitting process? How do you think your state permitting authority will respond to cases where the applicant does not provide the information you need to make a decision?

Roger Gorke: We have had a few conversations with the WestFAST team on this. Not on a lot of the stuff that Ward brought up, but more on how do we implement this moving forward, understanding that other Feds or fed through their permitting processes may be required to implement some terms and conditions on an estate that applies to any kind of action. What we would like to do is, see how we can collaborate moving forward using WestFAST as a forum to have the better State-Fed collaborative relationship. There has been requests from our headquarters office, for example, Reclamation saying they are going to need help because they do not have that expertise on the ground, particularly in Colorado in California. So a lot of those conversations are happening, but we thought it would be great to use WestFAST as a as a vehicle of opportunity.

Tim Davis: WestFAST has been great working with us. How do we move from WestFAST up to the Water Cabinet and how do we engage at a higher level as well with federal partners? I do like your idea as we are proceeding with the 401 rule update.

Erica Gaddis: How would that communication agreement flow down to various agencies that we directly work with? I mean, for the Forest Service or for the Army Corps of Engineers, we have relationships with a particular office. I do not know if there is going to be some sort of overarching federal agreement with how this is going to go with states, or if we are going to have to work those all-out individually on a kind of person by person basis. I hope not, but that may be the most realistic in the end.

Kent Woodmansey: Does anybody know who is doing this guidance? Will states get an opportunity to review it before it is final?

Ward Scott: It is really any federal agency that is the permitting agency where the 401 certification is required would be subjected to the directive to develop new guidance. We have not seen any public announcements of that. The spring unified agenda was just released last week, and there is no mention of regulatory actions either on 401, outside of what EPA has already done. At the same time, this also kind of triggers the fact that the agencies are coming up with new ways of developing and issuing guidance. This would be a prime example of a guidance document where the states would want to weigh in, but we have yet to see the agencies implement those requirements. The agencies are not required to involve the public on guidance unless they want to. We obviously want to be a part of that process. Being aware of any development of guidance would be a good thing and we would be more than happy to try to get states to be at the table as it is been developed.

Kent Woodmansey: If there's multiple guidance, I guess we want to make sure there is some consistency there.

Jennifer Carr: We work with the Corps more often than FERC, as we have very few FERC projects come through 401. I hope we are not alone that we have a good relationship with our local 401 office. I think one of the successes of our 401 program is the fact that we engage with them

very early in the process, or they engage with us. Projects proponents clearly communicate with both of us at the same time. I am happy to volunteer my staff person that is supervising that program to describe how that kind of goes down as new projects are being proposed.

Chris Carlson: Tony and I have been having a conversation about how WestFAST and the WSWC might collaborate on a template or suite of options for developing state agency/federal agency MOUs addressing water rights on the water quantity and quality sides. The new process and procedure that is set up in this rule has some opportunities. Some challenges in how the federal permitting agencies are working with the certifying authority and figuring those things out kind of in an up-front way so that everybody has a roadmap might just be a way to productively engage in and figure out solutions that work for everybody.

Tony Willardson: Yes, I agree. That would be a good idea. WGA has had a number of MOUs with the different agencies and I think WGA has been pretty clear about what they think is consultation and how the agency should consult with the state. In the past, we have done this and unfortunately, we spent about 18 months trying to get an MOU with FERC and then they said, well, we do not have any authority to enter into an agreement with you. I do not think that is the rule and maybe there is an exception. We would welcome working with the eight WestFAST agencies, as you say, with some sort of a roadmap to clarify and facilitate this for one review, particularly given, as Ward noted, the expedited timetable of the new rule.

Robert Boyd: Bureau of Land Management State offices have maintained MOUs with their state government counterparts probably since the 90s - data sharing, common goals, things of that nature. These may offer a template. Some of these MOUs I think are getting a little out of date. I do not think they have been updated or renegotiated, but there are some samples out there.

