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Sydney Hay
President

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Via E-mail (william.hylen@azdoa.gov)

William Hylen, Esq.
Governor's Regulatory Review Council
100 N. 15th Avenue
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Phoenix, AZ 85007

Re: GRRC Consideration of Proposed Final Rules Submitted By ADEQ Relating to Water Quality Standards for Surface Waters, A.A.C. Title 18, Chapter 11, Article 1 (R-08-1204)

Dear Mr. Hylen:

The Arizona Mining Association ("AMA") submitted substantial comments on selected aspects of ADEQ's proposed surface water quality standards rulemaking, published at 14 A.A.R. 1281 (April 25, 2008). The AMA has recently become aware that this rule is currently scheduled to be heard by the Governor's Regulatory Review Council ("GRRC") at its December 2 meeting.

Request for Delay in GRRC Consideration of Proposed Rule

The AMA requests that GRRC defer its consideration on this rulemaking for 60 days in order to allow interested parties time to review and analyze this lengthy and complex rulemaking.

The text of the rule was made available on ADEQ's web site in mid-November. However, this has allowed inadequate time (fewer than 10 business days) between the date the rule text was made available and the scheduled date of the GRRC hearing, and an even shorter time before written comments are presumptively due to GRRC (which I understand is 6 days before the hearing, pursuant to A.A.C. R1-6-111(D)). These already inadequate time frames are compressed even further by the Thanksgiving holiday. In the case of a trade association like AMA, where disparate members must coordinate to develop association comments, these short time frames make it difficult if not impossible to adequately review the lengthy (400+ pages) rule package and determine whether and to what extent comments to GRRC are appropriate, and then to draft such comments.

The AMA therefore respectfully requests that GRRC postpone its review of ADEQ's rules revising Arizona's surface water quality standards to its February 2009 meeting date, in order to allow the AMA and other interested parties to carefully review the revisions made to the proposed rule, the revised economic impact statement, and the Department's responses to the numerous substantial comments received on the proposal.

In the event that the request for a delay in consideration is not granted, the AMA provides the following list of potential concerns that it has identified to date in its ongoing review of the rule package. The AMA's comments on the proposed rule (dated June 4, 2008) are attached and will be referred to rather than repeated in the balance of this letter.

Potential Issues in Final Rule

1. Jurisdictional Scope: Despite the AMA's (and other parties') comments, ADEQ retained with no substantive change the previous definition of "surface water," which is found in the proposal at A.A.C R18-11-101(41).[1] This definition is inconsistent with recent United States Supreme Court jurisprudence and therefore with the governing Arizona statute as well.

ADEQ's authority to adopt surface water quality standards in this rulemaking is predicated on A.R.S. § 49-221(A), which requires ADEQ to adopt standards for all "navigable waters." Navigable waters are defined as "waters of United States" pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1362(7). The scope of the water quality standards program is thus coextensive with federal CWA jurisdiction over waters of the United States.[2]

ADEQ's definition of "surface water" includes any "ephemeral stream" with the potential to affect interstate or foreign commerce. See A.A.C. R18-11-101(41)(c). The phrase "ephemeral stream" does not appear in the corresponding definition of "waters of the United States" adopted by EPA and the Army Corps of Engineers, which implement the Clean Water Act. See 33 C.F.R. § 328.3; 40 C.F.R. § 122.2. Thus, the ADEQ definition is on its face broader than corresponding federal definitions, despite the statutory mandate that the standards apply only to navigable waters under the CWA.

Furthermore, the U.S. Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006) casts doubt on the authority to regulate any water with any potential affect on interstate commerce under the CWA. The five justices concurring in the decision in that case suggested that CWA jurisdiction requires either that water be present on a reasonably permanent basis or that a water have a significant nexus with a traditional navigable water. ADEQ's definition of "surface water" does not reflect these restrictions in any fashion, despite the fact that ADEQ's statutory authority is intended to be co-extensive with federal regulatory authority.

