

ADEQ WATER QUALITY DIVISION AZPDES PERMIT UPDATE MEETING STAKEHOLDER MEETING SUMMARY

DATE: June 15, 2020

TIME: 1-3 p.m.

LOCATION: Webinar

ADEQ STAFF

Trevor Baggiore

Justin Bern

Ben Bryce

David Lelsz

Chris Montague-Breakwell

Morgan O'Connor

Krista Osterberg

Leigh Padgitt

Amanda Stone

ADDITIONAL ATTENDEES

Kelly Cairo, GCI

Theresa Gunn, GCI

AGENDA

The complete agenda¹ is available online and includes:

- Welcome
- Review Agenda and Introductions
- Update on Legal Challenges to Rule
- Navigable Water Protection Rule Update
- ADEQ Program Updates
- Permit Updates
- Update: Surface Water Quality Protection Program
- Next Steps

WELCOME

ADEQ Water Quality Division Director Trevor Baggiore welcomed attendees. He explained the purpose of the meeting is to provide an update on permit status post-implementation of the federal rule change. He said ADEQ will continue to communicate what the department knows, when they know it.

REVIEW AGENDA AND INTRODUCTIONS

Facilitator Theresa Gunn reviewed webinar procedures and the agenda. She directed attendees to use the audience question feature. She explained questions will be grouped by topic and that specific permit questions will not be able to be addressed at this meeting. At least 378 stakeholders attended the webinar. Some attendees may have participated as a group using one registration.

UPDATE ON LEGAL CHALLENGES TO RULE

Ben Bryce, legal specialist, provided an overview on legal challenges to the rule. Highlights include:

- There are currently eight lawsuits challenging the rule²
- 41 states either defend or oppose the rule.

¹ <https://azdeq.gov/wotus-notice>

² This number is likely to change over the course of time

- Three cases involve a motion to enjoin the rule, which would effectively stop the rule before it goes into effect on June 22, 2020 or enjoin the rule after the scheduled effective date.³

Highlights of stakeholder comments, questions, and responses included:

- Is Colorado opposing? (Response): Yes, Colorado is opposing the rule.
- Will the State of Arizona be filing anything with the courts? (Response): Arizona is not involved in current lawsuits and was not invited to join lawsuits. At this time, Arizona is waiting to see what happens prior to joining any lawsuit.
- Could this issue go to the Supreme Court? (Response): Yes, this issue could go to the Supreme Court. However, court proceedings are in the early stages.
- Would the California decision apply to Arizona, because we are in that court district? (Response): The California filing requested a nationwide injunction. Last week, the court requested detail on why a nationwide injunction would be appropriate.⁴

NAVIGABLE WATER PROTECTION RULE UPDATE

Justin Bern, Surface Water Quality Protection Manager, reviewed the navigable waters protection rule (NWPR), which is expected to become effective June 22, 2020.

Presentation highlights included:

- NWPR was intended to focus on permanent waters.
- Exclusions to the new rule include ephemeral streams, wetlands, ponds, ditches, prior-converted croplands, and groundwater.
- Ephemeral breaks may sever jurisdiction of upstream waters. This is determined by answering the question: *Is flow conveyed through the ephemeral break to a TNW in a “typical year”?* If flow is NOT conveyed in a typical year, jurisdiction of upstream perennial and intermittent waters may be severed. The ephemeral break itself is not subject to jurisdiction.
- A TNW is not necessarily a jurisdictional water.
- Once the rule is effective, permittees must decide whether to terminate their permit, considering their individual circumstances and risks.
 - In the past, many states and cities that have sued permittees upon termination.
 - If a permittee terminates their permit, and then rule is stayed, enjoined, or rescinded, a consequence will be the need to reapply for a permit, associated permit fees, and potential lack of compliance with CWA.
- ADEQ will not unilaterally terminate permits.
- If a permittee terminates a permit, ADEQ will communicate potential concerns with the permittee.
- Following effective date of new rule, ADEQ will continue to enforce CWA authorities.

Highlights of stakeholder comments and questions included:

³ In *California v. Wheeler*, a nation-wide injunction or stay was denied on June 19, 2020. In *Colorado v. EPA*, the court granted a stay of the Navigable Waters Protection Rule, but only within Colorado. As of 6/22/2020, the rule is effective in the rest of the country.

