



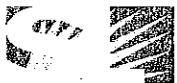
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November 15, 2007

Neil Stack
Engineering Division
2001 South State #N3100
Salt Lake City, Utah 84190

Re: Water Quality Stewardship Authorities

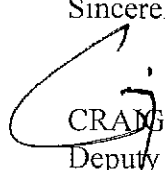
Dear Neil:

This letter is written in response to your correspondence dated October 16, 2007, regarding an outline of legal authorities for the Water Quality Stewardship Plan. Your letter was written in response to my proposal to limit the scope of the authorities relevant to the implementation of the Water Quality Stewardship Plan.

Based on your authorization to proceed with the limited scope proposal, I have prepared a summary containing the core legal authorities necessary to implement the Water Quality Stewardship Plan. I have also identified other relevant and appropriate legal authorities which should be considered in the planning process. The other authorities have been included as an appendix to the written narrative. A copy of the proposed written narrative, including the appendix, is enclosed for your review.

Please call me if you have any questions, comments or changes to the proposed narrative. My purpose in providing you with a draft is to allow time to incorporate any changes, additions or revisions in a final document by your November 30th deadline.

Sincerely,


CRAG W. ANDERSON
Deputy District Attorney

CWA/cgc/C27.wpd

Enc.

cc: Cal Schneller
Kevan Smith
T.J. Tsakalos

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ENGINEERING DIVISION
SALT LAKE COUNTY
DEPT. OF PUBLIC WORKS

WATER QUALITY STEWARDSHIP PLAN

Legal Authorities

DRAFT

I. BACKGROUND

A. Federal Water Quality Legislation

Congress enacted the “Federal Water Pollution Control Act Amendments (“FWPCA”) of 1972.”¹ The goal of the FWPCA was to restore and maintain the “chemical, physical and biological integrity of the nation’s waters.” Congress recognized the necessity to delegate authority to the states to solve local water quality problems. The states were required to develop “water quality plans” and to delegate the necessary planning authority to various identified state and local government entities. The Clean Water Act (“CWA” or the “Act”) is an amendment to the FWPCA enacted in 1977. The CWA is the basic legal structure for regulating the discharge of any pollutant into the waters of the United States without a permit. The CWA was reauthorized by Congress in 1987. Many of the permitting, administrative and enforcement authorities have been delegated to the state.²

B. State Water Quality Management Plans

The statute required the development of regulations to meet the water quality goals established in the Act.³ The federal regulations establish the procedural requirements for the preparation of a state Water Quality Management Plan.⁴ The Water Quality Management (“WQM”) plan is a document identifying areas in the state with water quality problems and setting ambient water quality standards⁵ and effluent limitations to be achieved in intrastate waters. The WQM plan is the basis for implementing sound water quality management decisions, implementing effective control programs and achieving water quality standards. One of the requirements of the WQM plan is the identification of regulatory programs and management agencies suitable to attain the water quality standards.

C. Area-Wide Water Quality Planning

Section 208 of the Act requires states to designate areas which, “as a result of urban-industrial concentrations and other factors, have substantial water quality control problems,” and to designate a regional planning organization for such areas to develop area-wide management plans for the control of pollution. With respect to point sources such as wastewater treatment plants, these plans are required to identify waste treatment facilities, specify construction priorities and develop a regulatory program.

¹ Title 33, Chapter 26, United States Code

² Title 19 Chapter 5, Utah Code Ann., 1953 as amended

³ Section 101(a)(2) of the Act.

⁴ 40 CFR Part 131.

⁵ State water quality standards are contained in Utah Administrative Code R-317-2.

The Salt Lake County Council of Governments (“COG”) was originally designated as the area-wide water quality planning agency under a grant from the Environmental Protection Agency (“EPA”) in 1975. In October 1977, the Salt Lake County Commission enacted Section 7-5-1 *et seq.*, of the Revised Ordinances of Salt Lake County, creating the Salt Lake County Department of Water Quality and Water Pollution Control, a permanent on-going water planning agency with countywide jurisdiction. On February 6, 1978, Governor Scott Matheson designated the Department of Water Quality and Pollution control⁶ as the area-wide water quality planning agency for Salt Lake County.⁷ At that time, the Department of Water Quality and Water Pollution Control reported directly to the Board of County Commissioners. Under Section 208(b) of the Act, the designated water quality management agency must operate a continuing area-wide planning process.

