

Arizona Surface Water Quality Program: Stakeholder Advisory Group

Meeting: #4

Date: May 20, 2020

Time: 9-11 a.m.

Attendees:

Agency

- Agribusiness and Water Council of Arizona
- Arizona Cattle Feeders' Association
- Arizona Chamber of Commerce and Industry
- Arizona Chapter of Associated General Contractors
- Arizona City/County Management Association
- Arizona Farm Bureau
- Arizona Manufacturers Council
- Arizona Mining Association
- Arizona Municipal Water Users Association
- Arizona Rock Products Association
- Center for Water Policy
- County Supervisors Association of Arizona
- Environmental Defense Fund
- Grand Canyon Trust
- Home Builders Association of Central Arizona
- Inter-Tribal Council of Arizona
- League of Arizona Cities and Towns
- Salt River Project
- The Nature Conservancy
- Water for Arizona Coalition

Member

Wade Noble
 Bas Aja
 Courtney Coolidge
 Amanda McGennis
 Gina Montes
 Stephanie Smallhouse
 Allison Gilbreath
 Lee Decker
 Warren Tenney
 Eric Mears
 Sarah Porter
 Michael Racy
 Chris Kuzdas
 Travis Bruner
 Spencer Kamps
 Susan Montgomery
 Tom Savage
 Maribeth Klein
 Patrick Graham
 Haley Paul

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Alternate

Jason Moyes
 Mike Ford
 Vince Lorefice
 Chelsea McQuire
 Scott Thomas
 Steve Trussell
 Craig Sullivan
 Holly Pearen
 Rob Anderson
 Mia Hammersley
 Scott Deeny
 Joan Card

Subgroup Members

- City of Phoenix Office of Environmental Programs Hilary Hartline

ADEQ Staff

- Trevor Baggione
- Krista Osterberg
- Rhona Mallea
- Ben Bryce
- David Lelsz
- Deborah Birutis
- Patti Spindler

Consultant Support

- Theresa Gunn, GCI
- Kelly Cairo, GCI

Introductions

Trevor Baggio, Director ADEQ Water Quality Division, welcomed attendees. Two new organizations have joined the SAG, the League of Arizona Cities and Towns and Arizona Municipal Water Users Association.

Review Agenda

Trevor reviewed the agenda and meeting housekeeping topics. Highlights are listed below.

- SAG members that speak to the media should note that they are speaking for themselves, not the advisory group
- WOTUS Litigation Update
 - Seven lawsuits filed in federal district court and are awaiting answer by federal government – four cases challenge rule as too narrow, three as too broad and claim the definition is unconstitutionally vague
 - Plaintiff states and cities in California v. EPA (18 states and two cities) have indicated they will seek a stay
- Action items update
 - Resent the link regarding the goals/principles survey, four additional responses received
 - ADEQ and USACE permit timeline information to be sent after this meeting in preparation for meeting on permitting next week
 - Polled members regarding meeting time change, unable to change
 - Working on a solution regarding recording presentations or providing additional speaker notes
 - Shared report on intermittent waters
 - Working internally on scheduling options for standards kaizen
- Reminders
 - We want you to discuss openly and freely – requested avoiding SILENT disagreement
 - You are not speaking on behalf of your organization
 - Use the raised hand feature in Zoom

Use Base Approach vs. Flow Regime

Trevor said that ADEQ's intent is to create a program based on water use and impacts to that use rather than utilizing flow regime and water body definitions. The trigger for regulation would be impacts to the use. He asked for thoughts and concerns regarding this type of program.

Member Questions/Discussion:

- Concern about cumulative impacts versus a singular impact
 - Trevor noted this will be an important discussion point, likely at the next SAG meeting.
- Are the actions of this group to fill a void left by the shrinking of WOTUS?
 - Trevor said that the next milestone is to create a program outline, which will be presented to state leadership for statutory authority
- Concerned that a use-based process will mean everything is regulated

- A regulatory program should protect waters that are clearly identifiable to be protected – that clearly have some type of threat
- How does a program based on uses apply to a specific water? What is the advantage of looking at uses when we don't know how it applies to a program we are already very familiar with?
- How will storm water moving to a water body used for drinking water or livestock watering be addressed?
- Concerned that a very broad group of waters that would fall under this program
 - Trevor noted that the intent would be to create a process for assigning uses
- Concerned there is a potential for uses to be applied to WOTUS, and that there may now be multiple definitions with an associated host of issues
- Will uses mean existing uses? Potential uses?
- Ephemerals should be exempt from a state program, also a question of tributaries
 - Trevor said that the desire is to have a process for assigning those uses. Agree that there is more work to be done
- Complexity does not go away, since uses differ along various segments
- Believe many of these comments will mesh with the ADEQ approach. Focusing on threats makes sense and works with a use-based program. If a use is threatened, the water is threatened.
- Want to be careful about excluding categories of waters, such as ephemerals, since waters are connected. Industrial discharge could be an issue
- Will be important to designate uses appropriately
- Managed systems versus unmanaged systems will be an issue, i.e. water pumped through NPDES permits allow for different controls on the system
- Don't agree that ephemerals should be excluded

SAG Subgroup Report Out

Ben Bryce, ADEQ Legal Specialist, reported on the water uses subgroup. The subgroup was presented with four questions:

1. Should the list of proposed uses be refined to eliminate overlapping categories or to be clearer? If so, which of these should be combined? Should any uses be added?
2. Is there consensus within the subgroup that a state program should protect any of the proposed uses? Which uses? Why does the subgroup feel these proposed uses should be protected?
3. Do the members of the subgroup disagree about whether any proposed uses should be protected under the state program? Which proposed uses? What are the arguments for and against?
4. What uses, if any, should apply to artificially created waters? Do those change if a water is located on entirely private land/intended for private use? Provide examples of when certain uses should/should not apply.

