Clean Water Act AND State § 404

PROPOSED PROGRAM

ROADMAP

AUGUST 2019

ADEQ
Arizona Department
of Environmental Quality

COVER IMAGE OF THE GILA RIVER NEAR DOME AZ. TAKEN BY ADEQ STAFF DURING A TRAINING WITH CITIZEN SCIENCE GROUP

OUR MISSION and VISION

The Arizona Department of Environmental Quality's (ADEQ's) mission is to protect and enhance public health and the unique environment in Arizona. To achieve this, ADEQ administers the state's environmental laws and delegated federal programs to prevent pollution of the air, water and land, and to ensure cleanup when pollution occurs.

ADEQ's vision is to be the No. 1 state in the nation in:

- Balanced, leading edge environmental protection through
- Technical and operational excellence, and
- Radical simplicity for customers and staff.

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ACRONYM LIST

A-D

ADEQ — Arizona Department of Environmental Quality
AJD — Approved Jurisdictional Determination
APP — Aquifer Protection Permit
A.R.S. — Arizona Revised Statutes
AZGFD — Arizona Game and Fish Department
AZPDES — Arizona Pollutant Discharge Elimination System
C.F.R. — Code of Federal Regulations
CWA — Clean Water Act

E-G

EPA — United States Environmental Protection Agency
ESA — United States Endangered Species Act
HCP — Habitat Conservation Plan

H-L

LTF — Licensing Timeframe
ILF — In-Lieu Fee
JD — Jurisdictional Determination

M-P

MOA — Memorandum of Agreement
NEPA — National Environmental Policy Act
NGO — Non-Governmental Organization
NHPA — National Historic Preservation Act
NWP — Nationwide General Permit
PIP — Permits in Process
PJD — Preliminary Jurisdictional Determination

Q-W

RGP — Regional General Permit
RHA — Rivers and Harbors Act
RIBITS — Regulatory In-Lieu Fee & Bank Information Tracking System
SHPA — State Historic Preservation Act
SHPO — State Historic Preservation Office
TWG — Technical Work Group
USACE — United States Army Corps of Engineers
U.S.C. — United States Code
USFWS — United States Fish and Wildlife Service
WOTUS — Waters of the United States

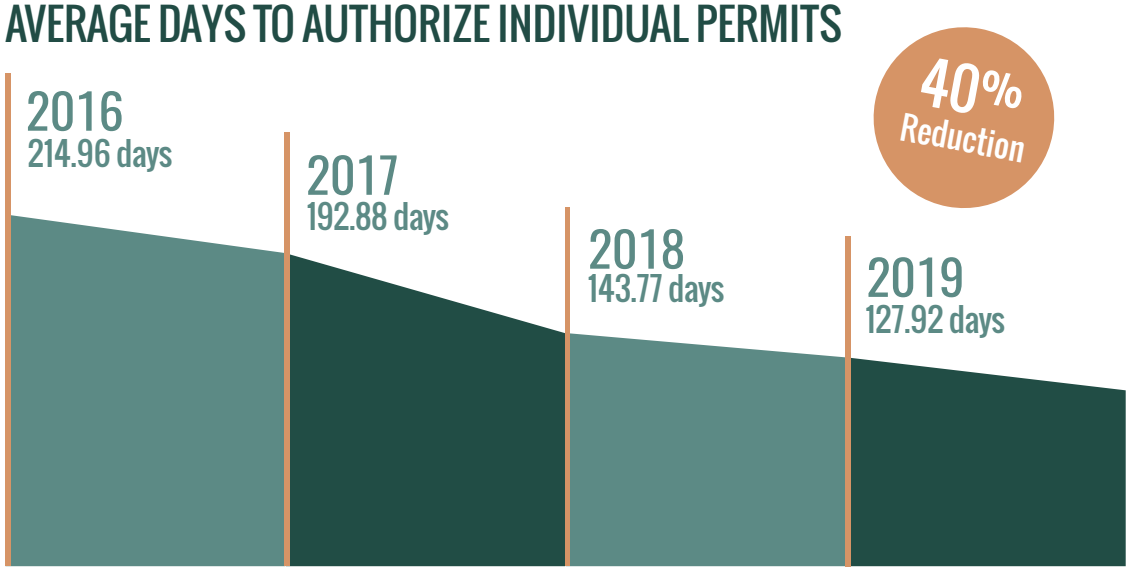
INTRODUCTION

With a record of improved permit processing and return-to-compliance timeframes *(see Figures A & B)*, the Arizona Department of Environmental Quality (ADEQ) is pursuing the development and administration of a state Clean Water Act (CWA) § 404 program to align CWA programs across the state. The value ADEQ can provide to the regulated community, while protecting public health and Arizona's unique environment, includes:

- Clear understanding of how a proposed project will be analyzed.
- Predictable and consistent permit conditions and reduced review timeframes.
- Improved accountability with one agency responsible for CWA requirements, resulting in consistent feedback and advice.
- Robust enforcement and compliance assistance programs providing consistent protection of Waters of the United States (WOTUS) in Arizona and encouraging good environmental corporate stewardship.
- Ability to streamline comprehensive analyses of impacts to aquatic resources by leveraging agency-wide environmental data and data from sister-state agencies.

Figure A

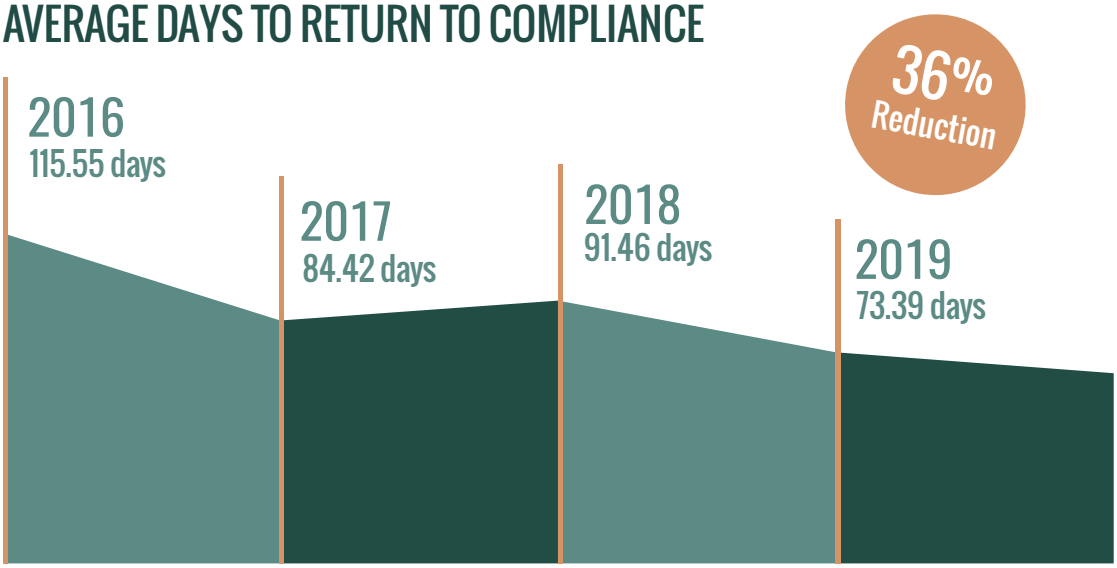
AVERAGE DAYS TO AUTHORIZE INDIVIDUAL PERMITS



ADEQ has continuously reduced the number of days to authorize Individual Permits

Figure B

AVERAGE DAYS TO RETURN TO COMPLIANCE



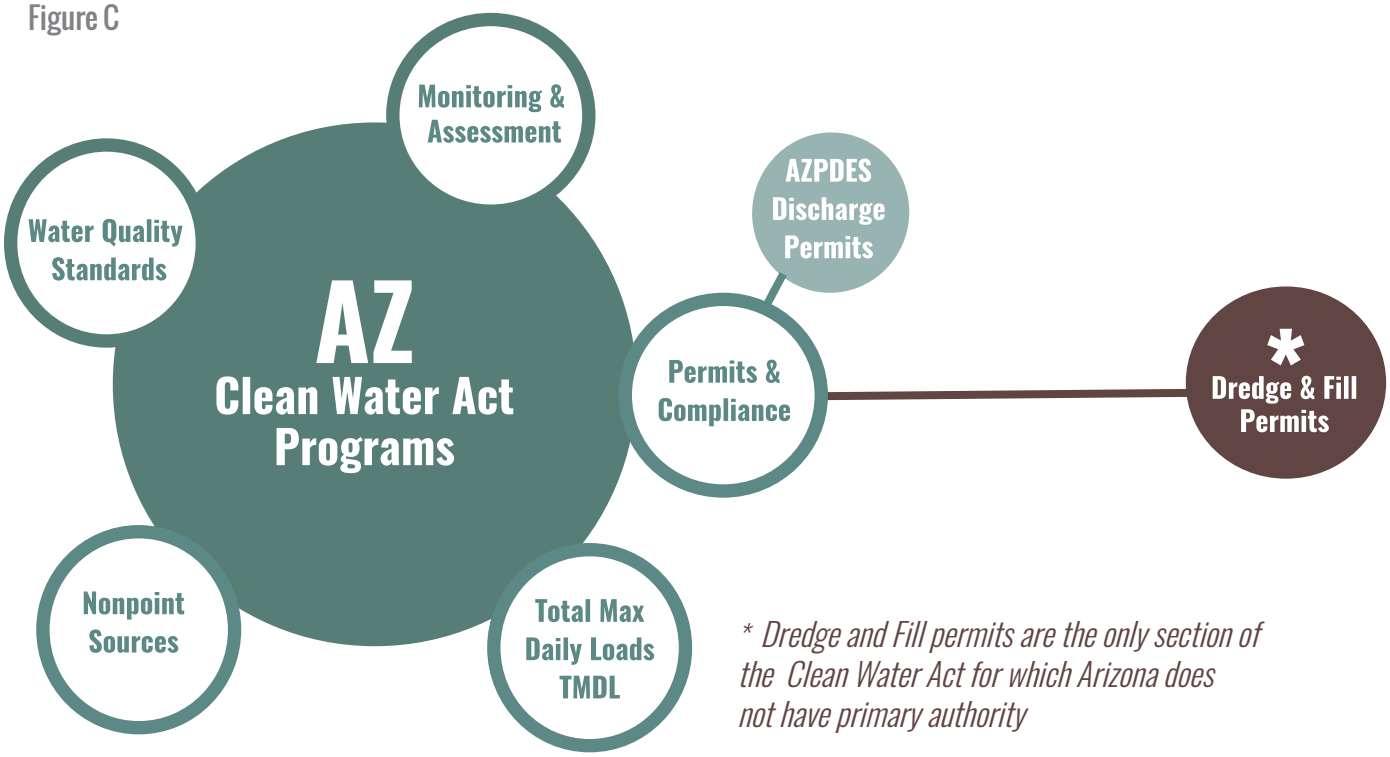
Through compliance assistance efforts, ADEQ has worked with customers to reduce the number of days to return to compliance

PROGRAM SUMMARY

The CWA is a federal statute enacted to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 404 of the CWA regulates the discharge of dredged or fill material within WOTUS.

