CRIS MEYER
City Attorney

City of Phoenix

OFFICE OF THE CITY ATTORNEY

March 24, 2022

Hearing Administrator
Office of Administrative Counsel
Arizona Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007

RE: ***City of Phoenix's Notice of Appeal of the Arizona Department of Environmental Quality's Publication and Listing of Indian Bend Wash, from its Headwaters to its Terminus, as an impaired water under Arizona's 2022 303(d) List of Impaired Waters; Request for Informal Settlement Conference; Request for Hearing***

Dear Hearing Administrator:

The City of Phoenix is appealing the Arizona Department of Environmental Quality's Publication and Listing of Indian Bend Wash, from its Headwaters to its Terminus, as an impaired water under Arizona's 2022 303(d) List of Impaired Waters. Please see the enclosed Notice of Appeal and Request for Hearing.

Pursuant to A.R.S. § 41-1092.06, the City of Phoenix requests an informal settlement conference be held in this matter, and the City of Phoenix requests a hearing in this matter in accordance with A.R.S. § 41-1092.03.

Sincerely,

Charles L. Cahoy
Assistant City Attorney
City of Phoenix

Enc.
cc: Nancy Allen
Environmental Programs Administrator
City of Phoenix

Shelley D. Cutts (via email)
Assistant Attorney General

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY
NOTICE OF APPEAL OF AGENCY ACTION
REQUEST FOR HEARING

1. The name of the party that is filing the appeal and request for hearing:

City of Phoenix, an Arizona municipal corporation

The City of Phoenix submitted timely written comments on the Arizona Department of Environmental Quality's Draft 2022 303(d) Impaired Water's List. Therefore, the City may appeal the agency action pursuant to A.R.S. § 49-232.

2. The address of the party that is filing the appeal and request for hearing:

City of Phoenix
c/o Office of Environmental Programs
200 West Washington Street, 14th Floor
Phoenix, Arizona 85003
Telephone: 602/256-5669

3. Legal counsel for the party filing the appeal and request for hearing:

Charles L. Cahoy
Assistant City Attorney
City of Phoenix Law Department
200 West Washington Street, 13th Floor
Phoenix, Arizona 85003
602-262-6761
charles.cahoy@phoenix.gov

4. The action being appealed:

The listing of Indian Bend Wash, from its headwaters to its terminus, as an impaired water under Arizona's 2022 303(d) [33 U.S.C. 1313(d)] List of Impaired Waters, as published in Arizona Administrative Register, Vol. 28, Issue 7 (February 18, 2022), pp 405-21 (hereinafter, "ADEQ's 303(d) List").

5. A concise statement of the reasons for the appeal and hearing:

According to ADEQ's 303(d) List, 13.9 miles of Indian Bend Wash is proposed as impaired for dissolved copper due to two samples exceeding the A&We acute dissolved copper water quality standard. Based on the sample dates and sample results, the data used by ADEQ for Indian Bend Wash corresponds to stormwater samples collected by the United States Geological Survey under contract to the City of Phoenix at MS4 sampling station IB008. The IB008 wet weather sampling station is at 33.599509, -111.995649 and is not within the Indian Bend Wash channel. This sampling station is on top of the bank approximately 242 feet northwest of the point where the catchment discharge enters Indian Bend Wash.

Thus, the data used for ADEQ's 303(d) List does not represent water quality within Indian Bend Wash. Further, no data was provided by ADEQ in ADEQ's 303(d) List to demonstrate that the water quality within Indian Bend Wash did not meet the applicable designated uses.

For a more complete explanation, please see Attachment A to this Notice, which attachment is incorporated into this Notice by this reference.

For these reasons, ADEQ's listing and publication of Indian Bend Wash, from its headwaters to its terminus in the Salt River, as an impaired water in ADEQ's 303(d) List is:

(a) Contrary to A.R.S. § 49-232 and A.A.C. R18-11-602.
(b) Unsupported by evidence.
(c) Arbitrary, capricious, and an abuse of discretion.