II. COUNTY WATER QUALITY MANAGEMENT PLAN

In October 1978, the County released an area-wide water quality management (“WQM”) plan. The WQM plan was intended to be the “starting point for a continuous planning process directed toward achieving the restoration of the chemical, physical and biological integrity of the waters of Salt Lake County.”⁸ The WQM plan was to coordinate the water quality management practices of the various political entities in the County. The WQM plan was based on the assumption that in the future, resource protection and public health values would place water quality management programs at about the same level of importance as police and fire protection.⁹

A. Agency Planning and Coordination

The County’s WQM plan presented the details of how water pollution control would be implemented, including the details of municipal wastewater treatment facilities. On April 22, 1979, Governor Matheson adopted the Salt Lake County Water Quality Management Plan, finding it to be consistent with the requirements identified in the federal regulations.¹⁰ In addition, the Governor designated several county departments as management agencies to implement the approved plan.¹¹ EPA Region VIII subsequently approved the Salt Lake County Water Quality Management Plan on December 11, 1979.

In March 1982, the county’s area-wide WQM plan was updated.¹² Prior to the time of the update, the Department of Water Quality and Water Pollution Control was consolidated with Flood Control as a Division within the Department of Public Works (“Flood Control and Water Quality Division”).¹³ Among other things, the Division was assigned to assist the Board of County

⁶ Enabling Ordinance No. 615, October 31, 1977.

⁷ Salt Lake County Code of Ordinances, Section 17.06.010.

⁸ Area-wide Water Quality Management Plan, Preface p.iv, October 1978.

⁹ 1979-1980 Water Quality Management Plan update, “Future Water Quality Management”, page 6.

¹⁰ 40 CFR Part 131.

¹¹ Designated county departments existing at that time: City-County Health Department; Flood Control; Planning; Surveyor; Building Inspection; Water Quality and Water Pollution Control.

¹² 1979-1980 water quality management plan update, “Future Water Quality Management”, page 6.

¹³ Ordinance No. 1473, 1982 amending Title VII of the Revised Ordinances of Salt Lake County.

Commissioners (under the Commission form of government in place at that time) in the discharge of its responsibilities to maintain a water quality management program.

The new Division was responsible for maintaining a twenty year master plan for the preservation and enhancement of water quality.¹⁴ At that time, the expected planning period was from 1980 to 2000.¹⁵ During the years following the plan update, the WQM planning process was subordinated to other priorities in the Department. In January 2005, the Utah Department of Environmental Quality (“DEQ”) recommended that the WQM plan be amended to support the issuance of a Utah Pollutant Discharge Elimination System (“UPDES”) discharge permit covering treated effluent from a proposed treatment plant to the Jordan River. This requested amendment initiated a renewed interest in the planning process and the implementation of the Water Quality Stewardship Plan.

B. Agency Reviews and Approvals

Many of the department level management agencies (Water Quality and Water Pollution Control, Flood Control, Planning, and Building Inspection) originally designated in the approved WQM plan became divisions in the re-organization of Salt Lake County government.¹⁶ One of the likely “unintended consequences” of this reorganization was that the water quality planning function vested in the Department of Water Quality and Water Pollution Control was distributed among co-equal divisions in the Public Works Department.

A review of the legal authority required to implement the WQM plan determined that the designated management agencies had the necessary legal authority to include water quality in their requirements for approval. It was noted, however, that the relationship among the various divisions in the Public Works Department needed to be formally established so that the requirements of each division are included in approved plans for development.¹⁷ An effort should be made to increase the awareness of the WQM plan responsibilities imposed on the identified management agencies in the Department.

II. **State Permits and Approvals**

A. Facility Construction Permits

The EPA has delegated the implementation and compliance requirements of the CWA to DEQ. A UPDES discharge permit from DEQ is required for new “point source” discharges such as

¹⁴ Salt Lake County Code of Ordinances, Section 17.04.020.