In states that do not have primacy, the United States Army Corps of Engineers (USACE) implements the program, while the Environmental Protection Agency (EPA) provides compliance and enforcement assistance and oversight to USACE. Dredge and Fill Permits are the only state assumable section of the CWA for which Arizona does not have primacy *(see Figure C)*.

Figure C



** Dredge and Fill permits are the only section of the Clean Water Act for which Arizona does not have primary authority*

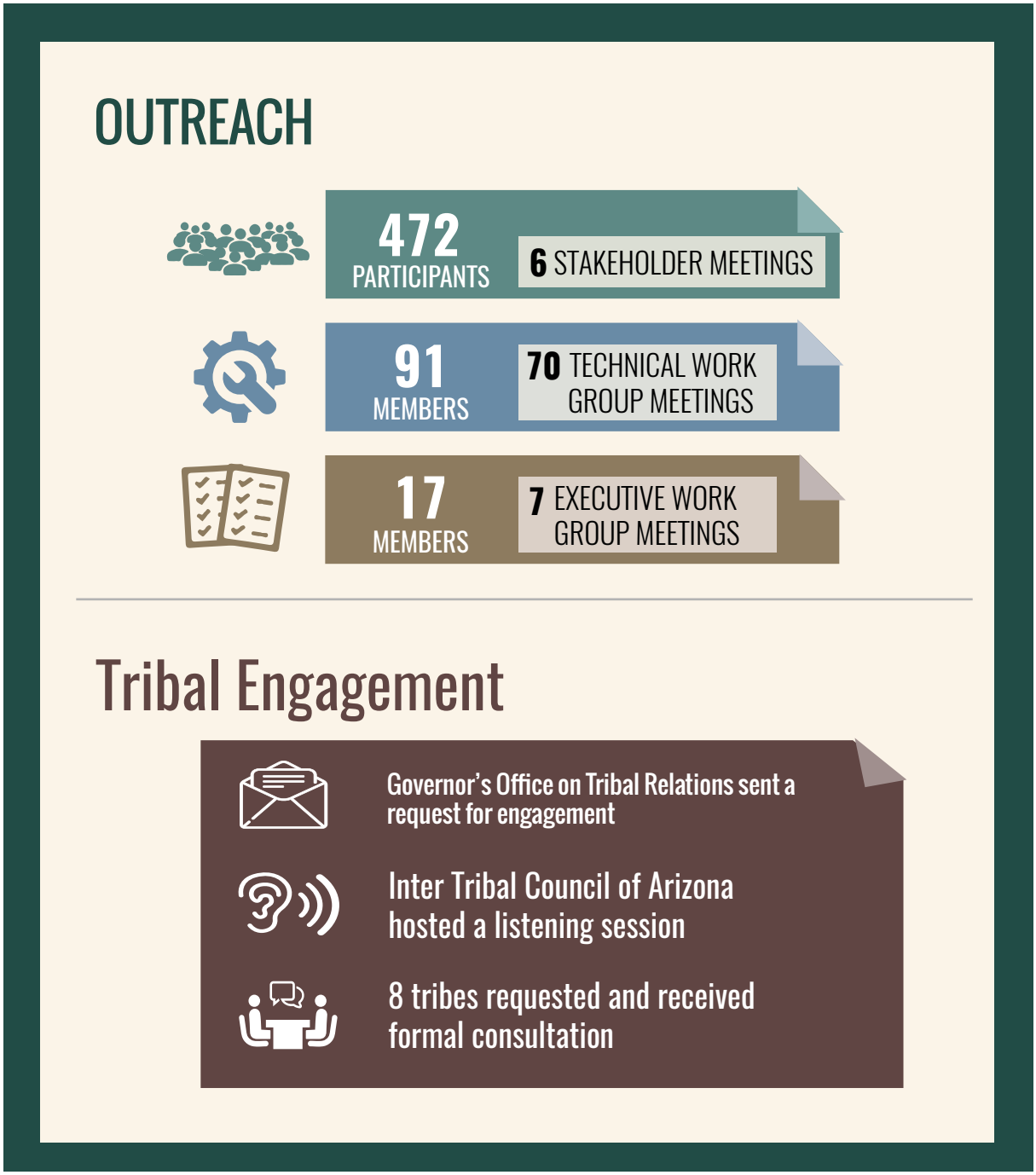
STAKEHOLDERS AND TRIBES

ADEQ has and continues to engage stakeholders and tribes in the development of an Arizona-specific § 404 program.

To date, ADEQ has hosted 6 general stakeholder meetings, 70 technical work group meetings, 7 executive work group meetings, 9 tribal listening sessions and/or formal consultations, and numerous meetings with partner-state and federal agencies. In addition, ADEQ maintains webpages for sharing program information and work group products and created a unique program email subscription for sharing updates, sending meeting invitations, and soliciting stakeholder feedback *(see Figure D)*.

Under a state program, much like all 10 other federal programs that ADEQ implements, the EPA will maintain oversight over ADEQ's implementation and permit issuance; maintain civil and criminal enforcement authority; and participate in compliance and enforcement actions. Citizens maintain the right to file civil suits against facilities.

Figure D



Learn more about § 404 engagement efforts at azdeq.gov/cwa-404

USACE & STATE § 404 PROGRAM COMPARISON

The following compares the current USACE program to the potential state program *(see pg. 48 for more details)*.

	TOPIC DESCRIPTION	USACE	ADEQ	FOR A MORE IN-DEPTH VIEW SEE:
Jurisdictional Determination (JD)	• **Preliminary JDs (PJDs)** are non-final statements affirming that a water may be regulated by the CWA • **Approved JDs (AJDs)** are final written statements that a water is or is not regulated by the CWA	Average timeframes for: PJDs = 73 days (ranging from 2 – 6,030 days) AJDs = 148 days (ranging from 9 – 3,502)	• Projected timeframes for: PJDs = 30 days AJDs = 45 days • Licensing timeframes (LTFs) will be established in rule, but must account for exceptional cases	*See pg. 28 for more details >*
Permit Process	**General Permits** regulate activities that cause minimal adverse effects and provide standard permit conditions	• 80 days on average from application to receipt of authorization (ranging from 1 – 1,207 days) • Provides five years of coverage for discharge	• Projected 30 days on average from application to receipt of authorization • Provides five years of coverage for discharge • Modify current USACE standards to comply with state law • LTFs will be established in rule, but must account for exceptional cases	*See pg. 41 for more details >*
	Individual Permits regulate activities that pose effects outside the parameters of a general permit; tailored to a specific project	• 229 days on average from application to receipt of authorization (ranging from 23 – 1,588 days) • Provides at least five years of coverage, sometimes more	• Projected 120 days from application to receipt of authorization with a goal of 180 days for all permits • No state permit may be issued for longer than five years, per federal law • LTFs will be established in rule, but must account for exceptional cases	*See pg. 41 for more details >*

	TOPIC DESCRIPTION	USACE	ADEQ	FOR A MORE IN-DEPTH VIEW SEE:
404(b)(1) Guidelines Implementation	Ensures a dredge or fill discharge activity will not have an unacceptable adverse impact to an aquatic ecosystem	• Avoidance and minimization of discharge • Least environmentally damaging practicable alternative must be permitted • Mitigation for impacts as appropriate • Significant degradation of WOTUS must not occur • Other restrictions on discharge must not be violated	Consistent with USACE	See pg. 24 for more details >
U.S. Endangered Species Act (ESA)	Requires a program to conserve threatened or endangered species and the ecosystems on which they depend	ESA protections apply; as a federal action, the consultation requirements under Section 7 applies	• ESA protections apply • Section 7 consultation does not apply • ADEQ will provide informal consultation process • If necessary because of unavoidable adverse effects, ADEQ will either transfer permit to USACE for processing or applicant may obtain ESA Section 10 permit	See pg. 29 for more details >
Cultural/Historic Resources	Requires a federal agency to consider the effects of federal undertakings on historic properties	Applicable if project poses an adverse impact to historic properties; triggers National Historic Preservation Act (NHPA) Section 106 and tribal consultations	• NHPA Section 106 doesn't apply • Impacts will be addressed instead via State Historic Preservation Office (SHPO) consultation, 404(b)(1) Guidelines, and per ADEQ's tribal policy	See pg. 32 for more details >

PROGRAM FEES

To cover the full cost of the state § 404 program, ADEQ developed a fee schedule based on data provided by the USACE (i.e., number of applications per year and touch time per application) and expertise provided by Elliott D. Pollack and Company, an economic consulting firm. The USACE data set included 10 years of data. Changes in WOTUS definitions would impact the number of permit applications, but is not anticipated to change fees. *(See Appendix Additional Fee Information section, pg. 73, for more details.)*

COVERAGE WITHOUT FEES

A feature of the USACE program that ADEQ proposes to retain is general permit coverage for specific discharges and activities without a requirement for ADEQ review, authorization, and associated fees.

Of the 44 USACE nationwide and regional general germits that are applicable in state program jurisdictional waters:

- 10 permits (22 percent) do not require approval and will not require a fee *(See Figure E)*.
- 14 permits (32 percent) do not require approval when certain threshold conditions are met and will not require a fee *(See Figure F).*
- 20 permits (46 percent) always require approval and will require a fee *(See pg. 73)*.