6. Informal Settlement Conference:

The City of Phoenix requests an informal settlement conference be held in this matter in accordance with A.R.S. § 41-1092.06.

7. Hearing:

Pursuant to A.R.S. § 41-1092.03, City of Phoenix requests a hearing be conducted in this matter.

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EXHIBIT A:

CITY OF PHOENIX FOLLOW-UP CORRESPONDENCE

ON

ARIZONA'S 2022 CLEAN WATER ACT ASSESSMENT

Tricia Balluff

From: Tricia Balluff
Sent: Thursday, March 3, 2022 8:58 AM
To: Erin Jordan; jones.jason@azdeq.gov; maro.greg@azdeq.gov
Cc: Hilary Hartline; Linda Palumbo
Subject: Indian Bend Wash sampling point location_303(d)
Attachments: Indian Bend Wash sampling point follow up_City of Phoenix_220303.pdf

Hi Erin, Greg, and Jason,

Per ADEQ's discussion with the Phase I MS4 cities last week, the City of Phoenix has pulled together more specific information on the location of the sampling point used by ADEQ to propose it as impaired (see attached PDF).

Please let us know if you need any additional information.

Please also let us know the results of your conversation with Law regarding removing Indian Bend Wash as a proposed impaired water.

We appreciate the open discussion and continued coordination ADEQ has provided on this topic.

Tricia Balluff
Environmental Programs Coordinator
Water, Wildlife, and NEPA
City of Phoenix
Office of Environmental Programs
602-534-1775
Tricia.balluff@phoenix.gov

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Attn: Greg Maro and Erin Jordan
Arizona Department of Environmental Quality (ADEQ)
Water Quality Division
1110 W. Washington St
Phoenix, AZ 85007

This correspondence is follow-up to the discussion on Indian Bend Wash during the February 24, 2022, meeting with the Phase I MS4s and ADEQ and the draft 2022 Clean Water Act Assessment (CWAA). This is additional information requested by ADEQ concerning the Indian Bend Wash sampling point used by ADEQ for the 303(d) analysis.

The City of Phoenix (City) provided a CWAA comment letter on January 6, 2022 that included information that the samples collected on Indian Bend Wash are MS4 wet-weather sampling stations. MS4 wet weather monitoring stations are designed to measure the discharge from stormwater catchments before it enters a surface water. However, per ADEQ request in the February 24th meeting, the City is submitting additional information providing details on the specific sampling point location to clearly demonstrate that it is not within the Indian Bend Wash channel.

According to the CWAA, 13.9 miles of Indian Bend Wash is proposed as impaired for dissolved copper due to two samples exceeding the A&We acute dissolved copper water quality standard. Based on the sample dates and sample results, the data for Indian Bend Wash corresponds to stormwater samples collected by the United States Geological Survey (USGS) under contract to the City at MS4 sampling station IB008. The naming convention of IB008 corresponds to the City's method to identify outfalls. "IB" means that the outfall discharges to Indian Bend Wash, and not that the outfall is in Indian Bend Wash. IB008 drains a sub-watershed (approximately 804 acres) that is primarily comprised of residential land use (estimated 64%) and pavement (estimated 15%). No data was provided in the CWAA to demonstrate that the land use in this sub-basin which the stormwater sample data represents is similar in composition to the entire drainage area for Indian Bend Wash.

The IB008 wet weather sampling station is at 33.599509, -111.995649 and is not within the Indian Bend Wash channel. This sampling station is on top of the bank approximately 242 feet northwest of the point where the catchment discharge enters Indian Bend Wash. A buried pipe carries the discharge from the sampling station to the discharge point into Indian Bend Wash. This sampling point is not capturing information on the flow in Indian Bend Wash.

Figure 1. Aerial of sampling point in context to Indian Bend Wash channel.