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[1] Citations to the water quality standards rules are to the provisions as they are worded and numbered in the final rule package submitted to GRRC.

[2] ADEQ has discretionary authority to adopt standards for waters that do not constitute navigable waters, pursuant to A.R.S. § 49-221(B), but has never proposed doing so.

ADEQ's response to these comments is essentially that the *Rapanos* decision arose out of a wetlands case and that it therefore has no relevance to a state's adoption of surface water quality standards as required by the CWA. (Response to comments #3 through #9.) This ignores the fact that there is a single definition of "navigable waters" in the CWA and that term is used in the section requiring states to adopt water quality standards (33 U.S.C. § 1313(c)(2)) as well the section governing the Section 404 program (33 U.S.C. § 1344). Moreover, the *Rapanos* decision has already been widely used by courts analyzing CWA jurisdiction outside the Section 404 context. See, e.g., *Northern California River Watch v. City of Healdsburg,* 496 F.3d 993 (9th Cir. 2007) (applying *Rapanos* in a NPDES permitting case). Under ADEQ's logic, it presumably can adopt (and perhaps even enforce) water quality standards for ephemeral washes even though no Section 404 permit is needed to discharge dredged or fill material into those washes.

In short, ADEQ has provided an inadequate legal basis for retaining its current definition of "surface waters" and has failed to adequately respond to significant comments on this important point. As such, this definition should not be approved by GRRC pursuant to A.R.S. § 41-1052(C)(5) & (6).

2. Davidson Canyon as an Outstanding Arizona Water: The AMA made several comments regarding the proposed classification of a portion (approximately 3.2 miles) of Davidson Canyon as an outstanding Arizona water ("OAW"). See A.A.C. R18-11-112(G)(21). The AMA has concerns with the manner in which ADEQ responded to several of its comments.

(a) In order to qualify as an OAW, the water in question water must have good water quality, which is defined as quality that meets or is better than applicable surface water quality standards. See A.A.C. R18-11-112(C)(3). In its comments, the AMA pointed out that there is very little sampling data for many core water parameters, especially metals. For example, there appears to be only a single sample analyzing any metal other than arsenic. With respect to that single sample, the practical quantitation limits ("PQL") reported by the lab, which represents the lowest level at which the lab was able to quantify the amount of the pollutant present, were well above applicable surface water quality standards. (See pages 4-6 of the June 4, 2008 comments.)

For example, selenium (a common pollutant in Arizona surface waters) was reported as non-detect, but with a PQL of 100 ug/l. The governing surface water quality standard for selenium is 2 ug/l. Failure to detect selenium at a level 50 times higher than the applicable standard in the single available sample does not demonstrate the "good water quality" necessary to support the use of the designation. Other metals where the PQL was above the applicable water quality standard include lead, antimony, arsenic, beryllium, cadmium, copper and zinc.

In the preamble to the final rule, ADEQ recited portions of the AMA comment, but did not include or respond to the comments that few samples were available or that the PQLs for the available data were for some parameters above applicable water quality standards (often substantially so). In its response, ADEQ merely stated that none of the available water quality data indicate the existence of water quality problems or exceedances of applicable water quality standards. (Response to comment #94) This response does not address in any fashion the AMA comment that the lab results were not adequate to measure down to the water quality standard

and thus demonstrate that the requisite good water quality is present. The Department therefore did not adequately address the AMA's comment on this critical aspect of the proposal to designate Davidson Canyon as an OAW, as required by A.R.S. § 41-1052(C)(6).

(b) In its comments, the AMA also noted that one of the three segments of Davidson Canyon proposed as an OAW (from the confluence with the unnamed tributary at 31°59'32.5"/110°38'43.5" to the unnamed spring at 32°00'54"/110°38'54") is classified as an ephemeral wash in Appendix B to the rulemaking. An ephemeral water cannot qualify as an OAW. See A.A.C. R18-11-112(D) (OAW must be perennial or intermittent).

