



## **ADEQ WATER QUALITY DIVISION SURFACE WATER PROTECTION PROGRAM TRIBAL LISTENING SESSION WEBINAR SUMMARY**

**DATE:** Nov. 13, 2020

**TIME:** 12:30-2:30 p.m.

**ADEQ STAFF**

Trevor Baggiore  
Justin Bern  
Ian Bingham  
Ben Bryce  
Erin Jordan  
David Lelsz

Chris Montague-Breakwell

**STAKEHOLDER ATTENDEES**  
(Attached)

**ADDITIONAL ATTENDEES**

Kelly Cairo, GCI  
Theresa Gunn, GCI

**WELCOME AND INTRODUCTIONS OF ADEQ STAFF**

ADEQ Water Quality Division Director Trevor Baggiore welcomed attendees. He explained that the purpose of the meeting was to seek input from Tribal Nations on a proposed framework for protecting Arizona waters and discuss potential permit terminations. Although the proposed program does not affect Tribal Nations, and ADEQ does not have authority over Tribal land, it is meant to provide an overview to attendees.

Trevor noted that ADEQ recognizes this meeting is not a Tribal consultation; rather, it is a listening session. He invited Tribal attendees to indicate their interest in holding consultation meetings.

**ONLINE PARTICIPATION INSTRUCTIONS**

Theresa Gunn facilitated introductions. A total of 17 stakeholders attended the webinar. Theresa reviewed webinar instructions and provided instructions regarding submitting questions online.

Trevor said that the proposed framework was reviewed at a general stakeholder meeting, by the Stakeholder Advisory Group (SAG), and provided to EPA.

**WHY DO WE NEED A STATE SURFACE WATER PROGRAM?**

Trevor explained that the definition of Waters of the United States (WOTUS) changed as part of the Navigable Waters Protection Rule (NWPR) in June, leaving some waters in Arizona no longer under the protection of the Clean Water Act (CWA). This change in definition is not meant to indicate these waters should not be protected, but rather limits federal control of state waters.

He reviewed newly non-WOTUS waters. While the Army Corps of Engineers has not indicated the specific waters are considered non-WOTUS, it is ADEQ's perspective that these waters are excluded. ADEQ believes these and other waters should be protected.

Trevor said that ADEQ heard the following from stakeholders:

- NWPR is confusing
- A unique and complex new state program would be the wrong choice
- Keep what we know about CWA
- Should build on existing programs/authorities
- Should include a map of protected waters
- Should not be a land management program

## OVERVIEW OF PROPOSED FRAMEWORK

Trevor explained that ADEQ proposes listing waters at the state level, and applying the processes and structures of the CWA to these listed non-WOTUS waters. The proposed program would create a second tier of Arizona-protected waters and not include a dredge and fill program.

- Proposed protected waters:
  - WOTUS (through the CWA)
  - Arizona's eight major rivers (through an Arizona Surface Water Protection Program)
  - Additional wet waters listed (through an Arizona Surface Water Protection Program)
- Do not yet have an initial list of protected state waters
  - Would welcome input in developing this list
  - Statutory process would include this initial list
  - Would define criteria for adding or removing waters from the list
- Goal is to avoid duplicity – a water covered through the CWA would not require state coverage
- Question: Will the state permitting process be similar to that at the federal level?
  - Response: We are evaluating whether to omit anti-degradation or emission limit guideline requirements, for example
  - One difference would be that EPA would not have program oversight of the state program
- Mission is to protect public health and the environment
  - Safeguard wet waters in Arizona
- Framework features:
  - Same permit program and fees as the CWA 402 Program
  - One set of standards
  - Same permit for both WOTUS and listed state waters
- Framework will **NOT**:
  - Require multiple AZPDES permits for a single discharge – if there is a permit at the federal level, an additional permit will not be needed at the state level
  - Set standards for any ephemerals other than appropriate portions of the eight major rivers
  - Change how ADEQ administers AZPDES
  - Regulate nonpoint source pollution
  - Regulate agricultural return flows and agricultural stormwater discharges
  - Create a state dredge and fill program (like CWA Section 404)
- Question: How will ADEQ treat a discharge to an ephemeral that is a conduit to a WOTUS?
  - Response: If an entity discharges to a covered water, a permit is required. Similarly, if the entity discharges to a conveyance that flows downstream to a WOTUS, a permit is required.