¹⁵ Section 17.04.020, Salt Lake County Code of Ordinances, twenty year master plan for the preservation and enhancement of water quality.

¹⁶ Later, a change in the form of government from a Commission to a Mayor-Council occurred on January 1, 2001. The Public Works Department is now in the executive branch (Mayor) of county government. It is unclear whether the original WQM plan intended the planning function to be vested in the legislative or executive branch since both functions were consolidated in the earlier Commission form of government.

¹⁷ County Attorney Opinion #80-515, “Legal Authority Required to Implement Water Quality Management Plan” (June 9, 1980, letter to Gerald H. Kinghorn, Director).

wastewater treatment plants. Each wastewater treatment entity in Utah was required to have developed a “Facilities Management and Financial Plan (“FMFP”) by 1985.¹⁸ These plans are a prerequisite to the issuance of construction permits for new or significantly modified wastewater treatment facilities and for the certification of new or renewed UPDES discharge permits.¹⁹ The FMFP must include: (1) an evaluation of alternatives in sufficient detail to determine the most cost effective and environmentally sound treatment strategy; (2) a financial plan to pay for all project costs; (3) optimizing the operation and maintenance of existing facilities; and (4) be consistent with “all applicable state and federal laws” regarding pollution control. Since FMFPs were not required prior to 1985, these planning elements have not been included in the County’s area-wide WQM plan.

DEQ has adopted technical and procedural requirements for the development of wastewater projects. An engineering report must be prepared in support of an application for a facility construction permit.²⁰ Among other things, the report must include location and design information, including the local land use and zoning in the area.

B. Discharge Permits

1. Point Source²¹ Discharges

As noted above, a UPDES discharge permit is required for a point source (discernible, confined and discrete conveyance) to discharge to a state waterway.²² Conformance with the approved area-wide WQM plan is necessary to issue a discharge permit.²³ DEQ’s regulations specifically prohibit the Executive Secretary of the Water Quality Board from issuing a permit for “any discharge inconsistent with a plan or plan amendment approved under Section 208(b) of the Clean Water Act.”²⁴

The permit application requirements for new wastewater treatment plants must consider the following relevant factors: (1) existing controls on point or non-point sources, including total maximum daily load (“TMDL”) calculations for the water body segment²⁵ and relative contribution of the publicly owned treatment works (“POTW”); and (2) receiving stream characteristics, including possible known or unknown water quality impairment.²⁶

¹⁸ Utah Admin. Code R317-1-7.

¹⁹ Utah Admin. Code R317-1-7

²⁰ Utah Admin. Code R317-3-1 and R317-3-4.

²¹ Section 402 of the Clean Water Act.

²² Section 19-5-107, Utah Code Ann., 1953 as amended.

²³ 40 CFR 120.12

²⁴ Utah Admin. Code R317-8-2.2(6).

²⁵ A TMDL is established by first determining the total capacity of a water body to assimilate a particular pollutant. This total daily load is then allocated among contributing point and non-point sources of pollution. *See*, Utah Admin. Code R317-1-7.

²⁶ Utah Admin. Code R317-8-3.11(c) & (d).

2. Storm Water Discharges

Storm water discharges are generated by precipitation and runoff from land, pavements and other surfaces. Storm water runoff accumulates pollutants such as oil and grease, chemicals, nutrients and bacteria as it travels across land. Heavy precipitation or snow melt can also cause sewer overflows which in turn, may lead to contamination of water sources. Most storm water discharges are considered point sources and are covered by the UPDES discharge permit system. A UPDES storm water discharge permit (#UTS000001) has been issued by DEQ to Salt Lake County. The Public Works Department and the Salt Lake Valley Health Department entered into a Memorandum of Understanding to formalize a procedure for the enforcement of applicable statutes, ordinances and health regulations prohibiting the discharge of pollutants, contaminants or wastes into waterways and storm drainage systems.

3. Dredge and Fill

Section 404 of the CWA regulates the discharge of dredged or fill material into waters of the United States, including wetlands. Section 404 requires a permit from the U.S. Army Corp of Engineers before dredged or fill material may be discharged into waters of the United States. The Corp of Engineers administers the program, including individual and general permit decisions. In addition, the Corp conducts or verifies jurisdictional determinations; develops policy and guidance; and enforces the provisions of Section 404.