⁴ Injunction denied

- Are effluent-dependent water (EDW) bodies included? (Response): If the EDW is an ephemeral reach, the ephemeral reach is not an included water body.⁵
- Are areas of the Santa Cruz river that are not intermittent or perennial non-jurisdictional, even though it has been determined a TNW? (Response): The ephemeral reaches will not be jurisdictional. TNW termination is not sufficient to establish jurisdiction. Ephemeral features are not jurisdictional regardless of their status as TNWs. Perennial and Intermittent reaches that are severed by an ephemeral may or may not be WOTUS, and will depend on whether they contribute flow either directly or indirectly to a TNW in a typical year. Perennial and intermittent reaches downstream of an ephemeral break and connected to a TNW are WOTUS.
- Who will determine jurisdictional status of water once the new rule becomes effective? (Response): EPA did not provide clear direction at a June 9 webinar. EPA and the US Army Corps of Engineers have an MOA and both retain the ability to make the determination. EPA has authority and acknowledges that they will abide by Corps recommendations. ADEQ is working to determine how the state will fit into this process.
- What will be effluent's role? (Response): It is not clear how the EPA and Corps intended this to work in the preamble. The text of the rule seems to show EDWs are meant to be jurisdictional if they meet the definition of a jurisdictional water in the rule. EDW status neither establishes or de-establishes jurisdictional status. ADEQ is seeking guidance from the federal government on application of the rule.

ADEQ PROGRAM UPDATES

David Lelsz, Project Manager, explained that ADEQ is working to develop plans to determine:

- Traditional Navigable Waters
- Typical year analysis
- Revising the flow regime map
- Executing the communications plan to update permittees

Highlights of his presentation included:

- There are currently 4 TNWs identified in Arizona.
- Seeking guidance from EPA and Corps.
- ADEQ will conduct a vigorous stakeholder outreach regarding TNWs.
- The Corps is conducting a determination for a segment of the Salt River. ADEQ will communicate what it learns from the Corps.
- ADEQ has seen confusion about flows across an ephemeral break. Additional guidance has been promised at the federal level. ADEQ has looked at alternatives in preparation of receiving guidance and will conduct a rigorous stakeholder process.
- EPA and Corps have had webinars with states and tribes. Recommend stakeholders participate in these events.

Highlights of stakeholder comments and questions included:

⁵ This response was clarified in this same meeting. An EDW may be a jurisdictional water if it meets the definition of a jurisdictional water in the new rule. Indeed, the preamble of the rule noted that the EPA and USACE anticipated that EDWs could be jurisdictional.

- What is the status on receiving guidance from EPA? (Response): On or about June 22, ADEQ expects to receive guidance on typical year analysis and how to determine and apply this portion of the rule, including stream/dam assessment.⁶
- Is there a flow regime map? (Response): Yes.⁷
 - Action item: ADEQ to make flow regime map available to after it has been reviewed by leadership
- Is there a list of TNWs the Corps is working on? (Response): The Salt River, Granite Reef Dam area is the only water.
 - Action item: ADEQ to provide link to the Corps list of 4 TNWs.⁸
- Will there be a public involvement component when determining TNWs? (Response): While the Corps does not require a public process, we do not know of a prohibition, and we not know if they would do so voluntarily. The Corps has said that there is not a standard for how to request TNW determination.
- How often will the typical year analysis be revisited? (Response): This is question is open to a public process should ADEQ determined to be receive responsibility.
- Will there be a list or map of jurisdictional waters? (Response): We believe it will be important to provide a list, if possible. While ADEQ would like to offer a map for clarity, it is uncertain whether this can be achieved.⁹ ADEQ is committed to an associated public process on our listing of jurisdictional waters.

PERMIT UPDATES

Chris Montague-Breakwell, Unit Manager, reviewed the termination process and permit amendments.

Presentation highlights included:

- ADEQ will continue to enforce its CWA authorities by:
 - Enforcing permit conditions
 - Performing inspections
 - Issuing permits
- If a permittee decides to terminate a permit:
 - NOTs available in myDEQ (MSGP, CGP, DMGP)
 - Paper NOTs (Phase II MS4s and PGP)
 - Termination Paper Form (individual permits)
- ADEQ will communicate any updates to the effective date of the new rule.

Highlights of stakeholder comments and questions included:

- For individual AZPDES permit renewals specifically for discharges to ephemeral waters approved after the effective date of the NWPR, and until such time as litigation on the merits of the NWPR is concluded, will ADEQ consider entering into agreements with applicants that toll the statutes of

⁶ As of 6/30/2020 ADEQ has not received that guidance

⁷ Note that this flow regime map does not employ the method of flow regime determinations specified in the rule. Rather, this shows ADEQ current understanding of flow regimes in the state, and areas where additional data is needed.