Figure E

Fees Not Required

- NWP 4 - Fish and Wildlife, Harvesting, Enhancement, and Attraction Devices and Activities
- NWP 5 - Scientific Measurement Devices
- NWP 6 - Survey Activities
- NWP 16 - Return Water from Upland Contained Disposal Areas
- NWP 19 - Minor Dredging
- NWP 20 - Response Operations for Oil or Hazardous Substances
- NWP 25 - Structural Discharges
- NWP 30 - Moist Soil Management for Wildlife
- NWP 32 - Completed Enforcement Actions
- NWP 41 - Reshaping Existing Drainage Ditches

Figure F

Fees May Not Be Required

- RGP 81 - Maintenance and Bank Stabilization Activities, Pima County, Arizona
- RGP 96 - Routine Transportation Activities, Arizona
- NWP 3 - Maintenance
- NWP 12 - Utility Line Activities
- NWP 13 - Bank Stabilization
- NWP 14 - Linear Transportation Projects
- NWP 18 - Minor Discharges
- NWP 22 - Removal of Vessels
- NWP 23 - Approved Categorical Exclusions
- NWP 27 - Aquatic Habitat Restoration, Enhancement, and Establishment Activities
- NWP 33 - Temporary Construction Access, and Dewatering
- NWP 36 - Boat Ramps
- NWP 43 - Stormwater Facilities
- NWP 51 - Land-Based Renewable Energy Generation Facilities

FEE STRUCTURE

- No recurring annual fees are anticipated for the state § 404 program.
- General permit authorizations and JDs will be charged flat fees.
- Individual permits will have an application fee and an hourly rate due to their unique nature and potential for substantial effort.

Although, ADEQ charges annual fees for 7 other CWA and 3 Aquifer Protection Permit (APP) categories and for all Clean Air Act construction and operating permits, recurring fees for § 404 are not being proposed.

FEE SCHEDULE

See the following table for the proposed fee schedule.

Service		Fee	Type
PJD			
	Single potential discharge	$7,875	Flat
	Per additional potential discharge	$375	Flat
	If site visit required	$7,500	Flat
AJD			
	Single potential discharge	$10,875	Flat
	Per additional potential discharge	$750	Flat
	If site visit required	$7,500	Flat
General Permit Authorization*			
	Single discharge	$9,000	Flat
	Per additional discharge	$1,500	Flat
Individual Permit*			
	Application fee	$54,800	Flat
	Plus an hourly review charge	$195	Hourly

** Assumes that a valid previously issued JD is available with application. If no JD is available, the JD will be carried out as part of the general permit authorization or individual permit review, and the appropriate fee will apply.*

GENERAL PERMIT EXAMPLE

Five bridges that are a part of the same project, but are located within separate water bodies, would be considered separate discharges. These five bridges (i.e., discharges) would likely receive five general permit authorizations under a single application, but fees for each discharge will be required. See the following table, which shows anticipated fees for example scenarios.

Example Scenario	Anticipated Fee
General permit and PJD for 5 discharges	$24,375

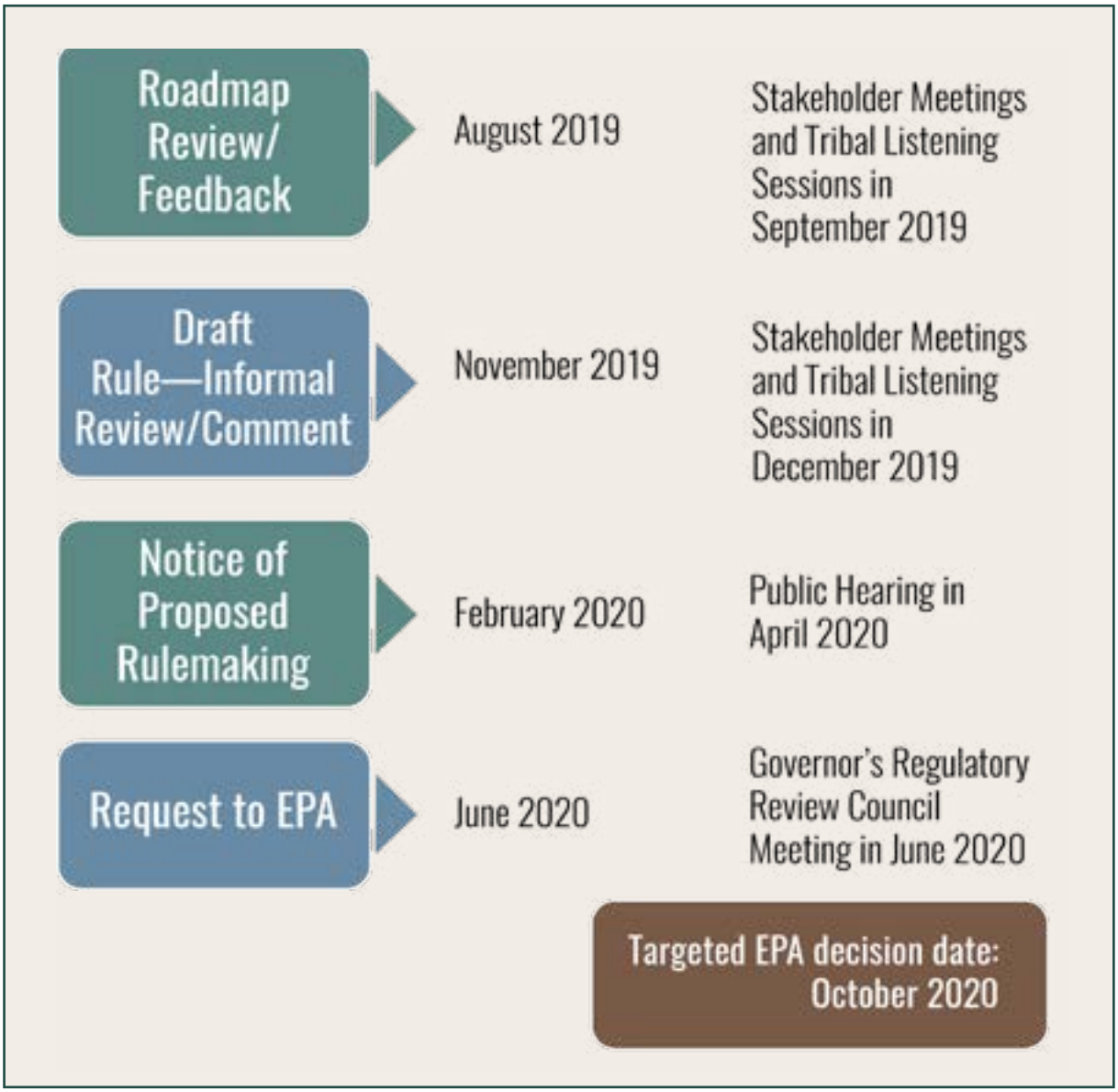
OTHER EXAMPLES OF APPLICATION SCENARIOS AND ANTICIPATED FEES

Example Scenario	Anticipated Fee
General permit and PJD for 1 discharge	$16,875
Individual permit with 80 hours of review and single discharge AJD	$81,275

See Appendix Additional Fee Information section, pg. 73, for more

PATH FORWARD

The following is a schedule of the key milestones for the development and approval of the state § 404 program. This schedule is subject to change, based on comment from stakeholders and development of the rules.



Details regarding upcoming meetings will be posted at azdeq.gov/cwa-404

ENGAGEMENT AND OUTREACH

PUBLIC, STAKEHOLDER, AND TRIBAL NATIONS

ADEQ committed to and implemented a robust stakeholder engagement process in development of the state § 404 program elements. The process to date has included webpages for posting information, a unique program email subscription, general stakeholder meetings held in Phoenix and Tucson with online participation options, technical work groups, an executive work group, tribal listening sessions, and meetings with partner-state and federal agencies.

1. INITIAL OUTREACH

After passage of the state authorizing legislation, ADEQ conducted stakeholder meetings in Phoenix and Tucson in June 2018 to inform stakeholders of the agency's intent to assume the permitting program and to seek early input from the regulated community, non-governmental organizations (NGOs), and the public.

Attendees participated in individual and group exercises to provide input on the following topics:

- Perceived pros and cons of a state § 404 program.
- Positives and opportunities for improvement of the current USACE § 404 program.
- Other issues that ADEQ should consider while developing a state § 404 program.

All comments received were posted on the project webpage.

2. REPORT BACK TO STAKEHOLDERS

At the end of June 2018, ADEQ held follow-up stakeholder meetings in Phoenix and Tucson to present an overview of the comments received and to ask stakeholders to identify any additional significant issues. During the meetings, ADEQ proposed the formation of volunteer work groups to address specific issues related to the main technical components identified during the initial outreach. Stakeholders responded positively to the formation of the work groups and suggested additional potential groups.

3. TECHNICAL WORK GROUPS

In July 2018, ADEQ prepared an online form that stakeholders could use to express interest in volunteering to serve on one or more of the technical work groups (TWGs). ADEQ formed the work groups with participants encompassing wide-ranging expertise and perspectives. More than 100 people expressed an interest in serving on a work group and 91 stakeholders were assigned to the following groups:

- Jurisdictional Determinations
- Permit Process
- 404(b)(1) Guidelines Analysis (Alternatives, Significant Degradation, Avoidance and Minimization)
- Endangered Species Act Considerations
- Compensatory Mitigation (subpart J of the 404(b)(1) Guidelines)
- Cultural and Historic Resources
- Fees

Each TWG was provided a charter, which outlined the logistical expectations, roles, and responsibilities of the volunteer members and the objectives of the group. Each TWG considered the following issues and drafted a technical white paper to identify issues and make recommendations to ADEQ:

- Identify the current state of the USACE § 404 program.
- Identify an ideal future state of a state § 404 program.
- Recommend gap closure options between the identified future state and current state.

All white papers are posted on the project website at azdeq.gov/cwa-404.

4. EXECUTIVE WORK GROUP

ADEQ established an Executive Work Group consisting of executive leaders from stakeholder organizations, NGOs, and state and federal agencies. The Executive Work Group provided the agency input in the following areas:

- Evaluate and align the TWG findings.
- Assist ADEQ in identifying and resolving issues identified by each TWG.
- Discuss draft roadmap options and recommend which future state gap options add value to the permitting process and protect WOTUS to the same level as the federal program.

5. TRIBAL CONSULTATION

In September 2018, ADEQ began tribal outreach with a listening session at the Inter Tribal Council of Arizona. During this listening session, most tribes stated they would like one-on-one consultation with ADEQ leadership and would like the agency to form a Tribal Nation Work Group.

Tribal Nation Work Group members were selected by each tribe and consisted of tribal council members and/or tribal attorney and environmental staff. While the Tribal Nation Work Group was initially convened to provide feedback about the CWA § 404 state assumption process, it evolved to discuss agencywide tribal consultation policies and therefore, did not produce a white paper.

ADEQ conducted eight face-to-face tribal consultation sessions, as requested by the respective Tribal Nations. Tribal leaders were briefed and provided feedback on ADEQ's intent to pursue CWA § 404 state assumption.

