

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

**DATE:** Nov. 7, 2019

**TIME:** 1:30-3:30 p.m.

**LOCATION:** Coconino Community College, Board Room, 2800 S. Lone Tree Road, Flagstaff

### STAKEHOLDER ATTENDEES (Attached)

#### ADEQ STAFF

Trevor Baggiore  
Justin Bern  
Ben Bryce  
Len Drago  
David Lelsz  
Rhona Mallea  
Krista Osterberg  
Meghan Smart  
Patti Spindler

### ADDITIONAL ATTENDEES

Kelly Cairo, GCI  
Theresa Gunn, GCI

### AGENDA

The complete agenda is available online and includes:

- Welcome
- Review Agenda and Introductions
- Overview of the WOTUS Rule change
- Listening Session
- Next Steps

### WELCOME

ADEQ Water Quality Division Director Trevor Baggiore welcomed attendees and thanked them for participating. He introduced the welcome message (available at <https://www.youtube.com/watch?v=qPHMxe1Bqus&feature=youtu.be>) from ADEQ Director Misael Cabrera.

### REVIEW AGENDA AND INTRODUCTIONS

Len Drago thanked attendees for their participation and facilitated introductions. At least 13 stakeholders attended the meeting, with at least 12 participating in person and one via webinar. Some stakeholders may not have provided their names.

He explained that this meeting is a listening session to hear from tribal participants on their concerns related to Waters of Arizona (WOAZ).

## OVERVIEW OF THE WOTUS RULE CHANGE

Baggiore presented a need for a Waters of Arizona Program. He explained that the presentation is designed to provide background information about the expected WOTUS rule change, and that the purpose of the meeting was to hear from tribes. He pointed out the definitions handout, and encouraged attendees to ask questions about any terms. Highlights of comments, questions, and responses included:

- EPA expects the final rule to be issued in January, and it would go into effect 60 days later.
- (Question): If groundwater was injected with pollution, would it be unprotected? (Response): Arizona's Aquifer Protection Permit (APP) program regulates discharges to the aquifer to protect human health.
- (Question): The Navajo Nation took a strong stance with the EPA against the proposed rule and the exclusions. What was the state of Arizona's position? (Response): Arizona does not have control over the federal government. Governor Ducey supported the rule, noting that he looked forward to creating an Arizona rule to protect Arizona waters. Baggiore said that he appreciated that the governor recognized waters in Arizona would require regulation.
- (Question): Which lakes will be affected? (Response): There has not been a comprehensive assessment to determine what is considered a traditionally navigable water (TNW). Two segments of the Santa Cruz and two segments of the Gila River are TNWs. Other waters, such as the Colorado River, are considered TNWs, but have not been officially identified as such.
- ADEQ recognizes that there will be a gap. Tribal nations are in a similar situation. As these federal changes will impact all of us, ADEQ wants input regarding how to protect these waters.
- (Question): The Navajo Nation has a clean water act which includes a definition of waters of the Navajo Nation. Has Arizona considered creating a state of Arizona clean water act or something similar? (Response): ADEQ currently has the authority to set surface water quality standards for waters of the state. The challenge is to define waters of the state and implement rules regarding permitting and enforcement.
- Other states have used waters of the state regulations to protect all waters, and some waters have additional status as WOTUS.
  - (Comment): Navajo has permitting authority for Section 401, much of it depends on who the nation is permitting.
  - (Comment): Navajo Nation and ADEQ have both used templates from each other in developing language.
  - Action item: ADEQ to follow up offline with Oliver Whaley, who is the expert on Navajo Nation water quality permits.
- (Comment): Waters in the Navajo watershed have to meet downwater water quality standards.
- One approach is to ensure that pieces of the CWA that are working well are mirrored in a state program.
- (Question): With tribal entities as a sovereign nation, how will ADEQ handle its authority? (Response): We will need to design a program recognizing this fact, and would appreciate input on how to design such a program.
- (Comment): Outcomes from the Gold King mine spill should be examined.
- The anticipated WOTUS definition will shrink the 404 program, AZPDES permitting, and exclude many lakes and streams. The question is, *How should Arizona protect these waters?* Tribes that do not have a clean water act will need to make a similar determination.