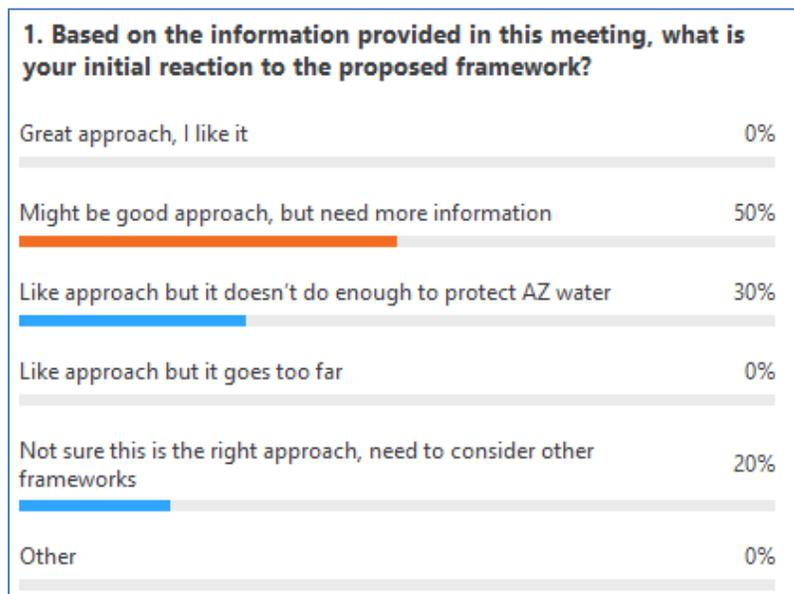
This means discharges to an ephemeral MAY be covered – depending on whether there is a conveyance to a WOTUS.

- Question: Does the discharge become a point source?
  - Response: The point of compliance is where the channel meets the WOTUS – don't believe this is a mechanism to require permits for what would otherwise be nonpoint source pollution
- Question: How will ADEQ ensure that discharges that are adjacent to or run through Tribal lands not affect watersheds?
  - Response: Proposing that an effluent-dependent water could be protected
  - Ephemerals won't have standards, but dischargers would have requirements
  - If there is a wet water on a Tribal Nation getting flows from an ephemeral, the Tribe has the ability to create laws about how this is handled
- Question: What about the discharge prohibitions found in rule already?
  - Response: We will need to look into this further – the possibility of waters flowing into other states or a Tribal Nation will need to be addressed
- Comment: As a state program under state law, it seems that if a Tribe comes to ADEQ and identifies a water that will affect our resources, there should be a mechanism to consider protections. It is difficult for a Tribe to enforce its regulations off Tribal land.
  - Response: Trevor asked whether Tribes are considering similar protections above and beyond the CWA
- Comment: Ak-Chin Indian Community is looking to mirror many of the processes developed at the state level. Would be a benefit for the state and Tribes to coordinate processes.
- Question: Why not regulate any pollutants as a point source as a result of dredge and fill activities?
  - Response: We are willing to consider incorporating pollutants from this type of example into this program and would appreciate additional thoughts on this topic. May be regulated under AZDPES – concept was also brought up at the broad stakeholder meeting
- For more information about *Sierra Club v. Abston Constr. Co.*, see: 620 F.2d 41, 41 (5<sup>th</sup> Cir. 1980)

### STAKEHOLDER DISCUSSION

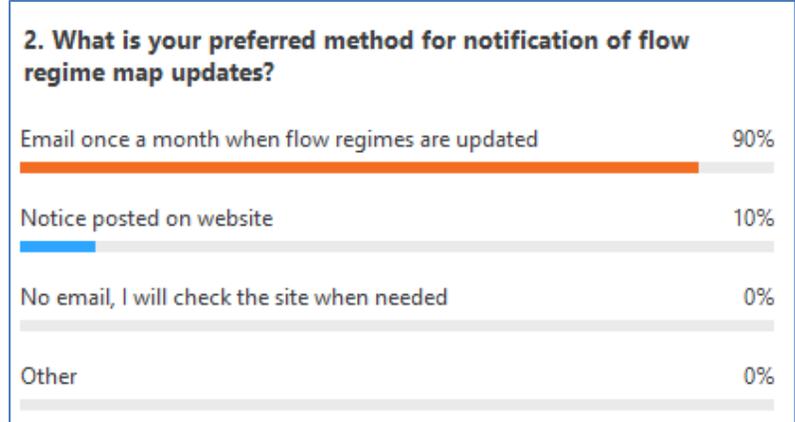
Theresa polled the attendees regarding their initial reaction to the proposed framework. She noted that attendees were not considered to be speaking on behalf of the Tribe, and that responses were anonymous.