4. Non-Point²⁷ Discharges

Non-point source discharges include all sources not explicitly permitted under Section 402 of the CWA, including sediments. The state is responsible for listing waters that are impaired. The state must then develop an analysis of the sources of pollutants causing the impairments and the reductions of each source necessary to address the impairments. Total Maximum Daily Loads (“TMDLs”) specify the maximum amount of a pollutant a waterway can assimilate and still meet the state’s water quality standards. The TMDL process²⁸ links the development and implementation of control actions to the attainment and maintenance of water quality standards.

IV. Other Relevant Legal Authorities

Other federal, state and local laws²⁹ regulate water *quantity* and *quality*. The quantity of water available for use is based on water rights. Water is public property³⁰ and the regulation of water rights is a matter of state law.³¹ In the past, the primary issues involving water have been access and the quantity of water available for use. The body of western water rights law is extensive

²⁷ Section 319 of the Clean Water Act.

²⁸ Utah Admin. Code R317-1-7.

²⁹ Statutes, ordinances and case law precedent.

³⁰ Section 73-1-1, Utah Code Ann., 1953 as amended.

³¹ Based on “beneficial use” and “appropriative rights” Section 73-1-3 Utah Code Ann., 1953, as amended.

and beyond the scope of this limited review. It is important, however, to understand that the historical development of water rights law in the west and in Utah plays an important role in the planning process.

Currently water issues focus on the *quality* of the available water, including matters such as irrigation return flows, TMDLs,³² salinity, and in-stream uses. It is also interesting to note that some of the early statutory authorities addressing water rights, pre-dating modern environmental regulations, reference water quality. State wildlife resources authorities also prohibit the pollution of waters deemed necessary for wildlife purposes.³³ City and County ordinances governing domestic water use,³⁴ watersheds,³⁵ flood control facilities,³⁶ wastewater³⁷ and health regulations³⁸ also address water quality. In addition, the re-use of treated effluent³⁹ is an emerging issue due to development, a prolonged drought and the potential impacts of climate change on water availability.

Many of these laws regulating quantity and quality are relevant and appropriate to consider in the WQM planning process. Although the County has WQM planning responsibility, the legal authority for requiring compliance under the other laws is vested with other public and private entities.⁴⁰ It is, therefore, important to first identify these “stakeholders” and second involve them in the planning process.

A summary of the other relevant and appropriate legal authorities which should be considered in the planning process is attached as Appendix “A”.

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³² Utah Admin. Code R317-1-7.

³³ Section 23-15-6, Utah Code Ann., 1953 as amended.

³⁴ Cities have jurisdiction over streams from which water is taken for culinary and domestic purposes to prevent pollution. Jurisdiction extends over streams for fifteen miles above the point from which the water is taken and three hundred feet on each side of the stream. Sections 10-8-15 & 16, Utah Code Ann., 1953 as amended.

³⁵ Watershed regulations: Chapter 17.04, “Watershed Areas”, Salt Lake City Code of Ordinances; Section 17.04.320, “Pollution of Canyon Water Prohibited”. Health Regulation No. 14, “Watersheds”, Salt Lake Valley Health Department.

³⁶ Storm waters and flood control. Section 17-8-5, Utah Code Ann., a county legislative body may construct and maintain facilities for the control of storm and flood waters. County executives shall enforce all laws and regulations against the pollution of water in natural streams, canals and lakes. Section 17.08.020, Salt Lake County Code of Ordinances, a permit is required to use a designated flood control facility.

³⁷ Wastewater control. Chapter 17.52, wastewater discharge permits, Salt Lake City Code of Ordinances. Chapter 17.75 Storm Water Sewer System, Salt Lake City Code of Ordinances. Chapter 8.32, Wastewater Disposal Systems, Salt Lake County Code of Ordinances. Health Regulation No. 13, Wastewater Disposal, Salt Lake Valley Health Department.

³⁸ Local health departments may enforce state laws, including environmental laws contained in Title 19. Section 26A-1-114, Utah Code Ann., 1953 as amended.

