

**Sierra Club - Grand Canyon Chapter
Center for Biological Diversity
Patagonia Area Resource Alliance
Cascabel Conservation Association Conservation Committee
Friends of the Sonoran Desert
Sky Island Alliance
Maricopa Audubon Society
Arizona Mining Reform Coalition
Tucson Audubon Society
Save the Scenic Santa Ritas
Friends of the San Pedro River
Community Water Coalition of Southern Arizona
Arizona Riparian Council
Coalition for Sonoran Desert Protection
Yuma Audubon Society**

November 18, 2019

Misael Cabrera
Director
Trevor Baggione
Water Quality Division Director
Arizona Department of Environmental Quality
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Submitted via email to cabrera.misael@azdeq.gov, baggiore.trevor@azdeq.gov, and
CWA404@azdeq.gov

Re: Clean Water Act and Section 404 – Proposed Program Roadmap, August 2019

Dear Director Cabrera and Director Baggione:

As stakeholders in land and water management in Arizona and participants in the 404 primacy assumption stakeholder meetings and/or work groups, we offer the following comments regarding our concerns about a state-led Clean Water Act Section 404 permitting system generally, plus specific comments on the Clean Water Act and Section 404 – Proposed Program Roadmap, August 2019 (Roadmap).

Because of the concerns we outline below, we maintain that the 404 program should continue to reside with the U.S. Army Corps of Engineers.

Introduction of the Roadmap

The Introduction to the Roadmap flips the priorities of a Clean Water Act program, as well as for ADEQ. The statement that “[t]he value ADEQ can provide to the regulated community, while protecting public health and Arizona’s unique environment...” (Roadmap pg. 5) creates a presumption that the main goal is providing value to the regulated community, when in fact the goal is protecting public health and Arizona’s environment. This language creates an overarching presumption that ADEQ is seeking the program to serve the regulated community rather than to protect Arizona’s important water resources. Under that section are bullets that are totally focused on the regulated interests and not the public interest. For example, the bullet “Robust enforcement and compliance assistance programs providing consistent protection of Waters of the United States (WOTUS) in Arizona and encouraging good environmental corporate stewardship” (Roadmap pg. 5) has no comparable bullet about actually having “robust enforcement” or a “robust program to ensure compliance.”

The introduction goes on to emphasize the number of days it takes ADEQ to issue permits and while it does include a chart on compliance, it does not include any information on how that compliance was achieved and if it resulted in better protection of public health and the environment.

ADEQ should use the Clean Water Act as its guide here, and the objective of the Clean Water Act generally is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. 33 U.S.C. § 1251(a).

Program Summary

Program Fees

A primary concern raised during debate on the bill allowing ADEQ to pursue primacy, at stakeholder meetings, on the working groups, and on the executive workgroup was that state primacy of dredge and fill permits will come at a high price. Virginia’s Department of Environmental Quality, weighing whether to pursue primacy, found that assumption would cost the state \$18 million over the first five years, and \$3.4 million annually thereafter.

According to information provided to the Fees Technical Working Group by ADEQ in a preliminary estimate, it would cost “\$2.1 million on an annual basis to run the CWA §404 Permit Program with ten (10) full-time employees, including \$220,000 projected for legal support services by the Arizona Attorney General.” Subsequent analyses of the program, based also on costs provided by the Army Corps of Engineers also put the costs in the \$2 million annual range. Key issues include the immediate costs of program development and implementation as well as the perpetual costs of overseeing the program, liabilities associated with this authority, investigation costs for reports of unauthorized activity, enforcement actions, and maintenance of mitigation projects and properties.

These concerns are compounded by the fact that there is little funding available specifically for Section 404 program administration. A publication by the Association of State Wetland

Managers states that “states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program.” While states can get Environmental Protection Agency (EPA) funds to support the “development of state wetland regulatory programs,” the primary costs are in the program’s administration. Michigan’s 404 program, though “broadly supported,” faced opposition due to its cost during “challenging economic conditions.” In 2009, the program was nearly handed back to the federal government due to cost concerns.

