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

82nd North American Wildlife and Natural Resources Conference -2-
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
- 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
      o Passed last session
      o Every two years
      o Working group interest is being requested
    ▪ Requesting our input on our needs
      o Direction to USACOE has direction to develop regional research stations
      o 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
        ▪ Emphemeral 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