³⁹ Sections 73-3c-101 to 401, Utah Code Ann., 1953 as amended.

⁴⁰ The state, counties, cities, improvement districts, special service districts and private parties.

APPENDIX “A”

Legal Authorities Water Quality Stewardship Program

I. Federal Agencies

A. Federal Agencies Involved:

1. Department of Agriculture
 - a. Forest Service
2. Department of Interior
 - a. Bureau of Reclamation – dams, reservoirs and impoundments, “wholesale” supplier of surface water withdrawn for irrigation
 - i. Upper Colorado Region (Utah)
 - b. Bureau of Land Management
 - c. National Park Service
 - d. Fish and Wildlife Service
 - e. U.S. Geological Survey
 - i. National Water Information System
3. Department of Defense
 - a. Department of Army Corp of Engineers
 - i. Section 404 Clean Water Act
4. Environmental Protection Agency
 - a. Federal Water Pollution Control Act 1972
 - i. 33 U.S.C. 1251 *et seq.*
 - ii. Clean Water Act amendments 1977
 - b. Safe Drinking Water Act
 - c. Solid Waste Disposal Act/RCRA
 - d. CERCLA/Superfund

- 5. Other Relevant Environmental Regulations
 - a. Migratory Bird Conservation Act
 - 1. 16 U.S.C. 701-718k
 - b. Endangered Species Act 1973
 - 1. 16 U.S.C. 1531 -1544
 - c. Oil Pollution Act 1990
 - 1. 33 U.S.C. 2701-2761
- B. Reserved Water Rights
 - 1. Winter's Doctrine
- C. Federal Land Policy & Management Act 1976
 - 1. 43 U.S.C 1701 *et seq.*

II. State Agencies

- A. State Agencies Involved
 - 1. Utah Department of Natural Resources
 - a. Division of Water Resources – comprehensive planning, conservation, development and protection of water resources
 - b. Division of Water Rights – administers the use of water based on water rights.
 - i. State Engineer's Office – chief water rights administrative officer.
 - c. Division of Wildlife Resources
 - d. Division of Oil, Gas & Mining
 - e. Division of Forestry, Fire & State Lands
 - f. Utah Geological Survey

2. Utah Department of Environmental Quality
 - a. Division of Water Quality
 - b. Division of Drinking Water
3. Utah Department of Agriculture
 - a. Division of Conservation and Resource Management
 - i. Section 319 CWA, non-point source pollution
 - ii. Agricultural groundwater sampling
 - iii. Colorado River Basin Salinity Control Program
4. State Water Development Commission
 - a. 73-27-101 to 105, Utah Code Ann.
5. Water Development Coordinating Council
 - a. 73-10c-1 to 9, Utah Code Ann.
- B. Water – Public Property
 1. 73-1-1, Utah Code Ann., all waters in Utah are public property.
 2. “Waters of the State”
- C. Constitutional Provisions
- D. Statutes
 1. Section 19-5-107, Utah Code Ann., a UPDES discharge permit necessary to discharge to state waterway.
 2. Section 73-3-29, Utah Code Ann., a permit is required from the state engineer to alter any river channel, bed or bank.
- E. Administrative Rules
 1. R. 317-1-7, Utah Admin. Code wastewater treatment entities are required to have a Facilities Management Financial Plan.
 2. R317-3-1 to 4, engineering report must be submitted in support of an application for a wastewater facility construction permit.

3. R317-8-2.2(6) prohibits issuing a permit for any discharge inconsistent with a plan approved under Section 208(b) of the Clean Water Act.

4. R317-2-13, water quality classifications

5. R317-2-14, numeric criteria

F. Case Law

1. *Utah v. United States*, 403 U.S. 9 (1971)

a. On the date of Utah's admission to the Union the Great Salt Lake was navigable and ownership of the bed of the lake passed to Utah at that time.

b. Bed of the Great Salt Lake "below the meander line" as duly surveyed.

2. *Fairfield Irrigation Co. v. White*, 416 P.2d 641 (1966) due to the nature of water, whether in streams or in basins above or underground, it not subject to absolute ownership in the same was as other property, but belongs to the public, and rights to use it are appropriable by private individuals only under conditions prescribed by law.

