

Tribal Pesticide Program Council – Executive Committee Meeting

Arlington, VA

Friday, March 8, 2019

Meeting Notes - Final

Attendees:

Tribes (11)

- Fred Corey, Aroostook Band of Micmacs
- Jasmine Courville-Brown, Confederated Salish and Kootenai Tribes
- Martina Wilson, Fort Peck Tribes
- Dustin Roy, White Earth Nation
- Ryan Evans, Confederated Salish and Kootenai Tribes
- Tony McCandless, Gila River Indian Community
- Jefferson Biakeddy, Navajo Nation
- James Jackson, Muscogee Creek Nation
- James Williams, Muscogee Creek Nation
- Larry Scrapper, Cherokee Nation
- Eric Gjevre, Coeur d'Alene Tribe

Tribal Organizations (2)

- Diania Caudell, California Indian Basketweavers' Association
- Africa Avalos, Inter-Tribal Council of Arizona

EPA (6)

- Amanda Hauff, EPA/OCSP
- Peter Earley, EPA/Region 9
- Cindy Wire, EPA/OPP
- Emily Ryan, EPA/OPP
- Carol Galloway, EPA/OECA
- Dolores Wesson, EPA/OPP

Other (2)

- Bob Gruenig, TPPC
- Suzanne Forsyth, UC Davis Extension

Action item: Emily Ryan to send out calendar appointment for March 27.

Action item: designate a TPPC representative to the PPDC.

Agenda

- The TPPC RFA for 2020-2024
- Funding anecdotes discussed with Aline
- OC's compliance priorities due March 11
- Revisit about OIG communication to provide them with any information
- Possibility to revisit Smithsonian and give up some meeting time in March 2020
- October 2019 meeting

Waters of the United States (WOTUS)

[Refer to the presentation slides posted on the TPPC website]

Guest speakers

- Rose Kwok, EPA/Office of Water
- Stacey Jensen, Office of the Assistant Secretary of the Army
- Brad Guarisco, U.S. Army Corps of Engineers

Clean Water Act Goals:

- “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
- “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution”
- Section 518: Treatment in a Similar Manner as States

Background on Definition of WOTUS

- “Navigable waters” are defined in CWA as “waters of the United States, including the territorial seas”
- Agencies’ regulations and preamble language
- Key Supreme Court cases: *Riverside Bayview*, *SWANCC*, *Rapanos*
- Guidance and Rulemaking: Agencies have been working since these Supreme Court decisions to provide clarification and predictability of waters that are – and are not – covered by the CWA
- 2003 *SWANCC* guidance for non-navigable, intrastate, isolated waters
- 2007/8 *Rapanos* guidance for tributaries and adjacent wetlands
- 2011 draft guidance (superseded by 2015 rule)
- 2015 Clean Water Rule

Agencies are pursuing a two-step process:

- Step 1: Publication of a proposed rule to repeal the 2015 Rule and recodify prior regulation.
 - The agencies are currently reviewing the 800,000 comments we received on the Step 1 proposed rule and supplemental notice.
- Step 2: Development of a revised definition, consistent with the Executive Order.
 - Today’s presentation focuses on the Step 2 proposed rule.

Goals of the Proposed Rule:

- Respond to Executive Order 13778, which calls for rescinding or revising the 2015 definition of WOTUS.
- Increase predictability, consistency, and regulatory certainty through a clearer definition of WOTUS.
- Restore and maintain water quality while respecting primary state and tribal authority over their land and water resources.
- Operate within legal limits established by Congress as clarified by the Supreme Court.

Waters proposed to be WOTUS

- Traditional navigable waters, including territorial seas
- Tributaries
- Certain ditches
- Certain lakes and ponds
- Impoundments
- Adjacent wetlands

Proposed categories of WOTUS

Traditional Navigable Waters (TNWs)

- TNWs are waters that meet any of the conditions in (a)(1) -- waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to ebb and flow of tide.
- Incorporates territorial seas, which had previously been its own category although also a TNW.
- Essentially the same as 2015 Rule and pre-2015 practice.

The proposed rule has certain categories that are both included and excluded from the WOTUS definition. "Navigable" – adding territorial seas to this group for the purpose of a more concise definition. Major change for 2015 rule and pre-2015 practice is that ephemeral streams would no longer be covered. New category for jurisdictional ditches (Erie Canal, tidal), ditches built in perennial tributaries as long as they meet the definition.

There is a 60 day comment period following the 2/14/19 publication date. There has been a request for an extension to the comment period beyond the current 4/15/19.

Q: Are artificial channels used for roadside management, man-made excluded from jurisdiction?

A: Certain ditches.

Q: CSKT has water quality standards which are stricter than their states'. When this changes, will the tribes and states be able to additionally provide jurisdiction to thing?

A: If you have your own tribal codes/laws to protect waters on your reservation. This would not become a CWA violation, but a tribal one.

Resource and Programmatic Assessment (RA)

Economic Analysis – largely qualitative

There is a webcast on the EPA website regarding the proposed change.

Step 2: Tribal Consultation Process

April 20, 2017 – June 20, 2017 – Tribal Consultation period, yielded 44 comment letters. Available on the website and in the docket and are open to the public.

Tribal Forums

- The EPA and Army will be hosting a half-day discussion forum for tribal representatives. Kansas City, Atlanta, ABQ, Seattle.
- Reps of federally recognized tribes interested in attending should send an email with their interest.

Q&A:

Q: has EPA thought about the impact from lack of permitting and increased development?

A: Just because the federal regulators are not there doesn't mean that the state and tribal regulators would not have a role in protecting. EPA looks at the cost savings of no longer having to do mitigation, a costly activity.