PROGRAM DESCRIPTION

OVERVIEW OF CLEAN WATER ACT § 404

The CWA is a federal statute enacted to address historical and ongoing impacts to water quality in the United States.[1] The purpose of the CWA is to, "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[2] The act was amended to include a variety of pollution control measures and programs, including § 404, Permits for Dredged or Fill Material, which regulates the discharge of dredged or fill material within WOTUS.[3] In states without a federally approved state § 404 program, the USACE implements the program. The EPA has oversight over these § 404 permits and establishes rules guiding state program assumption, including the 404(b)(1) Guidelines, or state program rules.

1. REQUIREMENTS OF A STATE CWA § 404 PROGRAM

The U.S. Congress intended for states to pursue assumption of the § 404 program,[4] as authorized by the CWA. To date, only two states have assumed the § 404 program: Michigan in 1984 and New Jersey in 1994.

To assume authority for the permitting program, a state must meet the specific requirements enumerated in CWA § 404(h). If the EPA, in consultation with the USACE and the USFWS,[5] determines the state program meets specific requirements, then the EPA "shall" approve the state's submitted program.[6] If the EPA does not make a determination within 120 days after the date of receipt of the state's program submittal, the program "shall be deemed approved" by operation of law.[7]

The rules that directly apply to the assumption and administration of a state § 404 program, promulgated by EPA, are:

- The 404(b)(1) Guidelines in 40 C.F.R. Part 230.
- § 404(c) Procedures (EPA objections to disposal sites) in 40 C.F.R. Part 231.
- § 404 Program Definitions; Exempt Activities Not Requiring 404 Permits in 40 C.F.R. Part 232.
- § 404 State Program Regulations in 40 C.F.R. Part 233.

2. STATE CWA § 404 PACKAGE SUBMITTAL COMPONENTS

The following components are required in a state assumption submittal package, along with a cover letter from the governor of the state requesting program approval:[8]

- State program description demonstrating how the state's program meets the requirements of CWA § 404.[9]
- Copies of authorizing statutes and regulations.
- Memorandums of agreement (MOAs) with both the EPA[10] and the USACE.[11]
- Statement from the state's Attorney General's Office.[12]

3. ARIZONA-SPECIFIC REQUIREMENTS OF A STATE § 404 PROGRAM

The Arizona Legislature authorized ADEQ, acting on behalf of the state of Arizona, to establish a dredge and fill permit program that is consistent with and no more stringent than the CWA § 404 requirements,[13] which are found in the United States Code at 33 U.S.C. § 1344.

A state program would have authority to issue permits within all WOTUS within the state's jurisdiction, except for certain waters retained by the USACE because they are presently used or susceptible to use as a means to transport interstate or foreign commerce.[14] WOTUS outside of the jurisdiction of a state program will include the Colorado River and its impoundments, and waters located in areas recognized as Indian Country by the federal government.

The state's authorizing statute requires ADEQ to implement the permitting program established by 33 U.S.C. § 1344 consistent with federal law as applied to a state. This means the state must implement those requirements specifically applicable to the state under 33 U.S.C. § 1344, EPA's state implementation rules consistent with 33 U.S.C. § 1344, and EPA's 404(b)(1) Guidelines.

The state authorizing statute does not require a state's program to be identical to that of the USACE, and does not provide for other federal laws that apply to a USACE § 404 program to be implemented by the state, e.g., NHPA § 106, National Environmental Policy Act (NEPA), or public interest review.[15] These laws are not functions or requirements of CWA § 404, or of state assumption of the program, and ADEQ therefore does not have authority to implement such laws.

4. EPA OVERSIGHT OF AN APPROVED STATE § 404 PROGRAM

Upon approval of a state § 404 program, the EPA would maintain oversight over the state's implementation of the § 404 program and permit issuance, and participate in compliance and enforcement actions as mandated by federal statute and regulation. This federal-state relationship is similar to that of other primacy programs, such as the Arizona Pollutant Discharge Elimination System (AZPDES) program.

EPA would have authority to:

- Review records and ensure that the state is implementing the program according to the CWA (for example through review of required annual reports).[16]
- Take enforcement action under the CWA.[17]
- Oversee state-issued permits under two statutory provisions, CWA § 404(c) and CWA § 404(j).
- Maintain the civil and criminal enforcement authorized under 33 U.S.C. § 1319, which includes a requirement to give a state 30 days' notice before bringing a civil action.
- Withdraw approval of a state program when a state is not administering an approved program in accordance with CWA § 404 requirements, including the 404(b)(1) Guidelines regulations and state implementation regulations.[18]

Modification to any applicable federal statute or regulation would require revision to a state § 404 program within one year of the date of such regulation, or within two years if a state must amend or enact a state statute.[19]

a) CWA § 404(C) – DISPOSAL SITE RESTRICTIONS

Under CWA § 404(c), the EPA may restrict or deny the use of a particular site as a disposal site if the discharge of dredge or fill material will have an unacceptable adverse effect on:

- Municipal water supplies,
- Shellfish beds and fishery areas,
- Wildlife, or
- Recreational areas.

The process to exercise this authority requires significant documentation and is also known as EPA's "veto" authority over USACE permits. This veto authority continues to exist when providing oversight of a state § 404 program.[20] Nationwide, the EPA has exercised its veto authority 13 times for potential USACE permit disposal sites since the inception of the program.[21]

b) CWA § 404(J) – PERMIT REVIEW IN CONSULTATION WITH THE USACE AND USFWS

The EPA's oversight of state-issued permits, including notification, comment and objection procedures, and transfer of certain permits to the USACE for processing, is detailed in CWA § 404(j) and 40 C.F.R. § 233.50. Under CWA § 404(j), a state is required to provide notice and copies of certain individual permit applications and proposed state general permits to the EPA prior to issuance.[22] This notification is required to allow the EPA to review and potentially comment and object, based on consultation with the USACE and USFWS. The EPA may waive the review requirements for any class, type, or size of § 404 permit.[23] Under 40 C.F.R. § 233.51, the EPA establishes the required types of permits and discharges for which the EPA may not waive review.[24]

The EPA will provide the permit applications and proposed general permits that are not waived to the USFWS and the USACE for review and comment, according to timelines and processes established in CWA § 404(j) and 40 C.F.R. § 233.50. Once the EPA notifies the state of its intent to comment, the state may not issue the permit for 90 days to allow the EPA time to submit any formal objections, if any. The EPA may object to the issuance of a permit and recommend permit conditions to resolve the objection only if the permit is the subject of an interstate dispute, or not in compliance with the requirements of CWA § 404, including the 404(b)(1) Guidelines.[25] State § 404 permit applications with unresolved EPA objections or permit condition requirements may not be issued.[26] If the state does not resolve the objection, and/or does not deny the permit, the USACE must process the permit application.[27]

404(B)(1) GUIDELINES

Both the USACE and states with primacy must follow the 404(b)(1) Guidelines in 40 C.F.R. Part 230 to implement the CWA § 404 program. The purpose of the Guidelines is, "to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material."[28]

As required within these Guidelines, permit applicants must consider alternative discharge sites and avoid and minimize aquatic resource impacts. Applications with proposed discharges that cause or contribute to significant degradation of WOTUS, or violate other restrictions on discharges in the Guidelines (e.g., discharges that cause or contribute to violations of applicable state water quality standards)[29] will be denied.[30]

Adherence to the Guidelines is a required element of state program approval.[31] ADEQ will incorporate the Guidelines by reference into state rules. The level of documentation necessary to comply with the Guidelines will be commensurate with the complexity and impact of a particular project.[32]

Guidance, negotiated with EPA, will be developed to clarify the documentation necessary to comply with the Guidelines, such as how to submit a substantively complete alternatives analysis, how to discern whether a submittal is for a single and complete project, or how to evaluate adverse effects in different ecosystems. This may entail referring applicants to already existing or modified guidance that comports with current case law. ADEQ will also retain the ability to request additional information to support its reviews under the Guidelines.

Similarly, ADEQ intends to describe, in guidance, its methodologies to assess effects in alignment with the Guidelines' requirements.

STATE § 404 PROGRAM DESCRIPTION

ADEQ intends to create a state § 404 program that will provide necessary protections of aquatic resources, while respecting the regulated community's desire for clarity, consistency, and reasonable review timeframes. The program will be located within ADEQ's Water Quality Division as its own unit. ADEQ anticipates employing approximately six full-time permit writers with appropriate levels of experience and knowledge encompassing the following topic areas:

- Water quality
- Aquatic and wildlife biology
- Hydrology
- Geology, including erosion, sedimentation, and soils
- Environmental toxicology
- Field skills, which include performing or reviewing:
    - Ordinary high-water mark determinations

    - Wetland delineations
    - Archeological surveys
    - Aquatic resource function assessments
    - Site inspections
- Mitigation and adaptive management plan creation and review
- Permitting

ADEQ anticipates hiring a full-time program manager, a compliance and enforcement officer, a legal analyst, and an administrative staff member, bringing total staff at ADEQ to 10. Currently, USACE has 10 staff members within the Arizona branch performing § 404 duties, who are also supported by the Los Angeles district and the national headquarters.

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.

Ten years of data from USACE indicate that, on average, the state § 404 program will review and manage the following tasks each year:

- 8 individual permits.
- 83 unique applications for coverage under a general permit:
    - 172 separate and additional impacts to WOTUS will be reviewed under those unique general permit coverage applications.
    - On average, each general permit coverage application will impact 3 separate areas of WOTUS.
- At a minimum, the same number of jurisdictional determinations as the areas of WOTUS impacted will be performed.

Other essential tasks that will be performed by the program include:

- Permit review process improvements.
- Re-issuance of general permits, under which applicants may seek coverage.
- Oversight of new in-lieu fee funds, mitigation banks, and permittee responsible mitigation.
- Review of compensatory mitigation annual reports.
- Corrective actions for underperforming compensatory mitigation sites.
- Compliance and enforcement activities.

