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Closing the Clean Water Gap: Arizona DEQ Proposes State Protected Surface Waters Program

The Arizona Department of Environmental Quality, on November 6, 2020, introduced a proposed Protected Surface Water Program, which would regulate certain state surface waters that are newly excluded from the regulatory scope of the federal Clean Water Act. Like Arizona, Colorado has recently moved in the direction of regulating these newly excluded "gap waters" in response to the Trump administration's recently narrowed scope of the CWA. However, this type of state program is not novel: states including California, Oregon, and Washington have long regulated "waters of the state" under their own state permitting programs.

Arizona's proposed program aims to protect human health, the environment, and Arizona's economy by regulating the quality of surface waters that people and wildlife regularly interact with, primarily in recreational contexts. ADEQ plans to finalize this new state water quality program and then seek statutory authority to implement the program in the 2021 legislative session.

Federal Impetus for State Program

On April 21, 2020, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers jointly published new federal regulations under the CWA (dubbed the "Navigable Waters Protection Rule"), which went into effect on June 22, 2020. The new federal rule narrowed the scope of the CWA by redefining the types of waterbodies subject to federal regulation. If these excluded waterbodies (sometimes called "gap waters") are to be protected, the onus is on states and local authorities to fill the newfound gaps in regulation.

Proposed Program Specific Components

Arizona's proposed program would serve to fill a limited set of the gaps left by the new federal regulations. The proposed program would import most of the existing CWA framework to regulate the water quality of a new class of state surface waterbodies that ADEQ has deemed important to protect from a public health and economic perspective. Table 1, below, summarizes the specific components of ADEQ's proposed framework for its proposed program. The program would have the same permitting and fee structure as the CWA program, would use the same water quality standards, and would be administered and enforced in the same manner as the CWA program—the essential difference is that it would apply to waters not covered by the CWA. It would not require multiple permits for a single discharge. Importantly, unlike the CWA, Arizona's proposed program would not include a dredge and fill program: ADEQ stated that it lacks the technical expertise to run such a program.

Table 1: ADEQ's Proposed Program Framework[1]

Program	Point Source and Stormwater Permits	Set Water Quality Standards	Enforcement Capability for Standards	Total Maximum Daily Loads	Dredge and Fill Permits
Waterbodies protected under the CWA	Yes	Yes	Yes	Yes	Yes
Proposed Protected Waters List	Yes	Yes*	Yes	Yes	No

* The Arizona program's water quality standards would primarily be imported over from the CWA, and ADEQ proposes to revise or create new standards as needed.

According to ADEQ's proposal, protected state waters would be limited to those that ADEQ designates on the Protected Waters List; a list that would be available in map form online to promote clarity for stakeholders. While ADEQ stated that the list has not yet been drafted, it provided the Santa Fe Reservoir, Roper Lake, and Granite Creek as examples of such key waterbodies. ADEQ also proposed that the list include Arizona's eight major rivers (Colorado, Little Colorado, Verde, Salt, San Pedro, Gila, Santa Cruz, Bill Williams) as well as any ephemeral stretches of these eight rivers and perennial and intermittent tributaries to them. ADEQ acknowledged that some stretches of these waters are already covered under the CWA, and noted that the proposed program would not require any additional permitting for such stretches.

The ADEQ further outlined several types of surface waters and discharges that will be excluded from the proposed program:

- Agricultural return flows and agricultural stormwater discharges
- Nonpoint source pollution
- Ephemeral waters (other than ephemeral portions of the eight major rivers)
- Ditches and canals
- Artificially irrigated areas
- Stock tanks
- Homeowner association and golf course ponds
- Waste treatment systems
- Swimming pools
- Upland pools incidental to construction and industry

Draft Legislation and Timeframe

Following input from an online comment period that ended November 13, 2020, ADEQ plans to finalize proposed legislation for introduction during the 2021 legislative session to obtain statutory authority for the program. The proposed legislation would authorize the initial list and define set intervals in which ADEQ would update the list. However, the legislation would not include the list itself, so that ADEQ can maintain flexibility to list or delist waters. The legislation would additionally define the criteria and the public process that would be

used to add or remove surface waters from the list. ADEQ has not yet shared these criteria with the public, as they are not yet drafted.

Since the proposed program is designed to fill gaps created by the Navigable Waters Protection Rule, the need for the program may be eliminated if the new federal rule is modified or rescinded. However, during its stakeholder webinar on November 6, 2020, ADEQ indicated that it would pursue statutory authority for the program regardless of potential changes to the rule because the proposed program would set a valuable baseline for protecting Arizona surface waters.

Endnotes

[1] This table was presented by ADEQ during the November 6, 2020, stakeholder webinar.

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