⁸ <https://www.spl.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Traditional-Navigable-Waters/>

⁹ Note that the EPA and USACE have indicated that it is not currently possible to create any such map. However, the federal government is undertaking efforts to create a comprehensive, WOTUS-mapping tool. For more, see the Mapping and the Navigable Waters Protection Rule Fact Sheet at https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_mapping.pdf.

limitations on appealing the renewal decisions, specifically on the issue of whether AZPDES regulation of such discharges is appropriate? (Response): This will need to be considered. If the permit is determined to no longer be needed, it would be available to terminate.

- Are MS4s able to terminate portions of their urbanized area if it does not discharge into a WOTUS under the new rule? (Response): The area covered by the permit may shrink. It is not necessary to submit termination on sections. MS4 permit holders can remove outfalls through permit modification.
- ADEQ is in the process of reissuing Phase I MS4 permits.
- Has anyone terminated their permit? (Response): The rule is not yet effective. ADEQ has received questions on how permittees would do so.
- Why are there still requirements to sample discharges to non-jurisdiction ephemeral streams? (Response): There is a risk of CWA liability, including EPA enforcement and citizen lawsuits. There is a want and need for a functioning termination process if the rule becomes/remains effective. It would also be prudent to submit for less testing.
- Will there be an official statement from ADEQ regarding their enforcement of the CWA? (Response): ADEQ will continue to enforce the CWA. Each permit is the responsibility of the permittee to continue to meet its obligations.

UPDATES: SURFACE WATER QUALITY PROTECTION PROGRAM

Krista Osterberg, Senior Program Manager explained that the department is considering the kind of program that will be needed at the state level to protect Arizona's non-WOTUS waters. ADEQ is working with a broad stakeholder advisory group to better understand potential issues. These meetings are paused until late July. ADEQ is currently creating a program outline. In July, the department will conduct stakeholder and tribal meetings to seek input on this program outline.

Krista encouraged those interested to subscribe to the email notification list or contact watersofarizona@azdeq.gov for information.

Highlights of stakeholder comments and questions included:

- Has ADEQ revisited the potential impacts to waters in the state? ADEQ previously stated that approximately 95 percent of waters would be affected based on the proposed rule? (Response): The final rule differed from the proposed rule, and will be based on typical year analysis. ADEQ is awaiting EPA/Corps guidance.
- When do you expect funding impacts? (Response): ADEQ does not expect major changes
 - PPG – no indication of anticipated changes.
 - 106 – nothing in the funding equation is affected by the definition change. A portion of 106 funding relies on the number of impaired waters and may impact the state, with perhaps a \$100,000-200,000 reduction.
 - Nonpoint source grant – nothing in the funding equation affected by the definition change.
 - 319 grants – NRCS/EPA don't know if impacts. Have in writing that NPS dollars can be used for any waters of the state. The focus is to remove impairments from WOTUS.
- SPCC requirements are going away for most of state because of WOTUS rule change. Is there any intention for ADEQ to implement an SPCC program for waters of Arizona? Any guidance on SPCC? (Response): Not something we have specifically discussed.

- Do you intend to use the advisory group to develop the program? (Response): The stakeholder advisory group is not a decision-making body. ADEQ is using this group to explore how this kind of program would function.

Highlights of stakeholder comments and questions on “What we Don’t know” slide included:

- How are TNW and WOTUS different? (Response): A TNW is a water that is, has been, or is susceptible to use in interstate commerce. TNWs are essentially the jurisdictional anchor for the navigable waters protection rule. Tributaries to TNWs may be jurisdictional/WOTUS due to their ties to TNWs.
- Monsoon rains are every bit as regular as snowmelts. (Response): This is not ADEQ’s rule. This is a question that was brought up to EPA and USACE and rejected.
- Please explain the question mark on the upstream lake or pond. (Response): A jurisdictional lake or pond must be anchored by TNW with the connection/flow conveyed during a typical year. The ephemeral break can potentially sever connection with the TNW. Permit holders should discuss these nuances to the rule with ADEQ.
- Has ADEQ started looking at questionable areas such as Planet Ranch between Alamo Lake and Bill Williams NWR? (Response): Staff is not aware whether there is an investigation of this water.
- What is ADEQ's plan to come to a conclusion on the ephemeral breaks and what they mean for WOTUS? (Response): ADEQ will take any and all advice from the Corps and EPA, conduct in-house analysis, and bring the overall question to stakeholders as a public process. We do not yet have timeline for this process.
- If the ADEQ Flow Regime Map lists a water as perennial, does that mean it is a WOTUS? (Response): Flow regime maps are available on emaps, and are not a formal jurisdictional determination.
- What is a typical year? (Response): A typical year is defined by rule. It can be seasonal or annually based over a 30-year period.
- If a facility discharges intermittently to an ephemeral water during a particular part of the year, would that water potentially be jurisdictional? (Response): Facility discharge to an ephemeral could be jurisdictional.
- Who approves typical year conditions? (Response): We believe it should be ADEQ, however, options need to be explored.
- Can you amend a permit to automatically terminate when the rule is resolved? (Response): No. ADEQ is not planning to amend permits to auto-terminate.
- When completing the NOI process and answering the question, "Will your facility's discharge reach WOTUS?" would myDEQ consider having an interactive tool to show “Yes/No.” That way, if an agency was ever in question, documentation would be available to demonstrate due diligence. (Response): ADEQ is working on maps for WOTUS. We don’t have a comprehensive map for post-June 22. We would like to be able to offer this.
- The 2020 CGP had language that the permit regulates discharges to surface waters. Is ADEQ enforcing AZPDES differently from the NPDES that regulates discharges to WOTUS? (Response): No, we believe the 2020 CGP considers surface water a WOTUS.
- Can you modify the number of outfalls on your MS4 annual report? (Response): Yes. Phase I permits specify latitude/longitude. ADEQ plans to update this for additional flexibility.

- Is ADEQ requiring the subjects, where construction activities as defined in the Appendix A of the 2020 CGP and have potential to discharge in ANY surface waters in Arizona , to get coverage under the 2020 CGP, even though the subject's activities might not discharge in a WOTUS?? (Response): This will be required if the discharge is to a WOTUS.
- Will there be any changes for OAWs? (Response): OAWs are defined within the surface water quality rule, which are defined as WOTUS. Any water no longer a WOTUS would be not eligible to be an OAW.
- Will the state permit program be fee-driven only, or are there other sources of potential funding? (Response): We haven't answered this question yet. This level of detail will be sought from stakeholders at a future point in the process.
- Have the agencies proposed a definition of "groundwater" as it relates to the new WOTUS rule? Would subsurface/hyporheic flow be considered groundwater or surface water, particularly as it relates to an ephemeral vs intermittent flow regime or contributing flow in a "typical year"? (Response): We do not believe this definition is included. We will need to see how hyporheic flow is differentiated from ground water. The rule applies to all covered by the CWA, as this is a nationwide act. The Maui case held that while groundwater is not covered by CWA, discharges to groundwater may be functionally equivalent.
- If there is an injunction, what is the time frame for it to go to Supreme Court? (Response): A preliminary injunction occurs when courts stop the rule before the case can be heard. If a case then fails, the rule goes into effect and the parties may choose to go to Supreme Court. Alternatively, a court may strike down a rule, which could be appealed at the Supreme Court level.
- A rolling 30-year analysis would help define and ensure ADEQ agrees if the ephemeral break is jurisdictional or not, correct? (Response): Even if an ephemeral break conveys water during a typical year, the ephemeral portion would not be jurisdictional.

Highlights of additional staff comments included:

- If a permittee terminates a permit it cannot be reinstated. The permittee would need to reapply for a permit and go through permit process again.
- Action item: ADEQ to update slides with links.¹⁰

NEXT STEPS

The program timeline includes

- June 2020: begin program outline
- July 2020: stakeholder meetings
- August 2020: initial program outline
- Fall 2020: key program elements
- July 2021: seek statutory authority if needed
- Fall 2021: program development
- 2022: rule drafting

¹⁰ Complete. https://static.azdeq.gov/wqd/wotus/june2020_permittee_presentation.pdf

- 2023: implementation

Stakeholders were encouraged to email watersofarizona@azdeq and visit azdeq.gov/woaz for more information.

Baggiore thanked attendees for their participation. He said that he appreciates the questions, want to provide all information so that permittees can be in compliance.

ACTION ITEMS

- ADEQ to make flow regime map available to all.¹¹
- ADEQ to provide link to the Corps list of 4 TNWs.¹²
- ADEQ to update slides with links.¹³

¹¹ ADEQ will release the updated flow regime once reviewed and approved by ADEQ leadership

¹² <https://www.spl.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Traditional-Navigable-Waters/>

¹³ Posted to <https://azdeq.gov/permittee-meeting-resources>