STATE § 404 PROGRAM COMPONENTS

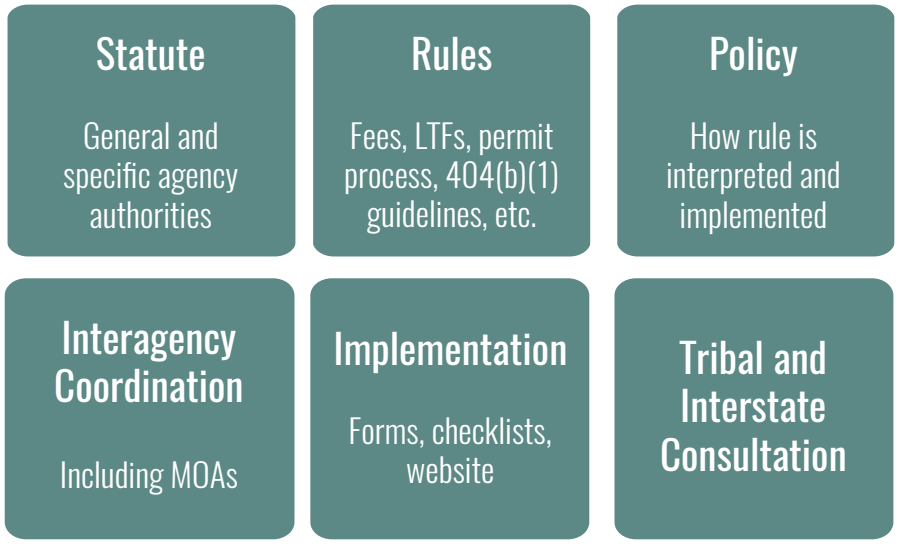
ADEQ has or will complete the following:

- Obtain statutory authorities and mandates.
- Create rules to implement and align with statutory authority.
- Develop substantive policies to ensure interpretive uniformity and transparency.
- Negotiate, in coordination with other entities, including EPA and the USACE, agreed upon provisions and memorialize them in MOAs.

All of these components will inform the agency's implementation and consultation procedures *(see Figure F).*

Figure F

PROGRAM COMPONENTS AT A GLANCE



TECHNICAL COMPONENTS

The following are the main technical components of the CWA § 404 program:

- Jurisdictional determinations
- Permit process
- 404(b)(1) Guidelines Analysis (alternatives, significant degradation, avoidance, and minimization)
- Endangered Species Act considerations
- Cultural and historic resources
- Tribal consultation
- Compensatory mitigation (subpart J of the 404(b)(1) Guidelines)
- Fees, cost, and economic impact

JURISDICTIONAL DETERMINATIONS

Under the USACE program, a jurisdictional determination (JD) is a written statement that a wetland or waterbody is subject to regulatory jurisdiction under either §§ 9 or 10 of the Rivers and Harbors Act (RHA)[33] or under CWA § 404.[34] An evaluation of geographic jurisdiction must be made prior to issuing a CWA § 404 permit to ensure that the scope of analysis of the proposed project is accurate.[35]

Although a formal JD process is not a federally required element of state assumption, state statute mandates that ADEQ adopt rules establishing procedures for preliminary jurisdictional determinations (PJDs) and approved jurisdictional determinations (AJDs).[36] Upon assumption, ADEQ will issue JDs much the same way the USACE does today:

- PJDs and AJDs will likely be defined according to the USACE's current definitions in 33 C.F.R. Part 331.
- JDs may be issued for longer than five years, if negotiated with EPA.
- ADEQ will use applicable federal technical manuals to identify WOTUS in accordance with relevant rules in order to increase consistency in applications and ADEQ review.

- ADEQ will provide a robust internal training program to ensure staff have the skills necessary to efficiently and accurately make determinations.
- ADEQ will provide guidance for PJD and AJD submittals.
- ADEQ will provide an online map of all JDs to enhance transparency.
- AJDs will be appealable by the "party affected by the jurisdictional determination"[37] to then Water Quality Appeals Board pursuant to A.R.S. § 49-323.[38] The state JD program does not abrogate any citizen suit rights under the CWA.[39]
- PJDs will not be appealable, but an applicant may request an AJD.
- Pre-application meetings will be offered.
- EPA will have specified time to review AJDs before they are finalized.
- ADEQ intends to establish maximum timeframes by law (as appropriate for the JD type) for review and approval of JDs and is considering the following:

    - Maximum 15 calendar days for administrative completeness review and application acceptance.
    - 30 calendar day substantive review for a PJD.
    - 60 calendar day substantive review for an AJD.
    - Possible time extension for large/complex determinations (similar to the current longer Aquifer Protection Permit processing timeframes for "complex" applications).[40]

ENDANGERED SPECIES ACT CONSIDERATIONS

The Endangered Species Act of 1973 (ESA) is a federal act that provides for a program to conserve endangered[41] and threatened[42] species and the ecosystems upon which such species depend (i.e., critical habitats).[43] The USFWS implements and enforces the requirements of ESA in Arizona.[44]

Under ESA § 9, it is unlawful for any person to "take" a listed threatened or endangered species.[45] A person who "takes" a species may be subject to liability under ESA.[46] A person or applicant may avoid liability for actions that would qualify as "take" if those actions are incidental to otherwise legal activities by obtaining an incidental take authorization from the USFWS. These authorizations are the product of either (1) inter-

federal agency cooperation under the provisions of ESA § 7, resulting in an Incidental Take Statement,[47] or (2) compliance with a Habitat Conservation Plan (HCP) developed under the provisions of ESA § 10, resulting in an Incidental Take Permit.[48]

Although the ESA applies to the take of listed species regardless of whether ADEQ assumes the program, generally, a state may not provide "take" liability protection.[49] However, stakeholders have identified incidental take liability as a potential risk should the state assume the CWA § 404 program.

In compliance with the Guidelines, ADEQ will not authorize any discharge that jeopardizes the continued existence, or adversely modifies critical habitat, of a species listed under ESA.[50] In addition, ADEQ will consider impacts to listed species and their habitat under subpart D of the Guidelines, as a contributing factor to the significant degradation of WOTUS.[51]

Also, while ADEQ may not provide legal take protection, the state intends to coordinate with USFWS and AZGFD to avoid take when practicable by incorporating conservation measures or other project modifications so that a take incidental to implementing the project would be unlikely to occur. ADEQ intends to develop an MOA with USFWS to allow ADEQ to seek guidance from USFWS on permits that have the potential to adversely affect listed species or critical habitat.

Professionals contracted by the applicant would conduct a Biological Evaluation (BE), reaching a conclusion as to the project's likelihood of adverse effects on listed species. In reviewing the BE, ADEQ (potentially in consultation with AZGFD, as negotiated) could make the initial determination of the project's potential effect on listed species. If the state makes a "no-effect" determination (i.e., there are no resources present), the permit process may proceed. If there is a reasonable potential that a listed species may be affected in any way, ADEQ may informally consult with USFWS, as negotiated. Any necessary conservation measures identified during the informal USFWS consultation process to avoid adverse effects that would rise to the level of "take" would be included in the state § 404 permit special conditions. ADEQ intends to negotiate timeframes for all parties involved in reviewing effects on threatened and endangered species. A form of informal consultation is currently implemented within the New Jersey and Michigan § 404 programs.

If upon review, and in consultation with necessary parties, there is a likely adverse effect to a threatened or endangered species that cannot be avoided or mitigated to a "may affect, not likely to adversely affect" determination, then a project may "off-ramp" (i.e., transfer) to the USACE for processing, which would trigger an ESA § 7 consultation and issuance of an Incidental Take Statement, or a facility may obtain an ESA § 10 Incidental Take Permit as a prerequisite to issuance of a state § 404 permit by ADEQ. Off-ramped permits will be permanently administered by the USACE.

ADEQ intends to follow the aforementioned informal consultation process for projects that may affect a species, as well as provide an off-ramp to the USACE for projects likely to have an adverse effect on a threatened or endangered species that may not be avoided through conservation measures. The criteria and legal framework under which the USACE would receive such permits would be defined in the MOAs between ADEQ, EPA, USFWS, and the USACE. This option allows for potential projects without ESA concerns to be expedited.

The following chart summarizes the potential effects on listed species and their habitat and associated coordination and permitting actions:

State Determination	Potential Coordination and Additional Permitting Actions(s)
No effect	None
May affect, not likely to adversely affect	May require special permit conditions to assure no adverse effect
May affect, likely to adversely affect	• Special permit conditions to bring below "likely to adversely affect" threshold • Technical assistance letter from the USFWS. • Permit may be off-ramped to USACE, requiring formal ESA § Consultation with USFWS. • May deny permit due to significant degradation of WOTUS.
Jeopardy or adverse modification of critical habitat	Permit denial

CULTURAL AND HISTORIC RESOURCE PROTECTION

The National Historic Preservation Act (NHPA) only applies to federal actions. Therefore, should ADEQ assume the CWA § 404 program, NHPA would not apply to projects that do not otherwise have a federal nexus, including, for example, projects on private land not contingent on federal funding.

ADEQ intends to be as protective of cultural and historic resources as practicable and permitted by state law and as required under CWA § 404. For projects that do not otherwise have a federal nexus, ADEQ will evaluate resource protections under assumption regulations, including the 404(b)(1) Guidelines, and other state law.

1. STATE ASSUMPTION REQUIREMENTS

Subpart F of the 404(b)(1) Guidelines stipulates that effects of the permitted discharge on human use characteristics of the aquatic site should be considered and avoided or minimized, including effects of the discharge into "areas designated under federal or state laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value."[52] Possible loss of values to consider include that the discharge of dredge or fill material into such areas may modify the human use characteristics for which such sites are set aside and managed.[53]

2. RELATED STATE LAW

Arizona has several laws that mandate consideration of adverse effects on cultural and historic resources, as well as those that protect freedom to exercise religion, mandate tribal consultation, and protect archeological sites from disclosure. Such laws include the following:

- Arizona Register of Historic Places[54]
- Historic Sites Review Committee[55]
- Public records disclosure exception[56]
- State Historic Preservation Act (SHPA)[57]
- Arizona Antiquities Act[58]
- Arizona burial protection laws[59]
- Tribal consultation and input incorporation law[60]
- Free Exercise of Religion Act[61]

3. STATE PROGRAM APPROACH

ADEQ will develop guidance and rule to clarify state cultural and historic resource protection under a state CWA § 404 program.

a) STATE BURIAL AND ANTIQUITIES LAWS

Arizona burial law[62] and the Arizona Antiquities Act[63] will continue to apply within the state, just as other federal laws applicable to federal and tribal lands will continue to apply within the state.[64]

b) STATE HISTORIC PRESERVATION ACT COMPLIANCE

Under state law, SHPA requires that state agencies initiate measures to ensure timely recordation of historic properties that would be substantially altered or demolished due to a state action.[65] A "state action" likely includes a permitting action. Therefore, ADEQ may require an archaeological survey of discharge areas and areas determined to be affected by the state permitting action to ensure that cultural and historic resources are identified and effects are considered, in consultation with the State Historic Preservation Office (SHPO).[66]

c) PROTECTION UNDER 404(B)(1) GUIDELINES SIGNIFICANT DEGRADATION ANALYSIS

The USACE-specific "public interest review" is a legal concept that does not arise from CWA § 404,[67] is not a state assumption requirement, and is not authorized by state statute.[68]

However, under federal law, the 404(b)(1) Guidelines require that impacts to WOTUS within areas designated under federal, state, or local laws and ordinances for their aesthetic, educational, historical, recreational, or scientific value be considered as part of a determination of significant degradation of WOTUS.[69] The term "designated" is broadly used here and likely includes areas within WOTUS that are listed, or eligible to be listed, in the National Register of Historic Places or Arizona Register of Historic Places. Therefore, impacts to these sites would be a factor considered in the CWA 404(b)(1) Guidelines significant degradation factor analysis. If the state should find that significant degradation exists based on the review of a project as proposed, and based on the significant degradation analysis in its entirety, ADEQ must deny the permit.[70] ADEQ may consult with SHPO, and potentially tribes, on how a project might be proposed or modified to avoid a significant degradation finding.

d) TRIBAL CONSULTATION AND INPUT INCORPORATION STEPS

Arizona agencies are statutorily required to seek input from (consult with) tribal officials before "undertaking any action or policy that will, or is reasonably believed to, have the potential to affect a tribal community or its members."[71] State agencies must also, within their authority, "integrate the input generated from tribal consultation into the agency's decision-making processes to achieve mutually acceptable solutions."[72] Where appropriate under its authority, ADEQ intends to uphold this tribal consultation responsibility in its permitting process with respect to cultural and historic resources.