III. Cities

A. Agencies Involved

1. Public Works

B. Utah Constitution Provisions

1. Article XI, Section 6 – no municipality may sell or dispose of any water rights, or sources of water supply.

2. Article XVII, Section 1, existing rights to use of water confirmed.

C. Statutes

1. Water service – 10-8-14, Utah Code Ann., city may operate waterworks and may sell surplus water beyond limits of city.

2. Extraterritorial jurisdiction – 10-8-15, Utah Code Ann., cities of the first class have jurisdiction over the entire watershed.

3. Control and regulation – 10-8-16, Utah Code Ann., city may control the water and watercourses leading to the city.

4. Acquisition of sources – 10-8-18 city may purchase or lease or lease springs, streams or sources of water.

D. Ordinances

1. Public Works

- a. Chapter 17.12, Metropolitan Water District, Salt Lake City Code of Ordinances.
- b. Chapter 17.40, POTW Sewer Construction, Salt Lake City Code or Ordinances.
- c. Chapter 17.52, Wastewater Discharge Permits, Salt Lake City Code or Ordinances.
- d. Chapter 17.75, Storm Water Sewer System, Salt Lake City Code of Ordinances.

2. Watershed

- a. Chapter 17.04, Watershed Areas, Salt Lake City Code of Ordinances.
- b. Section 17.04.320, Pollution of Canyon Water Prohibited, Salt Lake City Code of Ordinances.

E. Case Law

1. *Salt Lake City v. Young*, 145 P. 1047 (1915) city has jurisdiction over streams from which its water supply is taken.

2. *Bountiful City v. DeLuca*, 292 P. 194 (1930) city ordinance making it unlawful to permit animals to run at large within 300 feet of a stream used for water supply is valid.

F. Contracts

IV. Salt Lake County

A. Agencies Involved

- 1. Flood Control
- 2. Salt Lake Valley Health Department

B. Constitutional Provisions

C. Utah Statutes

1. 17-8-1, Utah Code Ann., county may contract with the United States for the construction of any flood control project within the county.

2. 17-8-5, Utah Code Ann., county legislative body may construct and maintain facilities for the control of storm and flood waters. County executives shall enforce all laws and regulations against the pollution of water in natural streams, canals and lakes.

3. 17-8-7, Utah Code Ann., county legislative body may declare a drought emergency and appropriate money to address the emergency.

4. 17-50-310, Utah Code Ann., county may purchase water rights or acquire real estate to obtain water for county purposes.

D. County Ordinances – Flood Control

1. Section 17.08.020, Salt Lake County Code of Ordinances, a permit is required to use a designated flood control facility.

2. Section 17.08.040, Salt Lake County Code of Ordinances, designated county storm drainage and flood control system.

E. Water Quality Management

1. Salt Lake County is the designated area-wide water quality management agency.

a. Enabling Ordinance No. 615, October 31, 1977

b. Section 17.06.010, Salt Lake County Code of Ordinances

c. Section 17.04.010, Salt Lake County Code of Ordinances

d. Section 17.04.020, Salt Lake County Code of Ordinances, twenty year master plan for the preservation and enhancement of water quality.

F. Administrative Rules

G. Case Law

1. Morris Decree

H. Contracts

V. Special Service Districts & Improvement Districts

A. Types of Districts

1. Water Conservancy, - 17A-2-1401, Utah Code Ann.
2. Irrigation Dist., - 17A-2-701.1 to 767, Utah Code Ann.
3. Metropolitan Water Dist., - 17A-2-801 to 851
4. Wastewater
5. Fire Protection

B. Water Commissioners

C. Statutes

1. Wastewater reuse – 73-3c-101 to 401 Utah Code Ann.,

VI. Compacts

- A. Bear River Compact, 73-16-1 to 5, Utah Code Ann.
- B. Colorado River Compact, 73-12a-1 to 3, Utah Code Ann.
- C. Columbia Interstate Compact, 73-19-6 to 10, Utah Code Ann.
- D. Ute Indian Water Compact, 73-21-1 & 2, Utah Code Ann.

VII. Privatization Projects

- A. 74-10d-1 to 7, Utah Code Ann

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