In its response to comments, ADEQ stated that the entire lower stretch of Davidson Canyon (including all three proposed listed segments) should be described as a spatially intermittent stream and that the stretch as a whole should be considered intermittent and thus eligible for classification as an OAW. The Department further noted that it had previously classified as OAWs waters with ephemeral reaches. The Department cited only Cienega Creek as an example. Cienega Creek, however, has not been segmented to include an ephemeral-only stretch, unlike Davidson Canyon (which does have such a stretch). See Appendix B. The fact that a portion of Davidson Canyon is classified as ephemeral disqualifies that stretch from being included within the OAW designation.

3. Economic Analysis: The AMA has several concerns with the economic impact analysis included with the final rule package:

(a) On page 79 in the preamble, ADEQ states: "The Department is aware of a few mining claims in the area that would face limitations on discharging to Davidson Canyon or to any of its tributaries." The Department does not elaborate on that statement, but goes on to simply say that it is "unclear" what economic costs a potential discharger to these new OAWs would bear. The AMA provided a comment that the proposed Rosemont project, a copper mining and processing project, will be located along washes that ultimately (via several connections) are tributary to Davidson Canyon, although the project is located over ten miles away from the designated reaches. The AMA also provided a specific instance of a cost already being incurred based on ADEQ's denial of *de minimus* AZPDES general permit coverage for well water discharges based merely on the proposed listing of a portion of Davidson Canyon as a OAW, despite the lengthy distance between the Rosemont site and the designated portions of Davidson Canyon. ADEQ has not acknowledged this cost (approximately $75,000 to date) in its economic impact analysis, nor has it attempted in any way to identify or quantify potential impacts to the Rosemont project despite its awareness of the project.

(b) The AMA expressed a concern that the designation of Davidson Canyon could be used by some in an attempt to stop the Rosemont project (a goal clearly referenced in some public comment supporting the designation). The Department did not directly respond to this comment as it relates to Rosemont, but did include a general statement that public comments on the potential costs of the rulemaking present an "apparent worst case scenario" (page 79). The Department then suggested that parties may have legal options to delay or minimize the impacts of new or revised standards, including variances and compliance schedules. It is not clear that

this generic discussion constitutes a good faith effort to assess potential costs of the Davidson Canyon designation, particularly since ADEQ has clearly signaled that restrictions on land use in the watershed (including possible limits on mining) resulting from an OAW designation can be considered in determining whether to designate a qualifying water as an OAW. See 8 A.A.R. at 1303. This concern is particularly acute because ADEQ has not explained how the "no degradation" standard will be implemented, and because of the lack of quality data reflecting existing conditions in Davidson Canyon (as discussed above).

(c) With respect to mining generally, ADEQ has included a new discussion (pages 88-92) of potential economic impacts. This discussion was not included in the proposal and thus the AMA had no opportunity to comment on it at that time. The discussion indicates that many mines would utilize storage and evaporation options, which is true. However, most mines have a storm water discharge permit of some sort (individual or general). The second portion of the new discussion addresses two possible treatment options being used in the electric utility industry that ADEQ believes could be transferred to mining (brine concentrators and reverse osmosis). It is not clear whether these systems would be useful in the case of storm water at mines, which is an episodic discharge of varying rates and qualities. Moreover, it is unclear if the cost estimates provided by ADEQ ($8.4 million for reverse osmosis, $9.365 million for brine concentrator) are on a per-facility basis or a cumulative basis. The mining-specific economic cost analysis is thus of questionable accuracy.

Please contact me should you have any questions on these comments. The AMA has not determined whether it will request the opportunity to provide oral comments at the December 2, 2008 hearing.

Sincerely,

Arizona Mining Association

Sydney Hay
President

Enclosure: Copy of AMA comments on proposed rule (June 4, 2008)