



MEETING SUMMARY

ADEQ WATER QUALITY DIVISION WATERS OF ARIZONA TRIBAL INFORMATION SESSION/TUCSON

DATE: Feb. 25, 2020 **TIME:** 1:30-3:30 p.m.
LOCATION: Tucson City Center Hotel, 425 N Granada Ave, Tucson

ADEQ STAFF

Trevor Baggione
Ben Bryce
Len Drago
David Lelsz
Rhona Mallea
Krista Osterberg

STAKEHOLDER ATTENDEES (Attached)

ADDITIONAL ATTENDEES

Kelly Cairo, GCI
Theresa Gunn, GCI

AGENDA

The complete agenda is available online and includes:

- Welcome
- Review Agenda and Introductions
- Final Federal WOTUS Rule
- Surface Water Protection Program for Arizona
- Program Goal
- Paradigm Shift
- Next Steps

WELCOME

ADEQ Water Quality Division Director Trevor Baggione thanked attendees for participating in the meeting. He explained that the change in the federal rule will affect both Tribal nations and Arizona. He noted that this informational meeting is not Tribal consultation, and that consultation sessions are welcomed.

REVIEW AGENDA AND INTRODUCTIONS

Len Drago, ADEQ Tribal liaison, welcomed attendees and facilitated introductions. He reviewed the agenda and asked for input on development of an upcoming program. A total of 10 representatives attended the meeting, with eight participating in person and two participating online.

FINAL FEDERAL WOTUS RULE

Krista Osterberg, ADEQ, presented on overview of the final Waters of the U.S. rule. The presentation is available online at https://static.azdeq.gov/wqd/woaz/feb2020_stakeholder_presentation.pdf.

The final Waters of the U.S. definition is expected to be published in the Federal Register soon. The rule will become effective 60 days after publication, unless there is a stay to the rule. One of the biggest impacts to

Arizona will be the exclusion of ephemeral streams from the new definition. The biggest change since the draft rule was announced in January of 2019 is that ephemeral breaks will not necessarily sever jurisdiction. If a water body conveys flow in a typical year, which is based on a 30-year rolling average, jurisdiction will not be severed. Arizona currently does not have data on 30-year averages.

Baggiore noted that this WOTUS rule change reflects a federal action. Osterberg said that there has not been a comprehensive analysis of Traditionally Navigable Waters. ADEQ has been speaking with the Army Corps of Engineers, EPA, and other states to consider like methodologies. The Arizona Navigable Streams Adjudication Commission examines whether a water was navigable at the time of statehood.

Ben Brice, ADEQ, noted that determination of navigability by ANSAC would cause a waterway to be determined navigable.

A meeting to discuss impacts to permit holders will be held in March in Phoenix. An invitation with details will be sent soon and include meeting location information. Tribes are welcome to attend this meeting in person or by webinar. (Note: The meeting is scheduled for March 24, 1-4 p.m. at the ADOT HRDC Training Facility at 1130 N 22nd Ave, Phoenix.)

Highlights of comments and questions include:

- What is currently regulated through WOTUS versus what will be out?
- Could you summarize the points of difference between how Arizona currently is regulated under the 1986-88 definition and the new WOTUS definition?
- What is a water nuisance?
- When is the rule expected to be published?

Baggiore asked whether any of the nations hold permits with ADEQ or EPA. The attendees did not indicate that they had permits, and have not had conversations with EPA about permits or the pending definition change.

Facilitator Theresa Gunn asked whether Tribes monitor permits upstream of a nation's waters. There was general agreement that each Tribe would be interested in state waters coming onto Tribal lands, and Tribal waters moving to state areas.

SURFACE WATER PROTECTION PROGRAM FOR ARIZONA

Osterberg explained that ADEQ is not assuming a federal program, rather determining how to develop a state program. She noted that ADEQ does not intend to copy the federal Clean Water Act.