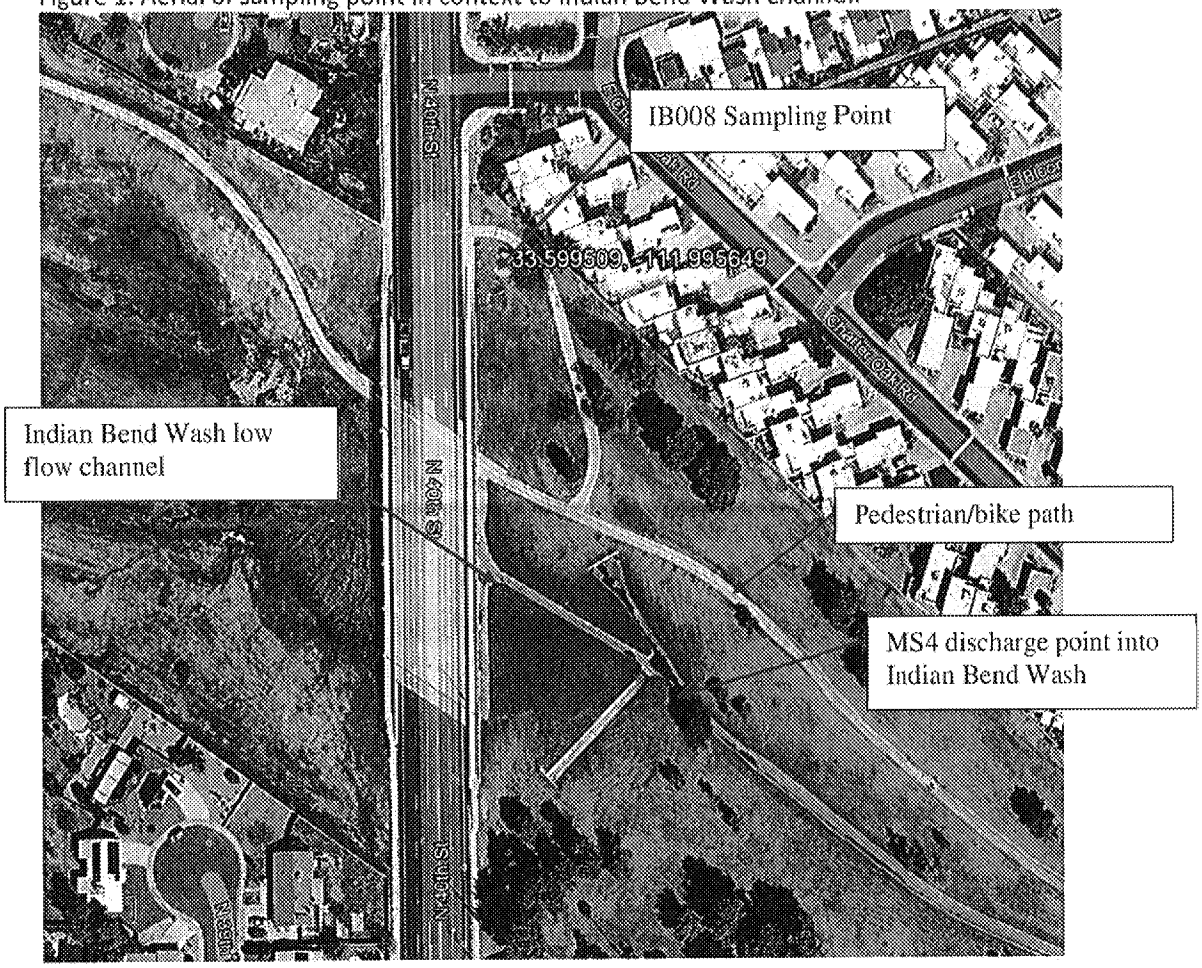


Photo 1: Looking directly from the sampling station on the top of bank down to the Indian Bend Wash channel.