Of grave concern is the possible outcome that because ADEQ intends to fund the program through permitting fees, the agency will become motivated to quickly issue permits that would otherwise require careful consideration. Increasingly the agency is seen as a captive agency where industry calls the shots. The industry representatives are referred to as the “customers” and their satisfaction takes precedence over the public interest. If the state elects to assume primacy and the costs that come with it, a dedicated funding source must be developed so that the state is not incentivized to issue permits for the wrong reasons and so there is funding for program staff during times when fewer permits are requested, such as economic downturns.

Establishing a program that is based on permit fees also can unfairly advantage those with the deepest pockets and result in weak permits being moved along more quickly than those that are more protective. As noted in the Roadmap, the permit fees for these permits will range from more than \$7,500 to more than \$80,000 per permit (Roadmaps pg. 15).

Finally, inadequate and/or uneven funding will make the ADEQ less likely to achieve the (required) same level of enforcement rigor as the Corps' program achieves and more likely to subject the state taxpayers to lawsuits.

We had asked and continue to ask ADEQ to fund this program with a general fund appropriation, if it is to proceed at all.

Path Forward

The Path Forward outlined on page 18 of the Roadmap is not realistic. Does ADEQ really think it is ready to proceed with drafting a rule, considering the significant opposition by the Tribal Nations, some counties and cities, and most of the environmental community? How will you seriously consider comments and incorporate them appropriately into drafting a rule when the deadline for commenting is November 18 and you say you will have a draft rule in December? How can decisions be made about 404 Permit administration when the definition of Waters of the United States is still up in the air, the new rule is likely to be litigated and a Waters of the State Program is likely years from implementation? It does make it appear that the path forward is to ignore stakeholder concerns and to plow ahead.

Engagement and Outreach

This section of the Roadmap highlights the number of meetings, stakeholders, and Tribes, as well as the technical workgroups and executive work group, but does not indicate how many of the stakeholders and Tribes or workgroups objected to ADEQ pursuing primacy of the 404 permit program (Roadmap pg. 18-20). Further, the working groups and executive group were not directed to consider whether assumption should occur, but rather to develop blueprints for how it should occur. That leaves out important and key information and means the agency is not

considering seriously the concerns of many who do not think ADEQ should pursue the program. As noted in our previous comments, in work groups, and at the executive committee, we maintain that the 404 program should continue to reside with the Army Corps of Engineers.

We also want to point out that the process did not really engage the broader public. Meetings were held during regular work hours and the technical workgroups did not allow for public participation. By the time this process reaches rulemaking, products will have been developed that would be difficult for members of the public that have been excluded up to that point to influence.

Program Description

Lack of State Expertise Regarding 404 Program

Another concern that has been widely voiced across stakeholder groups is that because this program has been administered by the Army Corps of Engineers, ADEQ does not possess the expertise or experience to run the program. This concern is not independent of funding concerns, since without general fund commitments or significant federal funds, it is difficult to imagine how the agency will be able to bring in additional experts. A fee-funded program will take time to generate funds, but the costs associated with program assumption will be immediate.

Jurisdictional Waters

One problem ADEQ will face almost immediately is a lack of clarity on which waters will be subject to state assumption. Regulation of “navigable waters” of the U.S. will, of necessity, remain under the purview of the Army Corps, since by law it cannot be delegated to states. To our knowledge, the Corps has not sorted out or mapped much of what could be termed navigable waters of the U.S. within Arizona. Such a process is essential in order to facilitate an orderly assumption of primacy, but it is not within ADEQ’s capacity to conduct it. This is a fact- and science-intensive process that is expensive, complex, and time-consuming. The state of Florida was recently delayed in its rush to assume 404 primacy when their unrealistic timeline did not allow sufficient time for the Army Corps to make these determinations. Moreover, it is essential that the state develop a clear picture of the scope of their regulatory responsibilities *before* developing cost assessments and plans for implementation.

Endangered Species Act Considerations

We are additionally concerned that endangered species will not receive the protections that they do under a federal program. A state assuming primacy must work to implement alternative means of coordination with “other federal resource programs.” If permits will be administered under state law, rather than federal law, the state must develop “alternative mechanisms” to “ensure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs.” (Clean Water Act, Section 404) Even if a state-led program develops guidelines or procedures that are modelled after the protections of the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act (ESA), policies and even rules may not offer the equivalent legal protections of a federal law.