Further, the agency is required to have a tribal consultation policy.[73] ADEQ intends to work with tribes to update the agency's current policy. ADEQ will take revisions thereof into account for CWA § 404 permitting purposes.

Even if effects do not amount to "significant degradation," inside or outside a WOTUS, ADEQ may ask permittees to consider tribal and SHPO input, and thereby modify proposed activities in order to avoid or mitigate adverse impacts to cultural or historic resources.[74]

e) NON-DISCLOSURE ACTIONS

Under state law, ADEQ and SHPO have the discretion to prevent disclosure of the location of archeological discoveries as described in A.R.S §§ 41-841 and 844, and places or objects that are included or eligible for inclusion on the Arizona Register of Historic Places.[75] ADEQ intends to ensure that such information is not generally disclosed, since disclosure poses a risk to such resources.

The following is an overview of cultural and historic resource protection, under a state § 404 program:

Location of Cultural or Historic Resources	Possible Required Actions(S)
No resources present	None
Resources within WOTUS (CWA and SHPA protections)	• Recordation of adversely impacted resources and SHPO review. • Denial of permit if impacts to resources amount to significant degradation.
Resources outside of WOTUS (SHPA protections)	Recordation of adveresly impacted resources and SHPO review

TRIBAL CONSULTATION

ADEQ is currently working with tribes to build a robust tribal consultation program. ADEQ intends to facilitate leader-to-leader consultation and continue to conduct listening sessions concerning both the state § 404 program and ADEQ programs department-wide. In conjunction with tribes, ADEQ will pursue policies for consultation on permits. ADEQ is exploring methods to include tribal recommendations and concerns into its § 404 permitting decisions where allowable under state law.

ADEQ intends to provide notice to affected tribes of general permit authorizations and individual permit applications that are likely to have an effect on tribal resources. Such notice may result in further steps toward consultation on a proposed state § 404 regulated activity. Individual permits in process will also be available on ADEQ's Permits in Process webpage.[76]

COMPENSATORY MITIGATION

Mitigation is a required element of a state CWA § 404 program.[77] Under subpart J of the Guidelines, adverse impacts to aquatic resources that are not avoided or minimized may be mitigated through methods of restoration, enhancement, establishment, and preservation under certain circumstances, as detailed in the guidelines.[78] The rules establish a preference for mitigation of ecologically similar resources to the impact site (i.e., "in-kind" mitigation is preferred over "out-of-kind" mitigation), unless out-of-kind mitigation will better serve the aquatic resource needs of the watershed.[79] Compensatory mitigation vehicles will include mitigation banks, in-lieu fee (ILF) programs, and permittee responsible mitigation projects, preferred in the order noted. However, the preference may be overcome if proposed mitigation would be environmentally preferable.[80]

ADEQ will retain the authority to enter into agreements and enabling instruments with sponsors and permittees to establish new mitigation banks, ILF programs, and permittee responsible mitigation projects. Coordination of currently established ILF programs will be negotiated with the USACE in an MOA and with ILF programs themselves.

In addition, A.R.S. § 49-256.02(C) requires ADEQ to identify available mitigation actions to permittees that are denied the sale of mitigation credits by service-area eligible mitigation banks or ILF programs. Under the Guidelines, if no mitigation credits are available for purchase from mitigation banks or ILF programs, the permittee must engage in permittee-responsible mitigation.[81]

1. ASSESSMENT OF AQUATIC FUNCTIONS

When determining appropriate project-specific mitigation requirements and the efficacy of mitigation efforts, it is important to have accurate and reliable methods of assessing aquatic functions of:

- Potential discharge sites
- Potential mitigation areas prior to mitigation efforts
- Approved mitigation areas after mitigation efforts[82]

However, there is no official or widely agreed upon assessment methodology for Arizona at this time.

Upon assumption, ADEQ will adopt an interim qualitative aquatic functions assessment methodology, using qualitative measures with an established rubric and recording observations of aquatic resources by assigning a low, medium, or high value. Specifically, ADEQ intends to use a qualitative aquatic functional assessment, which has been accepted for use in Arizona by the USACE.[83] The clarity of qualitative assessment methods enable the regulated community, as well as regulators, to easily and consistently implement them.

Post assumption, and not as a part of its initial submittal, ADEQ intends to establish a quantitative assessment methodology.[84] Quantitative assessment methods should decrease subjectivity and make objective and accurate results repeatable and consistent.

2. MITIGATION RATIOS

The USACE South Pacific Division created a standard operating procedure and checklist for determining mitigation ratios for permitted project impacts according to 404(b)(1) Guidelines.[85] Starting points for ratios are 1:1, and increase due to factors such as permittee responsible mitigation, out-of-kind mitigation, mitigation type, risk or uncertainty of mitigation success, mitigation site location, and the lag time between

impact and mitigation implementation.[86] ADEQ will also utilize currently applicable mitigation ratio policies, including those policies applicable to out-of-kind mitigation. This will ensure a smooth transition to a state program.

3. MITIGATION MANAGEMENT IN THE LONG-TERM

Generally, a mitigation project must be long-term.[87] Preservation, however, if chosen as a mitigation option, must be "permanent,"[88] and is only an option for land under threat of destruction or adverse modification (such as development).[89] Long-term management is critical to ensure that resources are replaced in the long-term. At the same time, financial assurances of mitigation sites are critical for their success. Therefore, the term "long-term" should be defined in the state § 404 program new enabling instruments and in permit conditions that require permittee-responsible mitigation.[90] ADEQ will work with EPA to define long-term in terms other than "in perpetuity," to ensure clarity and provide a pathway in cases where mitigation bank and ILF credits are unobtainable, so that mitigation remains a protective and technically financeable option.[91]

4. ILF ADVANCE CREDIT IMPLEMENTATION TIME WINDOW

Limits on the amount of time between initial advance credit sales and the implementation of the mitigation measures exist to reduce temporary damage to the environment. Under the Guidelines, ADEQ has discretion to determine the appropriate time between when advance credits are sold and when a project must be completed.[92] ADEQ will work with ILF program managers, should adequate justification be provided, to negotiate reasonable implementation windows on a case-by-case basis.

5. ILF SERVICE AREA SIZE

ADEQ acknowledges that larger service areas for ILF programs would benefit ILF program managers by creating more eligible customers for their credits, and benefit permittees by making it more likely that they will be able to purchase appropriate mitigation credits for their project impacts. However, larger service areas may have unintended environmental consequences, and require further research. At this time, ADEQ will not adjust service area sizes.

Post-assumption, ADEQ may work with EPA to establish processes to ensure that larger service areas are environmentally appropriate, especially if in-kind and local mitigation does not occur.

6. FACILITATING ILF SPONSOR COMMUNICATION WITH REGULATED COMMUNITY

ADEQ intends to facilitate meetings between ILF sponsors and the regulated community to improve communication regarding anticipated credit supply and demand within a minimum five-year planning window. This will help sponsors, potential permittees, and ADEQ identify opportunities to increase and improve aquatic functions where they are likely to be needed most in the future. This planning window will help to ensure that a no-net-loss goal is more attainable. The no-net-loss goal may be a long-term metric by which ADEQ could measure its environmental protection success.

7. MITIGATION TRACKING

Should the state develop a mitigation management program, it would need to establish a tracking system similar to the Regulatory In-Lieu Fee & Bank Information Tracking System (RIBITS), or coordinate merging data with the USACE.[93]

OVERVIEW OF ANTICIPATED MOAS

The following are required or proposed MOAs with identified federal entities, including EPA, USACE, and USFWS. Other memorandums of agreement or understanding will be developed, as needed, to operate the program and align with state and federal law.

1. EPA MOA PER 40 C.F.R. § 233.13 AND NEGOTIATED TERMS

Pursuant to 40 C.F.R. § 233.13, a state must establish an MOA with EPA in order to assume the § 404 program. Many of the MOA requirements focus on EPA-state coordination and EPA oversight procedures.

The EPA MOA shall include at a minimum:

- Provisions specifying classes and categories of permit applications for which EPA will waive federal review.
- Provisions specifying the frequency and content of reports, documents and other information which the state may be required to submit to EPA in addition to the annual report.
- Provision establishing the submission date for the annual report.
- Provision allowing EPA to routinely review state records, reports, and files relevant to the administration and enforcement of the approved program.

- Provisions addressing EPA and state roles and coordination with respect to compliance monitoring and enforcement activities.
- Provisions addressing modification of the MOA.

The EPA MOA may also potentially include:

- Provision describing grounds for objection.
- Provisions addressing permit issuance analyses descriptions and procedures to ensure state alignment with 404(b)(1) Guidelines:
    - Potentially define and describe permit scope of review to ensure that the state and EPA define scope of review according to the same criteria.
    - Potentially define and describe alternatives analysis procedures to ensure that the state and EPA are in alignment on the scope and content of an appropriate alternatives analysis.
    - Potentially define and describe avoidance and minimization procedures to ensure that the state and EPA are in alignment on scope and content of determining whether a permittee has sufficiently avoided or minimized their effects.
- Provisions addressing the state and EPA alignment on mitigation management and procedures.
- Potential procedures to move an application to the USACE for processing (ESA off-ramp).
- Provisions addressing the state and EPA roles and coordination with respect to compliance monitoring and enforcement activities.

