



## ADEQ WATER QUALITY DIVISION WATERS OF ARIZONA TRIBAL INFORMATION SESSION/FLAGSTAFF

**DATE:** Feb. 27, 2020                      **TIME:** 1:30-3:30 p.m.  
**LOCATION:** Northern Arizona University, Health and Learning Center Room 2405,  
824 S. San Francisco Str., Flagstaff

### 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. A total of 14 representatives attended the meeting, with eight participating in person and six participating online. He reviewed the agenda and asked for input on development of an upcoming program.

### 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](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.

Highlights of comments and questions include:

- If the rule is not in effect, does that mean it's not final?
- A 30-year rolling average in Arizona will represent many years of drought in Arizona.
- Does that mean a water body can be redefined in the future, as the 30-year time period will represent a different period of time each year?
- Some people have asked the Corps and EPA about the 30-year data methodology and have not yet received a response.
- Would spring-fed wetlands be removed from the definition?
- Tribal lands are trust lands, and the analysis will differ.
- Don't believe there was proper Tribal consultation prior to this federal change. Federal government is advocating a large portion of their responsibility.
- Will this rule change affect 319 funding?
- Don't believe Section 106 references WOTUS.
- If there is a gas spill that goes into WOTUS, will it prevent EPA from engaging in clean-up activities?

Baggiore asked attendees about communication with EPA regarding potential changes. Attendees did not indicate that there had been consultation. They noted that a comment period was noticed, but communication substantially different than public input did not occur.

Changes may affect 319 funding for both the state and Tribes. However, there are different formulas for states and Tribes. Funding changes are not anticipated for about three years, though there is not a guarantee.

Baggiore asked whether Tribal nations or the Intertribal Association of Arizona would be expected to join a lawsuit.

Highlights of comments and questions include:

- If EPA references traditionally navigable waters, the definition change would become an issue.
- Believe there would have to be a national stay of the rule because there would be danger of injury related to new regulations.
- Skeptical of a stay occurring because of hesitation to do so on the part of the courts.
- Anticipate that ultimately lawsuits would become consolidated and include a spectrum of Tribes across the United States.

### **SURFACE WATER PROTECTION PROGRAM FOR ARIZONA**

Osterberg said that at the November 2019 stakeholder meetings, 91 percent of attendees indicated that it was important or very important to have a state program. She noted that ADEQ does not intend to copy the federal Clean Water Act.

She asked attendees to consider the goals drafted from input at the November meetings, and to propose additional goals. Highlights of questions and comments included:

- Need to protect springs – some are off Tribal lands. Uses include ceremonial, drinking water, and public water areas. Tribes use Section 106 funds to monitor springs and report to EPA.
- Is this a continuation of the Nov meeting? What progress has been made?
- Will Section 106 funding be affected? There is concern regarding stream monitoring.
- Would it be possible to invite EPA to this or other meetings?
- Would the Attorney General’s opinion be an appropriate precursor to this, which may pertain to state liability?
- Surface water protected by Arizona will be defined by biological, chemical and physical connectivity between ephemeral, intermittent, and perennial water flows.
- What is the structure of the meeting with these three different interest groups? Should make the intent of the meeting clear in order to get answers.
- Since ADEQ also will suffer from these impacts, will ADEQ downsize?
- Think some of the questions Tribes have regarding springs also will be state questions.
- Arizona can adopt a goal that is more stringent.
- Can ADEQ still protect waters and fight this rule?
- Believe Arizona will be in the “hot seat” for impacts to springs and other important waters.
- Can ADEQ protect non-jurisdictional waters?

Facilitator Theresa Gunn explained that the department considered more than 500 comments and synthesize them into a draft of common goals. Although the state program would not apply to Tribes, ADEQ believes Tribal representatives can provide valuable input on developing a state program.

ADEQ staff members noted the following:

- EPA was not invited to these meetings, since they pertain to the development of a state program. However, there have been discussions about conducting a Tribal meeting to include EPA. Baggiore encouraged Tribes to reach out to EPA. At this point, EPA does not seem to have information to share with the state and Tribes.
- Baggiore said that an assessment of included waters under WOTUS will need to occur.
- ADEQ intends to move forward with a state-level program to protect Arizona surface waters, which is consistent with the environmental work with which the department is tasked.
- If authorized by the Arizona Legislature, Arizona can adopt more stringent water quality goals.
- ADEQ cannot apply the CWA rule, but can develop a state surface water program.

## **GUIDING PRINCIPLES**

Gunn reviewed the concept of guiding principles as essentially design criteria that should be included in creating a state program. She asked attendees to consider the guiding principles drafted from input at the November 2019 meetings, and to note suggestions for additional principles. Highlights of comments and questions included:

- The jurisdictional question for ADEQ’s purpose has to get resolved on the state site – no position is not a position. The law does not support the position of no action as being defensible. Urge ADEQ to make progress on that opinion.

- Agree to have a base state program regardless of WOTUS change.
- Difficulty we all face is that the changes are still a hypothetical, and may remain tied up in litigation.
- If there is a stay, will you continue to pursue a state program?
- Treatment as a state differs from Clean Water Act.

ADEQ staff members said that ADEQ intends to pursue a state program and sees value for the state in doing so.

### **PARADIGM SHIFT**

Osterberg explained shifting the paradigm to a consideration of the water uses that the state might want to protect. She asked attendees to consider: *Might looking at uses, impacts and risk be a better fit for protecting Arizona's waters.*

Gunn asked the group how to determine what gets regulated. Protecting uses, rather than types of waters, may address connectivity concerns.

Highlights of discussion regarding the regulatory approach included:

- Qualifiers to the air quality approach is that air is continuous, with significant mixing, and does not have defined borders. Water is more segmented, indoor air versus ambient air would be more comparable. There are general liability triggers that could come into effect for public safety.
- Even if all water is considered continual, this may not be an effective approach. To have effective results, must be specific about the requirements.
- Already have tools such as anti-degradation regulations, OAW, mixing zones, natural background variances, toxicity testing.
- Could duplicate the CWA and tools in the current surface water quality standards approach.
- Is there an APP comparison that would apply?
- Caution this process to not erase the Clean Water Act and recreate what has already been done. The pollutants are profiled with great understanding of harm.

### **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
- June 2020: draft program outline for stakeholder input

Highlights of stakeholder comments included:

- Requests for consultation often go to leadership, and would request ADEQ send duplicate letters to environmental representatives as well as leadership.

Baggiore said the department recognizes that a Tribal workgroup would need to be run differently than other technical working groups.

Drago said that he has received consultation requests from a few Tribes and would like to consult on this issue, as well as the tribal consultation policy. He thanked representatives for participating in the meeting. Attendees were asked to return meeting evaluation surveys; however, only one evaluation was received.

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

NAME	ORGANIZATION

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