



Subcommittee on Water
Chair: Chris Cantrell (AZ)
Vice-Chair: Jon Sjöberg (NV)

March 5th, 2019
8:00 am to 10:00 am
Governor's Square 10

Proposed Agenda:

- 8:00 AM** Call to Order and Introductions *Chris Cantrell, AZ*
Review Agenda/Approval of Minutes
from September 2018 Meeting - Approved
- 8:15 AM** Announce New Chairman and Transition *Chris Cantrell, AZ/Jason Olive, AR*
- 8:20 AM** Fish and Wildlife Coordination Act Survey *Chris Cantrell, AZ*
- Google document available on survey (<https://www.surveymonkey.com/r/V72G6HN>)
 - Passed in 1934 – 1946 – 1958
 - Impounded, diverted, channel deepened or modified by Federal agency or permitted
 - Major water developments
 - Federal – 404 Permit – Deny or condition recommendations
 - Case law if compliance with NEPA then done with FWCA
 - Survey
 - Adequate consultation – to state trust species
 - Are recommendations given equal consideration
 - Aware – 17 of 19 states
 - NEPA and FWCA – 15 of 19 states
 - Federal licensing or construction – 18 of 19 states
 - NEPA EA or EIS Process – 18 of 19 states
 - Types
 - FERC – 12 states
 - AOE – 7 states
 - Operation of Project – 4 states
 - BUCREC – 3
 - Reoperation of project – 3

- Interaction
 - Report – 30 %
 - EA – 30 %
 - EIS – 30 %
 - Comment only on EA – 60 %
- Quality of interaction
 - Very Good – FERC
- Report – 82% no report
- Transfer of funding – 95 % no
- State input given equal consideration – 66% Yes
- Amended needed on responsibility – 71% Yes
- More info – 85 % Yes
- Runs the gamut across states
- Equal consideration issues with verification, being subjective, flood control exempted, ACOE recreational fish are only economic not under Act, and USBR modifications exempted
- Reauthorize with following
 - Equal consideration language improvement
 - Require substantiating report – Would be a supporting report
 - Examples of such reports to show good coordination and case studies
- Opportunities with infrastructure and maybe reauthorization
- Issues
 - USCOE is expressing authority over state fish and wildlife resources in S. MS River Basin
 - Treating states as another stakeholder and not a sovereign government
 - Recent lands bill passage – Amended FWCA on AIS on federal lands but other additions difficult
 - Need case histories and specific examples
 - AZ – Colorado River
 - Initial invasive definition included state, tribal and local governments – Was not included in final bill
 - Need an invasive definition
 - Recreation fish and wildlife values – USCOE – Non-native fish are not wildlife and invasive species. Economic value only not to be included in FWCA.
 - Temporary restraining order – Fish loss vs. NEPA cost a deciding factor
 - No standard for coordination
 - Some good examples – BPA is the gold star
 - Prior to 1995 – Good ones in AZ Glen Canyon
 - Process has declined over time was observed
 - Unclear why 31 states did not respond and some are likely not aware of FWCA
 - Lack of response could be issues with making survey a priority
 - Staff turnover is a clear issue with young staff untrained in area
 - Many responses were FERC related and there are supporting acts
 - Slow processes

- Reviews more fragmented
- Likely need training in FWCA – Key tool in its infancy
 - AFS could sponsor training at Annual Meeting
 - NCTC standing class
 - Webinar that is stored
 - Succession planning need pointed out
- Utah – Benefits to population growth outweigh fish and wildlife benefits
- Looking to get support for purchasing water
- Legislation to show electric bills having fish and wildlife mitigation in their bills to move development interests forward at fish and wildlife expense – Did not pass
- Report in progress (Dave Weedman, AZ) and could be provided to FWRPC and Federal agencies
- Opportunities
- Report to help FWCA language
 - Good consultation examples and standards
 - Effective practices education materials
- Education
 - Need to have similar training for FERC
 - Who to call on FWCA and FERC issues
 - Would like additional states to provide input for final September report.
- Report out this week on states that have already participated, and detailed analysis in September

8:50 AM Importance of State Authority under CWA Section 401 *Ward Scott, WGA*

- WGA – Policy resolutions and collective action
- Water management in the West
- Water Quality in the West
- Building a stronger state-fed relationship
 - New webpage on issue on WGA
- Public comments do not equal consultation
- Partners not a stakeholder – Comments into the abyss of the federal black hole
- Federalism concerns are being ignored
- Final state authority, major water quality, intent of Congress
- Hiring abuses from administration
- From two projects – upheld in courts
- Widely used
- FERC, natural gas pipelines, coal export ports, NPDES, dredge and fill
- Broad interpretation
- States are primary responsible party
- Requires state certification of any federal license or permit
- Delegated from Congress
- States get judicial deference

- Commerce clause does not apply here
- Choices
- Certification
- Denial
- Certification with state-imposed conditions
- Waiver of state authority
- Historic Issues
- Timeline – Determined by federal agency – Usually 1 year
 - When does timeline start
 - Determination of completeness
 - Practice of withdraw and refile case
 - DC circuit has called questions into practice – Hoopa Valley Case
 - FERC may not intervene but Oregon may do so
 - Industry wants it preserved as it is their safety value
 - Scope
 - Nexus to water quality
 - Discharge vs. activity – Whole activity analysis
 - Appropriate requirements of state law
 - Issues
 - “Act” definition
 - Request for certification
 - Reasonable amount of time
 - Section 401(d) – State law issues – USEPA is final authority
 - USEPA Actions
 - Handbook 2010
 - Accompany with complete application
 - Including federal license too
 - Scope – Broad to water quality and not specifically to a discharge
 - 1991 Letter
 - FERC – Wanted it limited and EPA indicated it is all areas influenced
 - Recent issues
 - Attacking states
 - States do not issue permits within timeframes
 - Gas Industry - States hijacking permitting process on gas pipelines
 - Disservice to cooperative federalism
 - Senate letter – October 2018
 - Select number of states are hijacking process
 - Rewrite EPA handbook
 - When states receive application
 - Recent Actions
 - Potential Executive Office
 - USEPA Handbook revision
 - USACOE policy guidance – Constrain timeline to 60 days immediately upon receipt