She explained that at the November 2019 stakeholder meetings, 91 percent of attendees indicated that protection of waters was important or very important. She asked attendees to rate their level of agreement with each goal drafted from input at the November meetings. Attendees were also asked whether there will be gaps that Tribes will need to regulate and consider other goals that could be accomplished through a state program that would assist Tribes?

Highlights of attendees comments and questions included:

- Protect waters coming onto Tribal lands.
- How will water flowing from Tribal lands be regulated?

- Currently three Tribes are in a lawsuit against a mining company – there would be interest in protecting cultural resources and wildlife.
- Would like regulation of cultural and wildlife sensitive areas off Tribal lands.
- Would like a state program that could protect cultural and historic resources. This is of concern for those who no longer need to obtain a federal 404 permit, and a federal nexus would not be triggered, which is a concern for Tribes.
- Important to protect cultural and historic waters.
- Erosion and the creation of new runoff and stream areas affect Tribal lands. How might the activity change the surrounding waters?

Additional comments regarding goals noted by participants in all meetings are available online in the comment matrix.

GUIDING PRINCIPLES

Osterberg asked about the design criteria in creating a state program. She asked attendees to rate their level of agreement with each of the guiding principles as drafted from input at the November meetings, and to note suggestions for additional principles. Comments noted by participants in all meetings are available online in the comment matrix.

Highlights of comments from meeting attendees included:

- Should have a program in place when the new WOTUS rule becomes effective, rather than a gap.
- Should be funded, with enough resources to effectively operate

PARADIGM SHIFT

Osterberg explained shifting the paradigm to a consideration of the water uses that the state might want to protect. Gunn asked attendees to consider: *Might looking at uses, impacts and risk be a better fit for protecting Arizona's waters than the definition of a water.* Brice asked whether an impact-based approach would help avoid some of the pitfalls of current CWA rules.

Highlights of discussion regarding this approach included:

- There are many areas that do not often have water flow, but would want to see the wildlife habitat protected.
- Believe there would be the same problem in defining what waters would need to be protected.
- Would a recharge conservation area be a use?
- Is the approach Baggio described in the Clean Air Act more effective?
- In Arizona, it seems unlikely that any discharge anywhere would not have an impact (including a positive impact).
- Soil biomes seem like they would be more directly affected.

NEXT STEPS

Osterberg reviewed the timeline for next steps including:

- March 2020: establish a stakeholder advisory group; conduct permit holders information meeting
- April 2020: form technical work groups
- May/June 2020: draft program outline for stakeholder input

Osterberg requested feedback regarding how best to receive Tribal input, thoughts or concerns about the process in general, and additional comments. She noted that the department wants to continue to speak to Tribes about concerns about water flowing onto and off of Tribal lands. She also noted that without EPA/Corps authority, Tribes will no longer have certain protections.

Osterberg noted that setting state standards requires state rulemaking, but is not a three-year process.

Highlights of questions and comments include:

- Will you be asking for authority over Tribal lands?
- Once a permit holder is no longer subject to permit constraints, how will ADEQ re-initiate permits and controls?
- Will the advisory group be drafting materials?

Baggiore asked the group for advice on how to include Tribal representation on advisory groups while limiting the overall number of attendees. This representation would be in addition to Tribal consultation. Advisory groups are expected to help ADEQ identify parameters, and would not be a decision-making body. He noted that past meeting attendees indicated that they would approach representatives and the ITA to discuss whether a few individuals could meet this need or a separate workgroup should be created.

Attendees were asked to return meeting evaluation surveys; however, evaluations were not received.

Baggiore and Osterberg thanked attendees for their attendance, and asked representatives to encourage Tribal consultation meetings.

STAKEHOLDER ATTENDEES* (IN PERSON AND BY PHONE) AND ORGANIZATION

NAME	ORGANIZATION
X	x

**(Please note: Some stakeholders may not have provided their names and/or organizations.)*