Roger Gorke: I think this 401 issue is providing an opportunity to have a more robust and regular conversation and engagement related to guidance or what is coming out from the Feds. That is honestly the point of what WestFAST is - so that the western states can have a more direct and efficient line of communication between the guidance makers and the states. I think we did a really good job with that when you guys were doing your WOTUS discussions that were every couple of weeks or monthly. I was able to take that information back to those that were developing the rule. We have been doing the same thing with Brian Frazier, who is leading the effort on the 401 implementation in the Office of Water. So I think WestFAST provides a good conduit for those developing the rule. WestFAST team would see models and begin conversations on a more regular basis, and not wait for a WSWC meeting three times a year. That is what we are here for.

Pat Lambert: WestFAST has historically been able to facilitate proactive communication during the process. We can communicate where our relevant agencies are in the process and work with the WSWC states.

Robert Boyd: Many states have clearinghouses for 401. Does that fit under that process or is that a separate need?

Tony Willardson: I definitely think that the states would be amenable to working for one as part of the NEPA process. I think one thing that we would like to see is more streamlining and less sequential decision making by different entities. I think that the states would welcome the opportunity to work 401 into the overall project review process. The states would be amenable to working that process. Less decisionmaking by separate entities.

Roger Gorke: I think streamlining is great, but a wrinkle is the expertise. Make sure you have those folks that have the water quality expertise. As we move forward with this, I am hoping there is going to be a few touch points that we will be able to say, this works, or this model does not work. I think the main point is to figure that out with all of you moving forward.

Rebecca Roose: I have a different point. To what Roger just said, I appreciate that in terms of the different types of expertise that come into play - different approvals along the process for a particular project. That is really critical to make sure it does not get lost in any conversations around streamlining. But back to the questions that you have on the screen for us, given that New Mexico does not have 402 program authority, we are thinking about the new 401 certification rule and not just in the context of the Federal facility activities and all of that, but in context of all of the 402 permits that EPA Region 6 issues for our state.

The second point, since we do not have 404 authorization as well, we are in better company on that part among western states. But what I was going to say to the second question, New Mexico is one of the states challenging the final rule. One of the points that we are raising is that if we understand the rule correctly and how it is likely to be implemented, we are worried that we will be put in the position of completing a certification in some instances before we have all the necessary information. I think that is kind of what the second question on the screen is getting. In terms of how we anticipate will respond to that, it is possible we may be doing more denials, and this would potentially complicate things. It is obviously something we will be working a lot with our partners in Region 6 to talk through. Right now, we are waiting to see what the EPA training looks like, as well as the implementation. Also we want to make sure we understand the rule. That is just what we are thinking so far is a potential consequence of us being put in the position of having to complete a certification before we have all the necessary information to make a supported approval or approval with conditions.

Kent Woodmansey: Or if some of the information does not come in until the very end of the period you may not have time to process it.

Tim Davis: I agree. I think that is a good point to raise as well.

### **WATER REUSE SURVEY UPDATE**

Roger Gorke: I am not sure how much more of an update I can give you other than what Jeff [Lape] provided [during the recent WestFAST webinar]. I honestly think one of the best outcomes is the online dashboard that we created to be able to show the progress on the 37 actions that were fully developed in phase one of collaborative implementation of the Water Reuse Action Plan. I think what would be the most interesting from my perspective is the survey that [WSWC]

you did. I thought it was fantastic that the Council was out in front on what was being done. It showed how important the WSWC is compared to other organizations. I am happy to answer any questions, but in the interest of time, we can leave it more for Jessica and Michelle to talk about the survey.

Erica Gaddis: I was not able to hear Jeff's summary. Appreciate EPA's synthesis on this in terms of standards and guidelines.

Jessica Reimer provided a summary of the survey. Some states are further ahead in developing a regulatory and legal framework for reuse than others. That is partially due to interest at the state level, but also a need. The states that do not have this set up may not have a need for it on the ground yet. Another common area across different states is how water rights are being addressed. Is the water being appropriated after entering into a waterway again? Funding and ensuring that states and local communities have the resources to actually implement reuse programs is an ongoing challenge, especially in rural areas. A draft report of this has been sent out. This is a draft and is not ready for public review.