- WGA have sent in letters
- Coalition of Associations of State Officials which is increasing in strength
- States left out of conversation and force way in
- Congress and USEPA – Opposing changes
 - State consultation on changes
- Process improvements
- Early, meaningful and ongoing consultation is appropriate measure
 - Federal- Tribal consultation is a good example
- Preservation of state authority and cooperative federalism
- Timelines for review and authority
- Increase early coordination and communication
- Scope of state review
- Data and staffing
- Each Federal Department is supposed to have a Federalism Coordinator
- Committee Action on Section 401(a) – Get a copy from Devin and contact
 - Draft white paper went out to Fish Chiefs in December along with other information
 - Divide into background and current status
 - No feedback on brief was received
 - Looking for information from other states
 - Most states are going to comment in some way
 - Many trying to coordinate with sister agencies
 - Working group with regional emphasis
- **OUTSTANDING ACTION ITEM-** post final draft of 401 White Paper on SOW page on AFWA website

9:15 AM AFWA Government Affairs Update

Devin DeMario, AFWA/All

- Many efforts in past to limit state authority
- Hydropower
- Murkowski still is interested in a comprehensive bill
 - A lot on state role, deadlines and data needs
 - Likely coming back with Act 47 on lands being past
 - FERC bill was put in
 - Does not limit timelines
 - Resources to FERC to process applications quicker
- Appropriations
- Resolution 31 – Level or slightly increased
 - USGS – Language was changed – Interstate Council on Water Policy needs to be coordinated with
 - Transboundary rivers
 - Gages
 - Annual ask on gages has not been made yet and needs follow up
 - Toxicology on groundwater – PFAS
 - USEPA

- Water sense - Level
- Clean watersheds survey - \$500K
- BOR
- WRDA
- Passed last session
- Every two years
- Working group interest is being requested
- Requesting our input on our needs
- Direction to USACOE has direction to develop regional research stations
- Watercraft inspection and decontamination stations
- Regulatory Streamlining/WOTUS
- Repeal and replace rule
- Replacement of rule has been sent to us
- Hard to deal with at AFWA
- Broad range of views on federal authority on water regulation
- Conduit of information on issue and process
- Few comments submitted – Fish and wildlife is important noting the provisions in CWA
- Sufficient amounts of clean water for fish and wildlife is the need and goal
- Definition needs stated for states
- Rule in front of us
- How is our state working on this rule – Double check
- Call for each state to develop their own datasets
- Some work has been done to examine how the affects across the nation – ELI has information
- Immediate implementation is a big issue
- 23 states are under the old rule
- Federalism effect needs to be commented on it
- TX – AFWA going to comment response
- What does it mean to waters taken away with this rule
- Comment period is too short and WGA and AFWA are requesting more time
- Effects need to highlighted
- Types of data needed should be indicated
- AFWA Letter issues
- Clean and sufficient amounts of water for fish and wildlife
- Data and time needs for meaningful input and what is jurisdictional or not
- Ephemeral and intermittent waters at risk
- Pilot areas could be a way to develop an adaptive management strategy
- Clear issues with funding for improving NHD+ HiResolution coverage (all 50 states and gaging) for providing long-term gage coverage and better ungaged site estimates by USGS – critical to WOTUS assessments and for habitat assessments and conservation actions (covered in past AFWA EPA and USGS letters on same subject matter)
- Implications on WOTUS are large

- USGS has defined waters without ground truthing
- New rule wants an owner to determine jurisdictional status without a consultant and unlikely to happen without data
- Regulatory consistency
 - AFS paper can be included in comments
 - Issues with coordinating comments with other entities such as DEQs
- KC EPA Meeting
 - Range of entities were at the meeting
 - Large contingent of environmental groups were at meeting
 - Good balance between development and science
 - Co-regulators meeting
- KS was in favor of new rule
- If ephemeral streams are impounded, create an intermittent stream which would be jurisdictional
 - Dike and levees stop jurisdiction
 - Maybe some variance by region were recorded
 - Items to AFWA – Devin by the 22nd
 - Adds a burden to the states as all of these other waters are going their problem and funds will not be there to regulate
 - Similar issues with Section 404
 - Flyway Councils have sent in letters – MS Flyway has for sure
 - Infrastructure and Transportation
 - Package is wanted to be passed by June in House
 - Similar provisions to WRDA
 - Make sure that fish and wildlife concerns are incorporated
 - Properly sized culverts

9:45 AM Discuss SOW Priorities and Operations *Jason Olive, AR/Jon Sjöberg, NV*

- Teleconferences with committee – infrastructure bill, water smart
- Video conferencing will be done – Zoom was suggested
- Have them before and after calls
- Fish and Wildlife Health has such calls ahead of meeting
- Subcommittee Membership
 - Ask other committees for their input and participation
 - Could be open to anyone but may need Director
 - Self selected based on interest to date
- Task list date needs to be changed
- OUTSTANDING ACTION ITEM- Past meeting notes should be posted on the website
 - Password protected areas are being developed
- CHAT, AFS, WaDE, and NFHP Coordination of databases– Gary Whelan offered to reach out to identify leads and establish plan to improve coordination

9:55 AM Meeting Wrap/Adjourn

Jason Olive, AR