Photo 2: Looking directly from the Indian Bend Wash channel up to the sampling station.

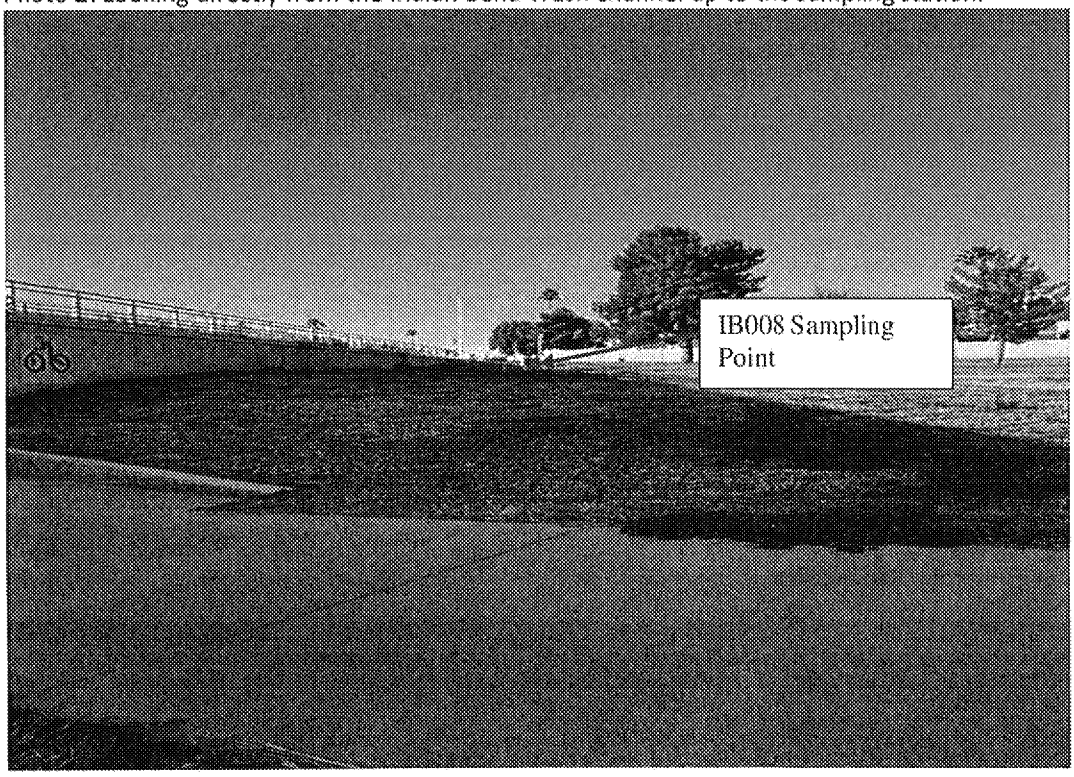
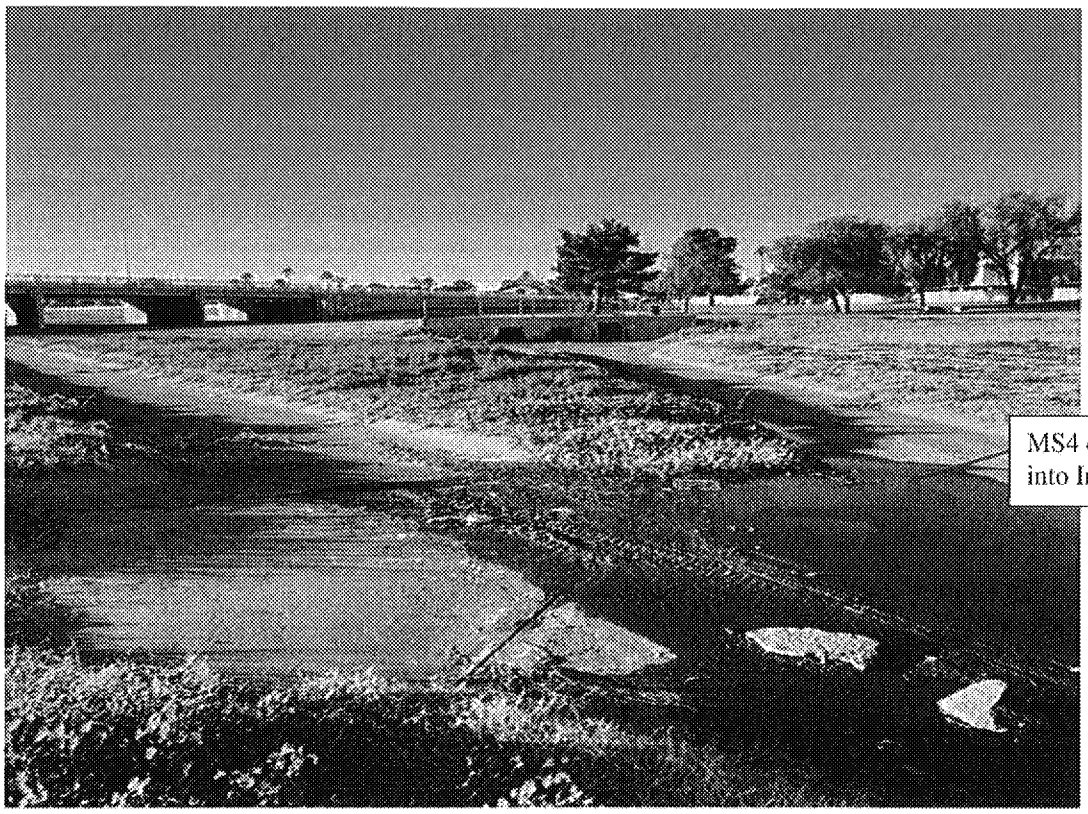


