

Arizona Surface Water Quality Program: Stakeholder Advisory Group

Meeting: #5

Date: June 3, 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 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
- Salt River Project
- The Nature Conservancy
- Water for Arizona Coalition
- Arizona Municipal Water Users Association
- League of Arizona Cities and Towns

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ADEQ Staff

- Misael Cabrera
- Trevor Baggio
- Rhona Mallea
- Ben Bryce
- Krista Osterberg
- Deborah Birutis

Member

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

Alternate

- Jason Moyes
- Chelsea McQuire
- Scott Thomas
- Steve Trussell
- Craig Sullivan
- Scott Deeny
- Joan Card
- Mia Hammersley
- Rob Anderson
- Mike Ford
- Holly Pearen
- Vince Lorefice
- Mike Denby
- Stacey James
- Cindy Blackmore
- Tricia Balluff
- Bob Hollander

Consultant Support

- Theresa Gunn, GCI
- Kelly Cairo, GCI

Introductions

Trevor Baggione, Director ADEQ Water Quality Division, welcomed attendees and facilitated introductions.

Review Agenda/Review Action Items

Highlights of Trevor's review included:

- WOTUS Litigation and Legislation Update
 - Navigable Waters Protection Rule becomes effective June 22.
 - Tracking eight lawsuits challenging the rule. Five claim the rule is too narrow violates the federal Administrative Procedures Act; three claim the rule is too broad and unconstitutionally vague
 - California v. Wheeler requests a nationwide stay, with a hearing scheduled June 18
 - New Mexico Cattle Growers Association is also seeking an injunction, but does not anticipate briefings filed before July 7
 - In Congress, Rep. DeFazio introduced H.R. 6745, the Clean Water for All Act. The bill would prohibit implementation of the rule, and require EPA and USACE to define WOTUS to include waters that affect traditionally navigable and interstate waters
- *Arizona Republic* article
 - Trevor said that the article does not accurately reflect the value of these meetings
 - SAG members are welcomed and encouraged to discuss the content of the meetings with your members and networks and bring feedback/input to the SAG discussion
- Standards Kaizen
 - Meeting is not yet scheduled and additional information will be sent prior to the Kaizen
 - Kaizen will review technical pieces ADEQ is preparing – will be a technical/legal discussion
 - Purpose is to understand the statute for setting state standards, which requires analysis of economic, social and environmental impacts
- Reminders:
 - We want you to discuss openly and freely
 - You are not speaking on behalf of your organization

Potential Permitting Process

Krista Osterberg, ADEQ Water Quality Division, said that at the last meeting, ADEQ presented a potential permitting process with the intent was to work through different scenarios to better understand how effective this approach could be. However, staff members realized additional discussion regarding how designated uses should be applied to waters was needed. Unless we understand where a designated applies, we cannot answer the first part of the process.

Krista presented a flowchart of the potential permitting process and requested any initial thoughts on the process.

Member Questions/Discussion:

- In the first box, what is considered a “discharge”? Think it's important to clearly define the term. Would like a list of activities that constitute a discharge and therefore would move through the flowchart. What about an ATV driving across the desert? Want to avoid a court down the road creating this definition.

- Trevor said this term is not yet defined. Some things are clearly a discharge, such as a discharge from a wastewater treatment plant.
- How would connectivity work in determining the uses?
- How would cumulative impacts be factored into the flow chart?
 - Krista said that “potentially exceed WQS” would allow for this consideration. This will need to be considered when delving into the next level of detail
- Will a discharge or a use drive this program? Will need the distinction and how to balance these items
 - Trevor said that the goal is to provide a radically simple program. Will talk more about uses today
- Like the permit approach. Location of discharge will need to be a consideration. Also, want to encourage recharge
- What about impairing a protected use?
 - Krista said that we will want to discuss threshold and severity of the impact
- Surface water quality standards include a uses framework. Is ADEQ contemplating a change to the standard?
 - Krista said these standards only apply to WOTUS. This topic will be discussed as part of the standards Kaizen. Looking at standards for non-WOTUS waters
- Will need to define list of minimal or no-impact activities
 - Trevor said that the Clean Air Act includes this type of list
- Water bodies often have multiple uses
- Mixing zones will need to be considered
- Might be difficult to avoid definitions because it might bring in additional unwanted activities.
- Perhaps consider a tiered approach. Whether a discharge reaches a protected use in a modeling approach may take away from the desired simplicity
- Is there an example of an ephemeral stream that we would not want to protect for partial body contact and why?
 - Topic will be discussed later in the agenda
- How can we provide more clarity for smaller dischargers? Under the CAA, the dischargers tend to be large facilities
 - Trevor said roughly 50 large, and 500 small dischargers are regulated under the CAA. There is a list of activities not regulated, such as an individual’s use of spray paint

ADEQ Director Misael Cabrera said that under the CWA, whether a permit is needed is based on a definition, and is a binary system. He explained that the department is trying to require permits only when there is a potential impact, using science and standards to make this determination. Questions to be considered include: *Is the discharge reaching a use that should be protected? If so, would there be an impact?* He said the department is attempting to emulate other types of environmental laws and avoid decades of arguments regarding definitions.