Ben said that there was general consensus among the subgroup that uses to be protected should include:

- | | |
|------------------------|----------------------|
| • Drinking Water | • Fish Consumption |
| • Aquatic & Wildlife | • Irrigation |
| • Full Body Contact | • Livestock Watering |
| • Partial Body Contact | |

Ben said these proposed uses and the uses that currently apply to navigable waters are very similar. He asked for concerns with these uses.

Member Questions/Discussion:

- What about flood control and flood mitigation? For example, a channel was built in Flagstaff to collect runoff. Don't know how we want to protect that water use
- Concerned that we are moving toward land use regulation if a flood mitigation use was added, and would oppose doing so
- There may be particular cultural protections needed, as well as special locations that need additional protection

Ben noted areas where the group did not reach consensus:

- Riparian habitat
- Cultural and historic resources
- Aesthetics

Member Questions/Discussion:

- Most areas where the subgroup was able to reach consensus aligned with the CWA uses
- In many cases, cultural and historic concerns will be covered, but in some instances they need additional consideration which should occur through tribal consultations
- Cultural uses will be specific to each tribe. The same way experts will help determine for standards for an irrigation use, tribes are the experts to determine standards for cultural uses
- Cultural and historic uses might also include protection of a species, such as the bald eagle, or ceremonial uses
- Agree that riparian, cultural and aesthetic uses are generally covered by the other uses. Important to keep the focus on the designated uses, with an eye to looking for exceptions and additions, such as a specific riparian habitat not covered by general aquatic and wildlife uses
- Smart to begin with list of designated uses, with the caveat that we can also consider changes
- Concerned tribal consultation might occur late in the process, needs to occur up front
- Concerned that "cultural and historic" might be a vague term and therefore used to encompass all dams, for example
- Aquatic and wildlife includes many subgroups. Is water body/water use appropriately defined? Waters are change based on current conditions

Trevor noted that there is an open invitation to all tribes regarding consultation and asked for input on when to consult with Tribes.

Artificial Waters

Krista Osterberg, ADEQ Water Quality Division, said that this topic was discussed during the Uses Subgroup meeting. She asked the SAG to consider:

- What uses, if any, should apply to artificially created waters?

- Do those change if a water is located on private land/intended for private use?
- Do you have examples of when certain uses should/should not apply?

Member Questions/Discussion:

- If an artificial water, even on private land, is connected to another water, may need protection
- Stand-alone water on private property might be an exception, though may be a use concern
- Pit lakes and connections to other waters could have far-reaching concerns for the mining industry
- Concern about overreach into land regulation
- Should not regulate water bodies on private lands through this process
- Preference to not regulate private waters, especially where there are connectivity concerns
- Patti Spindler, ADEQ, reported additional subgroup comments:
 - Privately owned lakes through an HOA, such as Dobson Lake
 - Ponds used for fish consumption
- What are the threats/risk to private lakes managed by an HOA, or any manmade lake?
- Can't control where migratory birds choose to land
- If a private pond caused a mosquito issue would this be covered through the county regulations?
- Trevor noted canals where prohibited uses occur. This type of complexity will need to be addressed
- HOA lakes are regulated by the HOAs for whatever use they have determined
- Challenge is how regulating by use would apply to private area; however, should consider the connection to another water source that is used by drinking water or other designated uses
 - Krista said that in this example, the private water itself could be considered a point source and protections would be afforded. In this case, if the private water/conveyance was discharging to a CWA jurisdictional water, AZPDES permit could still be required. If discharge was impacting a use under the state program (and not on a CWA jurisdictional water) the state regulatory approach would be trying to protect the use from impacts that might occur
- Seems like there is not a drop of water in Arizona that would not be impacted by this approach
- Protecting bodies of water from receiving water would be problematic for this program
- This would not be overlaying another level of regulation, correct?
 - Krista verified that the goal is to not overlap with CWA, APP, or other existing programs
 - Ben clarified that a permit would not be needed unless there is a threat to the water use. If discover a threat to a use, would need to protect
- Hypothetically, an illegal growing operation would not get permits and could dump into private land/water that flows to a protected water use
 - Illegal discharges would be subject to enforcement actions

How to apply use to waters? - Topics for Next Meeting

Ben asked the SAG to consider the following for the next meeting:

- How to assign uses? How do we determine if a use exists?

- Permitting and Thresholds – How permitting should work if a discharge reaches a protected use. Areas to consider will include:
 - Stormwater
 - Cumulative impacts

Trevor said this is the approach used by the APP and the Clean Air Act. He reviewed the discharge flow chart.

Member Questions/Discussion:

- Concerned about “potentially” exceeding water quality standards
 - Trevor said that modeling would be used if actual data was not available
- Currently leery of models
 - Trevor agreed that models are an approximation
- “Reach a protected use” can be in the eye of the beholders
- Approach presumes everyone is in the system until excused
- Is a discharge a point source?
 - ADEQ staff noted that point source hasn’t yet been defined and this will need to be part of further conversation
- Will sediment be considered a discharge?
 - ADEQ staff hasn’t contemplated which pollutants will be regulated
- Would water with a designated use have a water quality standard?
 - ADEQ staff agreed, noting the water quality standard can be exceeded without impairing the water. Also, the discharge may exceed the water quality standard, while the overall water body may not exceed the standard for that use

Adjourn

Trevor said that he appreciated the discussion and topics raised at this meeting. He thanked the attendees for their participation.