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December 21, 2020

Arizona DEQ Proposes Final Contours and Draft Legislation for Surface Water Protection Program

The Arizona Department of Environmental Quality updated stakeholders on December 15, 2020, regarding the final elements of its proposed state Surface Water Protection Program and solicited feedback on the draft legislation for the program. ADEQ originally introduced this proposed program at a stakeholder webinar on November 6, 2020, the details of which can be found in [our prior update](#).

The proposed program would regulate certain state surface waters—including some that are newly excluded from the regulatory scope of the federal Clean Water Act. Protected state waters would be limited to those that ADEQ designates on the Protected Waters List. ADEQ's draft list, as well as the other components of the proposed program, are detailed in the program's draft legislation that ADEQ released on December 4, 2020.

Although the contours of the proposed program remain largely consistent with ADEQ's [initial proposal](#) from November 6, 2020, ADEQ provided details and clarity surrounding which waters would and would not be protected and the criteria for those determinations, the listing and delisting process, and the water quality standards to be used. ADEQ also proposed a potential new program component regarding dredge and fill activities.

ADEQ's Defined Listing Criteria for Protected and Unprotected State Water

The draft legislation proposes defined criteria for protected and unprotected state waters, where waters would be divided into three categories:

- **"Shall List" Waters:** These waters must be protected by the program, and would include:
 - All navigable waterways
 - Arizona's eight major rivers, including their perennial, intermittent, or ephemeral mainstem reaches
 - Drinking water sources
 - Public waters used for recreation or for fish consumption
- **"Shall Not List" Waters:** These waters would be categorically excluded from the program, and would include:
 - Ephemeral features (excluding the ephemeral mainstem portions of the eight major rivers as described in 1(b) above)
 - However, *discharges to* ephemeral features are not categorically excluded from the scope of the program: ADEQ clarified that discharges to ephemeral features would require permits if the discharge is directly conveyed to a protected water on the list
 - Groundwater
 - Artificial water features including swimming pools, stock tanks, stormwater control features, ditches or canals, artificially irrigated areas, ornamental and urban ponds and lakes, and waste treatment systems components
- **"May List" Waters:** ADEQ would have discretion to list waters falling into this category, which would be any state waters that are not expressly included in either the "shall list" or "shall not list" categories
 - ADEQ may add waters to the list when the social, economic, and environmental benefits of listing the water outweigh the social, economic, and environmental costs of not listing it

The Proposed List of "Shall List" Waters

ADEQ's draft list of waters fitting into the "shall list" criteria includes 787 perennial and intermittent waters. The initial list is presented on pages 40-104 of the draft legislation [here](#); the listed waters are depicted in map form [here](#).

Neither the draft legislation, nor ADEQ in its December 15, 2020, stakeholder meeting, provided guidance on what the necessary evidence would be to successfully list a "may list" water. Furthermore, ADEQ did not provide guidance on how the "may list" balancing test would be implemented. ADEQ recognized that it may need to provide guidance or rules on these topics in the future.

Public Process for Listing and Delisting

The draft legislation provides that listing and delisting waters would be a public process, where listing and delisting decisions would be appealable agency actions. Any person may nominate a state water in the "may list" category for inclusion on or removal from the list; public notice would be required for any complete nomination.

Water Quality Standards

Current ADEQ water quality standards would apply to protected waters under the new program. Water quality standards could be changed through rulemaking, following the requirements already established by Arizona statute. Similarly, current state impaired waters and total maximum daily load programs would apply to protected waters.

New Dredge and Fill Guidelines in Response to Public Comments

Based on stakeholder feedback received, ADEQ is now considering including some best management practices for dredge and fill activities that occur inside a protected water. For protected ephemeral features, this area would be within the bed or bank of the protected ephemeral feature. For protected perennial or intermittent features, best management practices would apply within the ordinary high-water mark of the feature.

Live comments received during the meeting seemed largely in favor of including best management practices for these activities in the program. ADEQ clarified that it still does not intend to establish a state dredge and fill

program, but would like some added protection from dredge and fill activities for protected state waters.

ADEQ Intends to Submit the Draft Legislation Before 2021

ADEQ intends to submit the draft legislation to the Arizona legislature by the end of 2020. Stakeholders may submit online feedback on the draft legislation via [this link](#) through December 22, 2020, after which there will be opportunities for public comment associated with the formal legislative process. Once enacted, the program would apply immediately without additional rulemaking.

ADEQ reiterated that it will pursue statutory authority for the program despite the impending change in administration.

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