Flow vs. Use

Krista reviewed examples of differing uses of perennial, intermittent and ephemeral waters. She said that uses and threats go beyond consideration of flow regime. Much discussion occurs around the topic of ephemerals because they represent an unanswered question. She noted that although ephemeral stream are excluded under the new definition, downstream uses remain protected.

Trevor asked the group to consider different uses of perennial, intermittent and ephemeral waters.

Member Questions/Discussion:

- Appreciate why the department is focusing on uses
- Ephemerals – this is where connectivity becomes very important. Need to take care especially related to connectivity to drinking water
- Like the concept of impact to a use. If I discharge onto the ground, how do I know if it makes it to a water? How do I know, especially if my activity does not occur near a water body?
 - Trevor agreed that this will require additional thought. Krista noted ADEQ does not intend to apply uses to land
- Agree with looking at the direct discharges
- It is likely ephemerals should not allow for partial-body contact
- Seems most waters have aquatic or wildlife uses, and we cannot control for where migratory birds land. Which waters would *not* have an aquatic or wildlife use?
 - Krista said a process will need to be determined
- Pristine areas may need additional protection, particularly in areas outside of canals
- When connectivity is involved, ephemerals are an important consideration
- How do you define use for each of the ephemeral washes? Needs to be clear to the permittee
- Connectivity-based approach for ephemerals may be helpful. Thinking about a discharge in an ephemeral, a flood event brings pollutants to other water bodies

Trevor asked the group to consider whether all ephemeral waters have the same uses, and what criteria might be considered when determining which uses are appropriate.

Member Questions/Discussion:

- In Appendix B, ephemeral waters are sometimes treated as having aquatic and wildlife use. Many more do not have these uses applied. How will ADEQ identify those with aquatic and wildlife uses?
 - Krista said that there is also a tributary rule that is more of a blanket-approach. Developed for an acute event. Also have an effluent-dependent water standard.
- Appendix B may be a good starting point. Ephemerals are a gradient. Think we will work through some of these details, including EDWs, in Kaizen event.
 - Misael said that this is why CWA and WOTUS definition have been contested and debated. The CAA recognizes extraordinary events such as haboobs and dust storms
- Not sure monsoon waters should be considered an exceptional event, since they are normal to Arizona
- The indirect discharge/402 approach requires consideration if the ephemeral leads to a lake. Believe this should be regulated in some way
- Disagree with regulated indirect discharges. Could create a burdensome, unenforceable program. Makes it hard to answer the regulated community's question: *Am I in or am I out?*
- What would protect waters from indirect discharges?
- Do not want to go upstream to a dry wash to look at activities. Indirect approach would move us into WOTUS territory
- A direct discharge, such a dumping a pollutant into a wash, would be regulated
- Seems these types of discharges would be captured under other programs such as APP

- Staff noted that illegal dumping and other programs would cover certain activities. Issue may need further exploration
- When regulators try to anticipate far-reaching scenarios and apply them universally, leads to over regulation
- APP allows certain exclusions if covered by a 402 permit
- Some ephemerals might have uses we would protect; think most would not
- Concerned about specific named segments of some ephemeral streams listed in Appendix B. Would be appropriate for the Kaizen to explore. How were these 90 segments identified?
 - Previously argued for Williams and Valley Wash not to be included on that list
 - This may be the kind of discussion needed regarding ephemerals
 - Think this makes sense. Believe some on the list were changed from perennial/intermittent
 - Identifying how those waters were selected to be added to this list would be helpful
 - Don't agree with the process used; believe some were included due to definitions
 - Uses appropriate for ephemeral streams will illuminate this issue. Can't consider in isolation
 - How will the program treat downstream uses? Think ephemerals will be a great way to explore this concern
 - Believe majority of Appendix B waters do not support aquatic and wildlife uses; full-body contact
 - May be a gradient of where ephemeral waters affect areas with a riparian habit
 - Krista said that some regulators have a check list for field visits in making this determination, others use a blanket-approach

The Path Forward

Trevor said that SAG members have provided great input for consideration. Staff will be developing a program outline (not writing a rule) as a means to consolidate ADEQ's potential program to aid in moving forward. During this time, SAG meetings will be paused to begin to draft the program outline and conduct stakeholder meetings to gain broader input.

Member Questions/Discussion:

- Will there be a tribal information session?
 - Staff said they anticipate the need to continue to conduct remote meetings and will engage tribes in this manner
- Could you consider an approach to define discharge, yet still have a use-based approach? Permittees need more certainty to clearly understand whether a discharge is included under the new program
 - Trevor clarified that a discharge definition would be appropriate

Next Steps and Adjourn

Trevor said that the SAG should expect to meet next toward the end of July. He expressed his appreciation for members of the group spending time contributing to this process.

Theresa Gunn, facilitator, requested that attendees complete meeting evaluations which contains additional questions about the potential program.