Photo 3: Looking northeast toward the sampling station from the outfall discharge location into Indian Bend Wash.



The data used in the CWAA does not represent water quality within Indian Bend Wash. No data was provided by ADEQ in the CWAA to demonstrate that the water quality within Indian Bend Wash did not meet the applicable designated uses. In the Response to Comments #6 ADEQ states that "ADEQ agrees that all samples collected IN these ephemeral stream were collected during storm events". This is not the case as IB008 is not located within Indian Bend Wash. In addition, ADEQ's Response to Comment #6 further clarifies that Skunk Creek (WBID 15070102-003) and New River (WBID 15070102-002) were removed from the 303(d) List because the City of Glendale demonstrated that the sampling locations were not taken IN these streams but were collected in adjacent locations that were not part of the respective streams. Similarly, the Indian Bend Wash data was not collected in the stream.

The need to protect and restore water bodies to their designated use is critical, and the Clean Water Act Assessment is a vital step in the process to improve water quality in Arizona. However, the assessment process must be conducted consistently and accurately. In this response, the City has demonstrated that the samples used for Indian Bend Wash are consistent with the reasoning behind ADEQ's decision to remove New River and Skunk Creek as proposed impaired waters. Therefore, the same decision should be made for IBW.

For reference, see ADEQ Response to comments:

- #8 "Skunk Creek (WBID 15070102-003) and New River (WBID 15070102-002) have been removed from the 303(d) List. The City of Glendale demonstrated that the sampling locations were not taken in these streams but were collected in adjacent locations that were not part of the respective streams."
- #18 "ADEQ appreciates the clarification and has removed New River from the draft 303(d) List and the 2022 Assessment. ADEQ agrees that data collected in stormwater runoff adjacent to New River should not be used to make an impairment determination on New River."
- #19 "ADEQ appreciates the clarification and has removed Skunk Creek from the draft 303(d) List and the 2022 Assessment. ADEQ agrees that data collected in stormwater runoff adjacent to Skunk Creek should not be used to make an impairment determination on Skunk Creek".