2. USACE MOA PER 40 C.F.R. § 233.14 AND NEGOTIATED TERMS

Pursuant to 40 C.F.R. § 233.14, a state must establish an MOA with the USACE in order to assume the § 404 program. Much of the MOA will focus on procedures for transferring the existing § 404 program data, USACE-ADEQ coordination, and the waters over which the USACE will retain jurisdiction.

The USACE MOA shall include, at a minimum:

- A description of WOTUS within the state over which the USACE retains jurisdiction.[94]
- Procedures to transfer information from non-binding discussions for pending applications, so as to inform state permits.
- Procedures for the prompt transmission of relevant information, including support files for permit issuance, compliance reports, and records of enforcement actions.
- Identification of all general permits issued by the USACE; terms and conditions of which the state intends to administer and enforce upon receiving approval of its program; and a plan for transferring responsibility for these general permits to the state, including:

    - Potential ESA off-ramp procedures (see "Other Memorandums of Agreement" section).
    - Mitigation management information, whether the USACE retains ILF mitigation management or coordination with the USACE occurs, as the USACE will continue to manage mitigation for their own jurisdictional areas.

3. OTHER MEMORANDUMS OF AGREEMENT

ADEQ may partner with another state, local, or federal agency in order to implement the CWA § 404 program. Early coordination and accelerated procedures will be coordinated with the appropriate agencies based on the expected permit path. Depending on the structure and resulting responsibilities of a partnership, the resulting MOA may also be a part of the state's submittal for § 404 program assumption. Currently, ADEQ is considering partnering with SHPO to develop coordination procedures for implementing the SHPA.

ADEQ is also considering entering into either multiple MOAs or a single multi-party MOA to address ESA considerations, and resulting evaluation and coordination processes. The MOA may include the following parties:

- ADEQ
- AZGFD
- USFWS

- EPA
- USACE

It is anticipated that the MOAs will memorialize how the agencies will work with one another on ESA issues including, but not limited to, written concurrence, technical letters, formal consultation, and potential off-ramp of permits to the USACE.

PERMIT PROCESS

ADEQ anticipates issuing an average of eight individual permits and 250 general permit authorizations per year.[95]

Under federal law, ADEQ must follow state implementation requirements in 40 C.F.R. Part 233, which includes requirements for types of permits, permit exemptions, and minimum requirements for permit application data and permit conditions. The following are key issues related to permits:

- Permit Types
- Permit Conditions, Modifications, Terms, and Renewal
- Permit Applications, Forms, and Online Access
- Licensing Timeframes
- Public Notice
- Permit Transition from USACE
- Federal Nexus Projects
- Compliance and Enforcement

1. PERMIT TYPES

ADEQ will generally offer the same permit types as the USACE.

ADEQ will issue general permits, under which applicants may receive authorization for minimal impacts to the aquatic resources of WOTUS through the addition of dredged or fill material.

Statewide general permits will authorize categories of activities as currently authorized under Arizona-relevant USACE nationwide general permits (NWPs), as permissible under state law.

Activities authorized under Arizona-relevant regional general permits will also be authorized under state regional general permits (RGPs), as permissible under state law. This will include, at a minimum, RGPs 63 "Emergency Authorizations," 81 "Maintenance and Bank Stabilization, Pima County, Arizona," and 96 "Routine Transportation Activities, Arizona."[96]

Emergency permit coverage will be available under several general permits, including RGP 63. Expedited emergency individual permits will also be offered.

A list of statewide general permit covered activities and required permit conditions under a state § 404 program will be included with the final program package submitted to the EPA.

ADEQ will issue individual permits, which will be the only option for activities and magnitudes of impact to WOTUS that are not authorized under a general permit. These may include letters of permission.

After-the-fact permits will likely be offered. In addition to enforcement action, these permits will be required when a project proponent fails to obtain a permit prior to engaging in a discharge of dredged or fill material. These will likely qualify as individual permits. Offering these permits encourages unlawful dischargers to come into compliance, as part of an enforcement action.

2. PERMIT CONDITIONS, MODIFICATIONS, TERMS, AND RENEWAL

Permits will be issued, denied, and conditioned pursuant to CWA § 404 requirements and exemptions, including the 404(b)(1) Guidelines, and 40 C.F.R. Part 233, Subpart C.

Permits will be issued for a fixed term not to exceed five years.[97]

ADEQ intends to provide permits in clear language with defined terms; identify notification tiers, triggers for general permits, and triggers for elevating general permits to individual permits; and clearly delineate authorities for permit conditions.

3. PERMIT APPLICATIONS, FORMS, AND ONLINE ACCESS

a) PERMIT APPLICATIONS AND TRACKING

Applicants may need to initially apply for general permit authorizations and individual permits using forms transmittable via email. As soon as possible, ADEQ intends to develop an online application process for authorizations and permits through myDEQ, ADEQ's e-permitting and e-compliance online portal. With myDEQ, online applications help simplify complex rule interpretations and allow users to easily navigate processes for reporting compliance data. Issued permits will be publically available online through the ADEQ eMaps tool.[98] Individual permits in process will also be available on ADEQ's Permits in Process page.[99]

Applications will include information required pursuant to state implementation, including "such additional information as the director deems appropriate to assist in the evaluation of the application."[100] The level of detail required will be "commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation."[101]

ADEQ intends to provide guidance to ensure that applicants may prepare a permit application as effectively and efficiently as practicable.

b) ONLINE ACCESS AND WEBSITE MAINTENANCE

ADEQ intends to maintain a state § 404 program website. Preliminarily, the website will contain the following information and tools:

- An overview of the state § 404 program and its authorities
- Applications
- Available general permits
- Public notices
- Public hearing information
- State § 404 program handbook
- Links to appropriate informational resources:
    - ADEQ eMaps tool for location tracking
    - Form to report environmental complaints
    - Online billing portal

4. LICENSING TIMEFRAMES

ADEQ is required to establish licensing timeframes (LTFs), including for permits and JDs, in rule.[102] Timeframes may be designed to account for different levels of complexity.

a) EXPECTED ELAPSED TIMEFRAMES

As ADEQ has demonstrated in AZPDES, Aquifer Protection Permit (APP), and Air Quality Division permitting programs, the agency expects to outperform LTFs and will deliver permits as expeditiously as possible. Expected elapsed times[103] for typical applications are as follows:

- PJDs: 30 calendar days
- AJDs: 45 calendar days
- General permits: 30 calendar days
- Individual permits: 120 calendar days

b) EXPECTED LTFS

ADEQ will develop timeframes associated with each permit type and for different levels of permit complexity, similar to ADEQ's APP program,[104] and will explore establishing timeframes for various steps in the general and individual permit review processes, as appropriate, including:

- Application review for administrative completeness.
- 404(b)(1) Guidelines analysis (including water quality standards) review.[105]
- Coordination with other resource agencies (e.g., cultural, Endangered Species Act, etc.).
- Compensatory mitigation planning and negotiation.

State regional general permits will likely have the same timeframes written into the existing USACE permits (such as those for RGPs 81 and 96).

ADEQ will establish LTFs for major and minor modifications and extensions.

5. PUBLIC NOTICE

ADEQ must provide public notice according to CWA § 404 requirements, including 40 C.F.R. § 233.33. Under state law, ADEQ, "shall....establish public notice and comment procedures..... as the director deems appropriate to inform the public."[106] Also pursuant to state law, ADEQ must notify appropriate cities, towns, and counties of permit applications and requested permit modifications.[107] ADEQ must also establish procedures to submit comment and to request a public hearing.[108] The director must hold a public hearing if ADEQ determines there is a significant public interest in the permit,[109] or if ADEQ determines a hearing may be useful to its decision.[110]

ADEQ will provide public notice (likely 30 days) pursuant to CWA § 404 requirements.[111] Public notice will be reasonably calculated to cover the affected area and will be sent to appropriate parties depending on the permit type.[112]

For individual permits, including major modifications, ADEQ intends to issue two public notices:

1) Covers notice of the received application and will include a brief summary to inform the public of a proposed discharge activity and location. This notice would not have an associated public comment period or hearing.

2) Includes the draft individual permit in tandem with a technical support document. This notice would initiate a 30-day public comment period, an opportunity for a public hearing, and response to comments. If a hearing will be held, ADEQ will give a 30-day notice.

For emergency permits, ADEQ will give a 30-day public notice of the permit with an opportunity to request a hearing as soon as possible but no later than 10 days after the issuance date of the permit.[113]

For draft general permits, ADEQ will issue a public notice, which would initiate a 30-day public comment period, an opportunity for a public hearing, and response to comments.[114]

6. PERMIT TRANSITION FROM USACE

ADEQ will work with the USACE to ensure proper documentation of USACE § 404 program applications, which are pending at the time of state § 404 program approval. ADEQ will endeavor to reduce duplication of review where possible under applicable state law.

ADEQ will work with EPA to allow for a transition time period for the development and issuance of state-specific general permits.

Individual Permits

- Individual permits, previously issued by the USACE, will continue to be enforced by the USACE upon assumption and subject to an agreement with USACE memorialized in an MOA.
- Modifications or renewals of USACE-issued individual permits will be completed by ADEQ.
- ADEQ will encourage the USACE to continue processing pending applications prior to assumption approval and applicability.
- ADEQ will meet with the USACE to transfer information needed for the state to complete the review.

General Permits

- If feasible, USACE-equivalent state general permits, as allowable under state law, will be in effect at the time of the applicability date of the state § 404 program. As a backstop, until the state provides the USACE notice that it intends to administer a state-specific general permit program, the USACE may continue or ADEQ may administer and enforce general permits in coordination with EPA subject to an agreement and memorialized in an MOA.[115]

7. FEDERAL NEXUS PROJECTS

A project has a federal nexus if a federal entity takes an action that triggers the applicability of other federal laws, such as NHPA, NEPA, or Endangered Species Act (ESA) § 7. For example, if a project is located on federal land, or is funded by federal monies, these other laws would apply to the project to the

extent the nexus requires. Currently, all CWA § 404 projects have a federal nexus because the USACE is the federal actor issuing CWA § 404 permits.

Regardless of whether a project has a federal nexus, under a state-assumed CWA § 404 program, a permit applicant will be required to comply with all applicable state laws. ADEQ is considering requiring any project proponent with available information from a NEPA or NHPA process to provide ADEQ with that information. However, only previously available information, including conclusion documents (e.g., Record of Decision), that relate to the proposed project will be required. ADEQ will use this information to reduce duplication of effort and streamline the state application process. Further, ADEQ will establish coordination procedures in its MOA with the USACE to address potential linear or large projects that require permits in both state and USACE jurisdiction. In negotiating with the USACE regarding procedures for such projects, ADEQ will strive for simplicity, efficiency, and timeliness.