Michelle Bushman expressed her appreciation to Jessica for all her hard work. We are doing this report to update our 2011 report, but it also happens to fulfill some of the Water Reuse Action Plans aspirations that we are reaching for. We talked about working with the Association of Clean Water Administrators (ACWA) to build on this report and provide additional information in another report that would be more nationwide. We are not to that point yet, as we are still waiting for responses from some of our states. My understanding is that our states have been very highly responsive, but the rest of the states in the nation have not done quite as well in responding as quickly. We know it is a lot of time and effort that you guys are putting into the survey and so we appreciate the responses that we have received. For those states that are still working on this, they have communicated that to us. For the states that have not responded, we will reach out again. Especially now that you can see how some of the other states have responded, which may give you a little more incentive to add what is going on with your state.

Roger Gorke: One of the issues that Jessica brought up was dealing with rural communities. One of the benefits of pulling this action plan together was our ability to go out and pull in other federal agencies to contribute. We have had a lot of interaction and support from USDA's Rural Utility Service (RUS), including learning about their programs and understanding the funding that they have for rural communities, both for technical assistance and funding for infrastructure. That was pretty exciting to learn about. One of the benefits of WestFAST as well is the ability to make that connection with the Western Governors Association (WGA). We also had a conversation between RUS and Jim [Ogsbury] and Ward [Scott] at WGA, based on their priority of Reimagining the Rural West. All of these things connect to one another, and so we could maybe look into having a webinar in the future that pulls in RUS, so that they can talk about their programs to the Council. Not just on a reuse perspective, but more broadly. It was an exciting thing to see kind of the touch points between many different federal agencies.

Kent Woodmansey: In September, there is a water reuse summit. This issue will be a continuing effort.

## **GROUNDWATER PERMITTING**

Kent Woodmansey: In South Dakota, we do have groundwater discharge permits that we issue. We have not issued any for any federal operations, but we think we have the authority to regulate federal operations if we would need to. We do not have Class five delegation, to regulate certain injection wells, under the Safe Drinking Water Act (SDWA), so that remains with EPA. So if a groundwater discharge needed a class five permit, EPA would need to issue that. On state adjustments and potential impacts on the *Maui* ruling, regarding discharges to groundwater under the Clean Water Act (CWA), we have some questions and we are still evaluating those. I think we will probably end up looking at those permits as they come up for renewal, and try to figure out what we are going to do then. I do not think we have anything coming up soon. I think some of the issues with *Maui* are going to be difficult for us to resolve and may change the way we have done some things.

Michelle Bushman: I am not sure how many states have groundwater permitting programs. We typically talk about surface water when it comes to the Clean Water Act, but obviously groundwater is a state issue. What are other states doing?

Pat Pfaltzgraff: Colorado has a groundwater permitting program, but we do not issue permits for federal programs. Those are issued by EPA. For the most part, the way we issue groundwater permitting – we do not think the permits will change much in our state.

Jennifer Carr: Nevada permits any waters of the state. If it is not an NPDES permit, then it is a state discharge permit. Traditionally, that was a groundwater discharge permit, but as more surface waters have just become state waters (instead of federal waters), they all fall under the same umbrella. We pretty much permit any discharge in the state of Nevada through one program or another. I do not think we are going to have any impacts from the *Maui* decision.

Michelle Bushman: I know you have had some struggles in Nevada with some of the federal agencies when it comes to the water rights side of things. Have you ever encountered any problems with federal agencies that do not want to be permitted when it comes to discharging to groundwater in Nevada?

Jennifer Carr: Not that I am aware of. They do push back occasionally on weird things, because you know they are federal, but we just treat them the same way we treat everybody else and I am not aware of any issues.

Tim Davis: Montana has a similar program to Colorado and Nevada. We have separate programs. We do not have primacy from EPA for groundwater and so our standards are slightly different and do not need to be submitted to EPA. The permitting is fairly similar and the programs work closely together.

Rebecca Roose: New Mexico has a groundwater permitting program that is the oldest permitting program in the Environment Department. Right now we have around 700 permanent facilities and so more direct state control there than on our surface water permitting side, which I

spoke about earlier. It is certainly going to be something that we look at as we continue to work to tackle our surface water discharge permitting gap. We will be looking to our mature groundwater permitting program as a model. I do have a question for some of the other states that have just spoken up. Is there any distinction on the enforcement side between federal and non-federal facilities in your state?