Results appear at right:



## FLOW REGIME MAPS

Erin Jordan explained that the flow regime map will be available online. She requested input on how attendees would like to receive updates to the flow data. Results appear at right:



Trevor said that next steps in developing the framework include:

- Revise framework to incorporate feedback (by Nov. 25 if possible)
- Stakeholders to participate in online survey (by Nov. 18)
- Finalize draft legislation to seek statutory authority

Highlights of additional stakeholders questions and comments, and staff responses include:

- Question: How do ditches and canals that carry drinking water fit in this program?
  - Response: SRP canals are currently regulated under CWA. The Central Arizona Project regulates CAP canals and water. We are meeting with CAP next week to discuss this issue. To the extent that these sources provide drinking water, we think it's important to protect these sources.
- Question: When will we see the criteria for listing waters?
  - Response: We expect the criteria to be included in the draft legislation anticipated approximately Nov. 25. The project team will seek input on the proposed criteria.
- Comment: Urge Tribal consultation as program progresses, as well as when adding or removing waters to the state list.
- Question: Will this be considered emergency legislation? If so, it will require a broader level of support at the Legislature.
  - Response: Emergency legislation is effective immediately upon the governor's signature, whereas other legislation becomes effective 60-90 days after the governor's signature. ADEQ's preference is emergency legislation.
  - ADEQ is looking at 2021 legislative session.
- Comment: The waters list criteria could include waters Tribes consider important to be protected.
- Comment: Pasqua Yaqui Tribe requests Tribal consultation.
- Comment: The listing process might be easier if at an administrative level.
  - Response: Legislation is expected to include criteria, and the rulemaking to include more specifics of criteria and the initial list. Adding or subtracting waters would be part of future rulemakings, which includes a public process.
- Question: Are ephemerals of the eight major water bodies (rivers) or additional listed waters included?

- Response: Main stem ephemerals of the 8 major rivers would be covered, proposal does not include other ephemerals.
- Proposal would regulate discharges that reach a protected water.
- Would like to receive input on types of ephemerals that should be considered for developing the program and criteria, as well as how to manage this inconsistency.

**PERMIT TERMINATIONS**

Chris Montague-Blackwell asked attendees how they would like to be notified about permit terminations.

Highlights of recommendations, comments and questions include:

- Chairman, Tribal EPA, and any Council members should be notified
- If a Tribe has previously commented, should notify the Tribe
- If a Tribe has specified a geographic area of interest, should notify the Tribe
- Tribes will have varying preferences
- Permit termination should require consultation, perhaps monthly or quarterly meetings
- Status of ADEQ’s update to Tribal consultation policy?
  - Staff explained that the policy is in draft form. The administrative council provided commented and will be finalized and provided to executive leadership. Seeking input on the process each Tribal Nation would like followed. Hope to begin individual conversations at the start of the new year.
- Recommend that if there is rapid growth of terminations, provide the information about changes or terminations in a table format similar to that provided by other departments.
  - Staff said that the intent is to provide the information in the manner preferred by each Tribe, and for each to have the information readily available.

**NEXT STEPS AND ADJOURN**

Trevor requested attendees provide input via the survey (<https://www.surveymonkey.com/r/AZWater>) by Nov. 18. He expressed his appreciation for stakeholders time and providing thoughtful questions. He also invited attendees to participate in Tribal consultation.

**STAKEHOLDER ATTENDEES**

Jason Adder, Gila River Indian Community  
 Brenda Ball, Ak-Chin Indian Community  
 Laura Berglan, Pascua Yaqui Tribe  
 Peter Bungart, Hualapai  
 Sarahna Cooper, Salt River Pima-Maricopa Indian Community  
 Meghaen Dell’Artino, Gila River Indian Community  
 Tom Harbour, Ak-Chin Indian Community  
 Jason Hauter

David Lewis, Yavapai-Apache Nation  
 Susan Montgomery, Pasqua Yaqui Tribe and Inter Tribal Council of Arizona  
 Katosha Nakai, Ak-Chin Indian Community  
 William Niebling, Gila River Indian Community  
 Crystal Tulley-Cordova, Navajo Nation  
 Will Nabahe, Colorado River Indian Tribe  
 Frank Venegas, Quechan Indian Tribe  
 Jay Weiner, Tonto Apache Tribe  
 Jim Wells, San Carlos Apache Tribe