Federal agencies also have mandates to coordinate with one another, so to retain the benefits of collaboration, a state assuming primacy must work to implement alternative means of coordination with other federal resource programs. If primacy is to be assumed, ADEQ must find

ways to protect ecosystems and endangered species to the same degree afforded by Section 7(a)(2) of the ESA, as that consultation will go away under the proposed state program. Oregon approached this requirement by developing a memorandum of agreement with the US Fish and Wildlife Service (USFWS) whereby the Service would still be part of the state decision-making process. It is critical to involve USFWS in these decisions as in the Oregon example, where they are now just considering partial assumption of the program. The informal process outlined in the Roadmap is unclear and inconsistent and could result in threatened and endangered species not receiving the protections afforded by the Endangered Species Act, creating more potential conflicts.

We also are concerned about ADEQ's plan to kick endangered species issues to Arizona Game and Fish, especially considering the Arizona Game and Fish Commission's often hostile approach to species listing and protection, critical habitat designation, and habitat protection.

The Roadmap indicates that "ADEQ is also considering partnering with the Arizona Game and Fish Department (AZGFD). CWA and the Guidelines place special emphasis on the protection of threatened and endangered species and their critical habitat. AZGFD may assist with review of biological assessments submitted with applications. AZGFD would either concur with the biological assessment and/or recommend conservation measures to address adverse impacts to endangered species listed and their critical habitat. Preliminarily, AZGFD anticipates that it would need to hire two wildlife biologists to perform these reviews." (Roadmap pg. 26).

This has great potential to allow for the neglect of endangered species protections and resulting violations of the Endangered Species Act. Would ADEQ have any incentive to investigate any potential endangered species conflict? Likely not.

The state program as proposed, even with a referral to and input from Arizona Game and Fish, can't provide the liability protection for "incidental take" that Section 10 of the ESA provides permittees. We are concerned first and foremost with protecting species; this lack of liability protection creates an incentive for permittees to withhold information from the agency when losses occur. Likely results are less accurate reporting and a dramatic increase in litigation when incidental takes are discovered.

Cultural and Historic Resource Protection

As noted above, a state assuming primacy must work to implement alternative means of coordination with "other federal resource programs." If permits will be administered under state law, rather than federal law, the state must develop "alternative mechanisms" to "ensure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs." (Clean Water Act, Section 404) Even if a state-led program develops guidelines or procedures that are modelled after the protections of the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act (ESA), policies and even rules may not offer the equivalent legal protections of a federal law.

Various Tribes and the Inter Tribal Association of Arizona raised significant concerns about ADEQ's ability and commitment to protecting cultural resources. In its letter to the Environmental Protection Agency (EPA) dated October 21, 2019, the ITAA asked EPA to make it clear "... that it will not waive its right of Federal review over ADEQ-issued 404 permits

which have the reasonable potential to adversely impact cultural resources or the downstream water rights or resources of tribes. In addition, because Arizona takes the position that the National Historic Preservation Act will have limited application after state assumption, the MOA should also expressly authorize and memorialize the terms for EPA's re-involvement in any individual 404 permit where the tribe(s), ADEQ, and the applicant are unable to agree on an appropriate means to avoid, minimize, or otherwise resolve adverse impacts to cultural or historic resources associated with the 404 permit."

Arizona's State Historic Preservation Act will not afford the cultural resources the same protections and as noted, ADEQ is assuming that the National Historic Preservation Act will no longer apply as it is related to federal actions, so there is reason to be concerned about the impacts of state primacy on these resources. Until the state has a comparable program in place to protect historic, cultural, and religious resources, it should not pursue primacy of the Section 404 permit program.

Tribal Consultation

Currently, there is no Tribal consultation process in place. Federal law requires government to government consultation (federal to Tribal government) with Tribal nations. Such a program for consultation should be codified in statute before ADEQ pursues primacy of the Section 404 permit program.

Compensatory Mitigation

As noted in the Compensatory Mitigation Work Group White Paper dated January 2019, "...many of the challenges for Section 404 permittees and mitigation providers in Arizona arise from the fact that there currently is no quantitative functional assessment methodology to assess the intermittent and ephemeral waters or episodic riverine environments that are predominant in the state. Until a quantitative functional method is approved in Arizona, a qualitative method should be approved and vetted with the EPA to reduce contention in individual project reviews and approvals." (pg. 22). It goes on to say that a mitigation ratio approach for Arizona is needed. We recommend that ADEQ explore the gaps here and fill those gaps before further pursuing primacy for the Section 404 Permit Program.