Erica Gaddis: We have had trouble enforcing any of our permits under the CWA with federal agencies. We are always careful to make sure that we enforce under state law when we have enforcement issues that involve a federal agency. We also have a groundwater permitting program similar to Nevada. We treat everyone the same. I would encourage you to use state statutes, not CWA, when issuing a Notice of Violation to a federal agency.

Tom Stiles: Going back to Erica, if you use state law, what is to make the federal agency not claim federal sovereignty and say “we are above that,” because that is what we have found. We have used the federal law to bring them to heel.

Erica Gaddis: They used the opposite with us, saying they are immune from federal law. They agreed under the Utah Water Quality Act.

Tom Stiles: We have non-discharging lagoons serving campground facilities that are permitted under state law. The Army Corps of Engineers has said, “That does not apply to us, we are not doing it.”

Erica Gaddis: The one I am thinking of was not a permanent facility. It was an illicit discharge of raw sewage into a water. Actually, we have another one that we are about to go forward with. The first was for the Fish and Wildlife Service. The second is with the Forest Service and those are not permitted facilities, rather they are illicit discharges.

Tom: We’re probably more familiar with those types. Like stormwater runoff from an Air Force Base. They tend to treat us like they treat you guys in Utah.

Erica: This might be a good topic for the Legal Committee. This sounds like it is not just a Utah or Kansas concern. Rebecca Roose agreed.

**IN THE CHAT BOX:**

Rebecca Roose: Jennifer, does your enforcement program address federal and non-federal facilities equally?

Jennifer Carr: Federal facilities do not like it when we initiate enforcement and would rather have Administrative Orders on Consent versus Finding of Alleged Violation and Order, but we work through it as we need to. When it comes to the Safe Drinking Water Act, EPA Region 9 has offered to do enforcement at federal facilities if needed. Nevada would pursue enforcement on illicit discharges on a federal land if needed. Any discharge without a permit is prohibited.

Bob Boyd, Bureau of Land Management: BLM is required to follow all federal/state/local anti-pollution laws under the Federal Land Policy Management Act, so we should be complying with state government permitting requirements for discharges to groundwater.

Jessica Reimer provided a brief update on state-federal cooperative efforts on per- and polyfluoroalkyl substances (PFAS) contamination.

Pat Pfaltzgraff: FYI, Colorado just passed a PFAS policy that allows for monitoring of all dischargers.

### **WATER QUALITY COMMITTEE DRAFT WORKPLAN FOR FY2020-2021**

Kent Woodmansey: The work plan is an evolving item. One of the things we have been talking about for a while was looking at hydraulic fracturing. If anyone has any suggestions, or anything on that issue that you think we should be doing, let us know. There are other things I think should be added, pending what other entities are doing. Is there was a call on EPA oversight on permitting? That could be a big issue. I think we have the major things of concern in the work plan.

Michelle Bushman mentioned that hydraulic fracturing has been an item on the work plan for at least five years and has not been a priority for quite some time, in part because the 2015 hydraulic fracturing rule was rescinded. As long as that 2015 rule is not reinstated, or any other version by Congress or by a new administration, this is probably not as important as some of the other things that we are working on in the work plan, but it is still being updated in the background. A lot of the research has been done, but it has not been put into a report yet. The report is more of a framework that we can put all that information into.

Rebecca Roose of New Mexico expressed interest in continuing to work on hydraulic fracturing and suggested that the conversation continue outside of the current meeting, as did Kevin Frederick from Wyoming. Michelle recognized this would be a good item to discuss collaborating with the Groundwater Protection Council, and will reach out to those who are interested in further discussion.

### **SUNSETTING POSTIONS FOR THE FALL 2020 MEETINGS**

Sunsetting Position No. 414 - Asserting State Primacy on Protecting Ground Water Quality. This position was very first adopted in 1997 on protecting groundwater quality. Kent suggested members look at it before the next meeting and see if anyone had any suggested changes to make.

### **OTHER MATTERS**

A WestFAST Salinity Control Webinar was mentioned, but Jessica stated that Tony provided a brief overview of this during the Water Resources Committee.

Pat Pfaltzgraff, Director, Water Quality Control Division, Colorado Department of Public Health and Environment announced that this was going to be his last meeting as he was moving to Arizona to be partner in a law firm.

There being no other matters, the Water Quality Committee was adjourned.