Q: James Williams reflected public comments from the coal industry from the Kansas City forum were very much in favor of the change and deregulation. The oil/petroleum industry was present at the forum and also spoke in favor of the change. He said that Oklahoma already has enough problems in their water resources, and now EPA wants to undo some protective parts of the regulation that are 47 years old.

Q: Diania said they have done a lot of mitigation in southern CA as they tried to protect tribally sacred sites. They go through Camp Pendleton and into the Pacific Ocean. What's going to happen after the change to that will affect landfill activities. Concern is that the government will expose tribes to toxics and this is sad.

A: Tribes are fortunate that CA actively advocates for tribes and waters and part of the change is to give regulatory authority all over again.

Q: James Jackson said that majority of public who spoke out in support of the regulation change was industry (large farm, coal, petroleum, registrants). Citizens, scientists and the public were conveying opposition. If "we the people" are really asking for this, then how can that be held? There is concern that the larger voices of industry will be more highly regarded. In the time we live for instant gratification and we will look back on history and realize this was a mistake. He hopes that EPA considers what the public would like to see and not industry. He appreciates some of what EPA/Army all have to deal with. James Williams expressed his appreciation for their listening to tribal concerns and public comments.

A: Rose appreciates his thoughts and said they will consider and respond to all of the public comments received. A transcript of the public hearing will eventually land in the docket.

Stacey was certain the rule changes would be challenged in federal court and it would take a handful of years before anything was implemented.

Action item: Suzanne to post slides on the TPPC website and share the speakers' contact information.
Action item: Suzanne to add to the website the handout for References and Links for the Proposed Rule: Revised Definition of "Waters of the United States".

TPPC Request for Proposals, by Cindy Wire & Emily Ryan

Cindy Wire reported that this is her last TPPC meeting although she will be in the background supporting Emily as the new PO. They have been working on the RFA for the next cycle. The reason they are talking about it now is so they can get the RFA completed so there is no gap in the cooperative agreement coverage in time for the next 5-year cycle to begin on 10/1/2020.

Funding Anecdotes for NASDA

Fred was not aware that there was a hard and fast response timeline for the anecdotes. Jasmine said this is something we should send out to all TPPC members.

Suzanne asked if we should attach any guidance along with the request for anecdotes that will help them with their submissions.

Action item: Suzanne to send a request to the TPPC list serve asking for inputs for NASDA's needs as the impacts. Must be factual and include a short narrative with how a funding/resource shortfall affected the tribe's ability to address pesticides in Indian Country. Send to Suzanne and she will send to the entire membership. Input will be anonymous and we will remove mention of your tribe's name. 1 week turnaround and then share summary with TPPC for comment before it goes to NASDA.

EPA National Compliance Initiatives

Of the compliance initiatives mentioned, none of them mention pesticides. Fred feels we should include one for FIFRA. He is concerned about diluting the focus of the TPPC if we get involved in multi-media.

Fred mentioned that WPS implementation in Indian Country is an area of concern. Carol suggested that tribes approach their inputs from the toxics angle and not necessarily just WPS.

Action item: Fred to draft a letter to EPA in response to the March 11 compliance initiative and submit on TPPC's behalf.

Decision Regarding Providing Additional Information to EPA OIG

Jasmine spoke in favor of providing additional information to OIG beyond the individual interviews they conducted via phone calls since the October 2019 meeting.

New timetable is September 1 for the *Status Report* completion and perhaps the TPPC could provide that as the "additional information". Carol Galloway suggested there is always an opportunity to educate OIG and others. Tony said he's not opposed to reaching out to OIG but it's important to know how it's worded. Eric said if it's outside of what their office does, then it's there's no way to address it. OIG serves 2 different function areas: eliminating waste/fraud; and program effectiveness. There have been 9-11 OIG audits in the past 5 years and one of the tribes was told that the audits were not the result of any complaints, violations, or other.

Eric said that the OIG inspectors asked if they had ever thought about helping other inspectors. Dolores asked if we could we get a copy of the letter from OIG with the questions. Tony asked how the letter would be written, context. Thanks them for attending the TPPC meeting last fall, offer to add info, etc.?

Fred said the letter could state that tribes are facing funding shortfall issues and their concerns and we have tried other mechanisms with no impact. These decisions are being made outside of EPA (White House and OMB). Also mentioned that the lack of resources via EPA is that there is not DI happening in Indian Country. TPPC cannot lobby as they are not permitted but perhaps they have some ability in the tribes' ability to have FIFRA enforced in Indian Country, Highlight the great work happening and maybe they can bring attention to that, not enough attention to FIFRA, that maybe that can help tribes?

Fred made the proposal to draft a letter to OIG documenting the lack of resources and mention impacts to programs and DI implementation. If OIG wanted to follow up with the EC via conference call then this could be offered. Keeping it general that there is a lack of resources but we have not been effective at leveraging this and perhaps this would be of interest to them.

Conversation moved to DI in Wyoming and the 10 tribes there covered by EPA. Wyoming lacks primacy so the state has no inspection /enforcement authority. Amanda encouraged that they talk to NTOC about cooperative federalism. Fred feels that the DI angle is another means of getting more funding for tribal pesticide programs since this is the area of the services needed. This ensures FIFRA is implemented and the states/tribes are the one to implement them locally.

Action item: Fred to draft the letter and Bob to review it and share with the Council before it goes to OIG. Keep it simple with just enough info to get their interest. Fred to send to Bob by 3/18, edits then send to TPPC send out by the end of 3/31.

Adjourned at 12:02 PM