Permit Process

If ADEQ assumes responsibility for the 404 permit program, there will be no implementation of the National Environmental Policy Act (NEPA) for major projects that now require 404 permits, and the state has no comparable environmental impact assessment law.

It is important to consider the reasons that we have NEPA. "The purposes of this Act are: "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321.

Without NEPA, the public is robbed of an opportunity to review and analyze comprehensive information about the environmental and related economic and social impacts of a proposed action and to advocate for their communities and for the environment. ADEQ and some

regulated interests seem to think the 404(b)(1) guidelines would be the equivalent of NEPA. That is just not the case.

Per the Permit Process Technical Work Group White Paper dated March 11, 2019,

Having a NEPA-equivalent also appears to be consistent with ADEQ's intent in pursuing adoption of the Section 404 program. When asked if there was a plan to duplicate the NEPA process or if NEPA would be dropped in an ADEQ-assumed Section 404 program during the Arizona House Energy, Environment and Natural Resources subcommittee meeting that covered SB1493 (the bill that provided ADEQ authority to work toward assuming the Section 404 program) on March 6, 2018, Director Cabrera (ADEQ) stated, "we will have a process that, in substance, accomplishes the same as that process in the USACE. . . . But you are correct, NEPA in itself won't be triggered because it's no longer a federal program, but it's our intent and we believe that it's requisite to get approval from EPA that we adopt the substance of the program. We do not see EPA giving us approval unless we adopt substantively the same protections as what's accomplished today by the USACE." (pg 32).

Before pursuing primacy for the Section 404 permit program, ADEQ must advocate for and the state legislature must pass a law that provides for an environmental impact assessment for state actions, complete with robust public involvement, prior to assuming responsibility for the Section 404 permit program.

Another big loss to the public if ADEQ gains primacy for the Section 404 permit program is the loss of the public interest review the Army Corps of Engineers performs on these permits. The U.S. Army Corps of Engineers is not allowed to issue a permit if it does not comply with 404(b)(1) guidelines or if it's determined by the district engineer to be **contrary to the public interest** (33 CFR § 320.4).

Before pursuing primacy for the Section 404 permit program, ADEQ must advocate for and the state legislature must pass a law that requires a public interest review for Section 404 permits.

Other Concerns

Both ARS § 49-203 (A) 2, specific to the Clean Water Act Section 404 Permit program,

Adopt, by rule, a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters. The program and the rules shall be sufficient to enable this state to administer the permit program identified in section 402(b) of the clean water act including the sewage sludge requirements of section 405 of the clean water act and as prescribed by article 3.1 of this chapter.

and ARS § 49-104 (A) 16

Unless specifically authorized by the legislature, ensure that state laws, rules, standards, permits, variances and orders are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter.

state that ADEQ may not adopt any provisions that are more stringent than the federal government relative to this important program to protect our waters. Both of these provisions can limit ADEQ's ability to take actions to truly protect Arizona's waters. We suggest that ADEQ seek repeal of these provisions in order to better protect the waters in Arizona and our environment overall.

We are also concerned about how this change to a state program could affect the standing of groups who are acting in the public interest from challenging these permits. Please address this concern in any subsequent documents to ensure that those who have a deep interest in protecting the waters in Arizona can do so.

Summary

State assumption of the 404 program will be costly and unlikely to achieve the protections of the federal program and certainly currently does not include important provisions for public participation and review—NEPA or a similar state process—and no public interest review, something that has been key to some proposed permits that would have caused undue harm to waters in Arizona.

Since ARS § 49-203 (B) 9 makes it optional for ADEQ to pursue control of the Section 404 permit program, stating that the director **may** “adopt by rule a permit program for the discharge of dredged or fill material into navigable waters for purposes of implementing the permit program established by 33 United States Code Section 1344,” ADEQ should exercise the option to not pursue primacy until it can ensure the same or greater level of protections for waters in Arizona and the same or greater level of review and public involvement the U.S. Army Corps of Engineers is providing now.

Thank you for considering our comments.

Sincerely,

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cc. Sallie Diebolt,, Arizona and Dave Castenon, LA District, Army Corps of Engineers

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