## LISTENING SESSION

Drago recognized the Water Quality Division for initiating these meetings prior to the final rule announcement. He asked attendees to consider the water protections that will be lost and how to address this change.

Highlights of attendees' questions and comments include:

- There is a massive abrogation of federal trust responsibilities by the federal government. I anticipate a lawsuit against the federal government.
- The department's response regarding this loss of WOTUS is not helpful.
- It's hard to see how we will have equal protection under a state program.
- What is the state's position?
  - ADEQ wants input in creating a program, not feedback on a proposed program.
- Suggest spelling out in slides what CWA authorities go away for non-WOTUS waters?
- You mentioned Oregon's program was efficient, but there were concerns about cost.
  - Baggiore clarified that cost was not identified as an issue.
- Does ADEQ have authority to develop state standards?
  - Yes.
- Use the CWA standards for Arizona Waters
- Look at antidegradation policy on which waters to protect.
- What is the status of tribal policy?
- Opportunity to re-evaluate how permits are issued and to create efficiencies.
- What does "authority if needed" mean?
- Why change the WOTUS definition? Why not change it back?
  - Arizona leadership supports the change. The state wants to develop a state program that protects waters. A benefit is to no longer be subject to federal changes.
- How does the state see itself during the gap? If the state doesn't act quickly it is creating damage to a neighbor and therefore creates a risk.
- The rule change doesn't add clarity, it creates risk.
- Would like to see a one-page rationale as to why to change the rule and the benefits of the change. This could be used for the tribes to review and put the changes into context.
- Suggest APP cover discharges.
- How will ADEQ meet individually with tribes? Has this process been initiated?
  - ADEQ will meet with tribes upon request and through continued listening sessions and outreach efforts. Extensive outreach has occurred.
- How will the state address ancestral waters? There is an ADOT program that is a delegation of a federal program that could serve as an example.
  - We are not certain how this process would work under a non-federal program such as Waters of Arizona. This would be an opportunity to collaborate on common desires to protect Arizona waters. Also, the opportunity to identify areas not working well under the CWA and craft a better rule.
- When will you visit?
  - Action item: Drago to contact White Mountain Apache representatives offline.

- What kind of response are you getting from industry?
  - No one has indicated ADEQ should *not* have a WOAZ program. Haven't yet discussed *how* this will occur.
- Is ADEQ against the WOTUS change? What does ADEQ get out of this?
  - ADEQ is not against the change and the governor does support it. The goal is to see that Arizona waters are protected.
- I would argue that the ability to set standards could extend in other ways, such as regulations and enforcement.
- Arizona could be subject to huge liability with the WOTUS rule change.
- If ADEQ can do a better job of protecting water I'd support it. However, I haven't seen this yet.

#### **NEXT STEPS**

Baggiore reviewed the timeline for next steps. The WOTUS changes are expected to become effective in late spring, 2020.

- February 2020: meeting summaries
- June 2020: ADEQ program outline available
- July 2021: Statutory authority process if needed
- 2021: Collaborative program development
- 2023: State program effective

#### **ADEQ ACTION ITEMS**

- ADEQ to follow up offline with Oliver Whaley regarding Navajo Nation water quality permits.
- Drago to contact White Mountain Apache representatives offline for tribal consultation.

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

<b>NAME</b>	<b>ORGANIZATION</b>
<b>ETHIC ANDERSON</b>	Navajo Nation EPA Water Quality Program
<b>PETER BUNGART</b>	Hualapai Tribe
<b>THERESE CARPENTER</b>	USACE
<b>JACK CONOVALOFF</b>	San Juan Southern Paiute Tribe
<b>IDA COSAY</b>	White Mountain Apache Tribe / Water Resources
<b>JAVIS DAVIS</b>	White Mountain Apache Tribe / Water Resources
<b>MEGAN KELLY</b>	Grand Canyon Trust
<b>CLAYTON LUPE</b>	White Mountain Apache Tribe / Water Resources
<b>AMY MIGUELLE</b>	WMAT
<b>KRISTIN MILLER</b>	ETD Inc.
<b>JOHN NYSTEDT</b>	U.S. Fish and Wildlife Service
<b>ERIC RICH</b>	Navajo Nation EPA Water Quality Program
<b>EUNICE TSO</b>	ETD Inc.

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