8. COMPLIANCE AND ENFORCEMENT

ADEQ will establish a proactive compliance and enforcement program to verify permit conditions and the efficacy of mitigation plans. ADEQ will concentrate its efforts on compliance assistance and maintaining a dialogue with facilities to ensure that facilities remain in compliance. A proactive compliance and enforcement program, including inspections and timely resolution of violations, serves both the public and the environment.

Upon assumption, ADEQ will serve as the compliance and enforcement agency for the CWA and other environmental programs, allowing facilities to communicate with a single entity. This approach provides consistency in regulatory oversight across environmental programs. By establishing a broadly applicable and consistent enforcement program, ADEQ intends to encourage good corporate stewardship.

STATE § 404 PROGRAM HANDBOOK

To maintain consistency and transparency, ADEQ will develop a substantive policy handbook to ensure alignment among internal staff and external stakeholders with CWA § 404 requirements. ADEQ will use available guidance, including USACE guidance and potentially the draft Florida § 404 handbook as starting points.

FULL COMPARISON OF USACE § 404 PROGRAM TO STATE § 404 PROGRAM

The following compares the current USACE program to the potential state program.

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Jurisdictional Determination			
Jurisdictional Waters	All WOTUS	WOTUS in Arizona except for USACE-retained § 10 waters and tribal waters	Identifies the waters under state jurisdiction; may change if EPA redefines WOTUS
Preliminary JD (PJD)	Waters with an ordinary high water mark or wetland features are presumed jurisdictional (no significant nexus evaluation necessary)	Determinations process will be the same (jurisdiction is presumed)	No change
Approved JD (AJD)	USACE jurisdiction (or lack thereof) over waters is documented and proven based on federal rule	Determination process will be the same	No change
Appeals – Jurisdictional Determinations	AJD is appealable; PJD is not appealable	AJD can be appealed to water quality appeals board by a person affected by the JD (e.g., landowner or leaseholder); PJD is not appealable	Appeals must conform to state appeals process

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Timeframes – Jurisdictional Determinations	Average timeframe for PJDs: 73 calendar days (ranging from 2 – 6,030 calendar days) Average timeframe for AJDs: 148 calendar days (ranging from 9 - 3,502 calendar days) 10 years of USACE data	Estimated timeframe for PJDs: 30 calendar days Estimated timeframe for AJDs: 45 calendar days	Licensing timeframes will be established by rule
Fees – Jurisdictional Determinations	None	Fees will be charged for AJD and PJDs (see draft fee schedule)	Change from a no-fee to a flat fee based program
Permit Process			
Exemptions, Applicability	Certain activities related to normal farming, silviculture, and ranching are exempt from the CWA	Exemptions and BMPs to support those exemptions will be the same	No change
Permit Types	Regional general permits (RGP); Nationwide permits (NWPs); Individual permits, including letters of permission, emergency permits, after-the-fact permits	Effectively carried forward State general permits (to cover applicable activities under existing RGPs and NWPs), permit conditions modified to comply with state law, individual permits	RGPs and NWPs will be minimally modified and reissued as state general permits; specific modifications still under evaluation No change to individual permits
Public Notice and Participation – General Permit (GP)	Public notice when GPs are renewed every five years; NEPA review occurs with each issuance	ADEQ will provide public notice of draft state general permits; no NEPA review	Public comment opportunity on issuances or renewals of general permits

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Public Notice and Participation – Individual Permit (IP)	A public notice issued within 15 days of receipt of a complete application The public notice comment period is 15 to 30 days (depending upon nature of activity), and includes opportunity for public hearing	First public notice upon receipt of administratively complete application Second public notice of draft permit and technical support document, with opportunity for comment and to request a hearing	Public will have a greater opportunity to engage in individual draft permit process under a state § 404 program
Renewals/Extensions	Renewals and extensions can be obtained upon written request	Effectively carried forward	No change
Permit Duration	Nationwide permit term – five years; individual permit term – typically five years	Per federal regulation, no state permit may be issued for longer than five years	No change for general permits Individual permits will no longer be valid beyond five
Monitoring/Reporting/Recording	Monitoring, reporting and recordkeeping to be required as needed to safeguard the aquatic environment, including notification upon completion of fill activities	Obligations to condition permits will be carried forward	ADEQ will condition permits as necessary to maintain compliance and to safeguard aquatic resources
Timeframes – General Permits	Average timeframe for GPs: 80 days (ranging from 1 – 1,207 days) 10 years of USACE data	Estimated timeframe for GPs: 30 days	Licensing timeframes will be established by rule

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Timeframes – Individual Permit	Average timeframe for IPs: 229 days (ranging from 23 – 1,588 days) 5 years of USACE data Separate CWA § 401 state water quality certification is required	State water quality evaluation will be incorporated in permit review Projected 120 days from application to receipt of authorization with a goal of 180 days for all permits	Licensing timeframes will be established by rule Review timeframes will likely be shortened due to a streamlined individual permit review consistent with the CWA and state law
Fees – General Permit	None; program is federally funded	Proposed flat fee will be charged (see draft fee schedule)	Change from no fee to a flat fee
Fees – Individual Permit	$10 for non-commercial activities $100 for commercial activities; balance of program is federally funded	Hourly review and processing fees will be charged (see draft fee schedule)	Change to a fee-based program

Concept	USACE § 404 Program	State § 404 Program	Description of Change
404(b)(1) Guidelines Implementation, minus compensatory mitigation			
Avoidance, Minimization, Alternatives Analysis, Significant Degradation, and other restrictions on discharge	Permitted activity must demonstrate avoidance, minimization, no significant degradation, and least environmentally damaging practicable alternative (LEDPA), as well as compliance with other discharge restrictions CWA § 401 certification used to ensure state water quality standards will not be violated	Carried forward State water quality evaluation will be evaluated as part of 404(b)(1) analysis	No change

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Endangered Species Act	Project must not cause jeopardy or adverse modification of critical habitat Triggers formal ESA § 7 consultation with USFWS if impacts to listed or proposed threatened or endangered species or to critical habitat would occur Informal consultation triggered with USFWS if a project may affect a listed species or critical habitat	Jeopardy and adverse modification limitations carried forward under Guidelines ESA continues to apply to permittee actions Obligations under the Guidelines are carried forward, which also consider effects to threatened and endangered species ADEQ will work with USFWS and AZGFD to develop informal consultation to reduce impacts to listed species Permits that are unavoidably "likely to adversely affect" species will be off-ramped permanently to the USACE to perform an ESA § 7 consultation and issue the permit, or the project proponent may obtain a § 10 incidental take permit and ADEQ will issue the 404 permit	ADEQ intends to provide an informal process to resolve or eliminate potential adverse impacts to listed species without ESA § 7, with an option for a transfer of the permitting action to USACE for formal ESA § 7 consultation and permitting if impacts unresolvable If necessary because of unavoidable adverse effects, ADEQ will either transfer permit to USACE for processing or applicant may obtain ESA § 10 permit

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Cultural and Historic Resources	Impacts to register-eligible historic properties trigger consultation under NHPA § 106 and tribal consultation	Review and comment by SHPO per A.R.S. § 41-863; if substantial adverse effects, ADEQ will initiate measures to ensure that timely steps are initiated to document cultural resources inside or outside of WOTUS If effects amount to significant degradation under the 404(b)(1) Guidelines, ADEQ will require additional minimization measures in the WOTUS ADEQ will consider tribal input regarding impacts to cultural and historic resources after consultation and will encourage permittees to incorporate tribal input in project plans	Protections will be provided primarily through SHPA compliance and significant degradation review processes under the 404(b)(1) Guidelines
Tribal Resource Protection	Federal trust responsibility requirements for consultation ensures, to extent permitted by law, that tribal concerns and interests are considered whenever federal actions and/or decisions may affect Indian Country or other tribal interests	State law requires agencies to seek input from tribes before undertaking any action that has the potential to affect tribal resources, and incorporate such input into the agency's ultimate decision, to the extent the agency is authorized to do so	ADEQ intends to build upon and improve its consultation procedures

Concept	USACE § 404 Program	State § 404 Program	Description of Change
Public Interest Determination	All USACE-issued permits undergo a public interest factor review before a permit is issued; permit conditions may be modified to avoid significant adverse effects on the public interest Permits may be denied if they are not in the public interest	ADEQ will review similar factors under the 404(b)(1) Guidelines to protect public health and the environment	CWA 404 does not require public interest evaluations; ADEQ, therefore, may not require permit condition modifications as a result of a public interest review
Compensatory Mitigation			
Interagency Review Team (IRT)	The IRT reviews ILF enabling instruments, projects, and credit release schedule	Likely carried forward with the same membership in coordination with the USACE	Unchanged
Mitigation Vehicles	No mitigation banks in Arizona currently; an in-lieu fee program is an option, if available and within service area; permittee responsible mitigation is also an option	Carried forward	No substantial changes anticipated
Mitigation Ratios	Follows South Pacific Division standard operating procedures and checklists	Carried forward	Effectively unchanged
Functional Assessment	No quantitative functional assessment currently available in Arizona; qualitative assessment methods have been utilized by the USACE's Arizona Branch	Carried forward Likely to negotiate with EPA to use a qualitative functional assessment method	Effectively unchanged
Self-Monitoring/Reporting	Required by 2008 mitigation rule	Carried forward	Effectively unchanged

Concept	USACE § 404 Program	State § 404 Program	Description of Change
EPA Oversight	A USACE/EPA MOA allows for EPA review of and elevation of USACE permitting decisions, but EPA cannot prevent permit issuance, except to restrict discharge sites under 404(c)	EPA will have review and objection authority under the CWA and can prevent a permit from being issued if the permit does not meet CWA requirements, Guidelines, or state program regulation requirements	EPA may object to a state § 404 permit issuance if the permit does not comply with § 404 requirements
Inspections	Principally complaint-driven per USACE regulation	ADEQ will have an inspection program to comply with state program regulations	ADEQ will conduct regular inspections to ensure compliance ADEQ will employ a full-time compliance and enforcement officer to perform inspections of permitted actions and unauthorized discharges
Enforcement	USACE is lead enforcement agency for § 404 EPA retains shared enforcement authority Federal citizen suits can be filed against facilities	ADEQ will enforce § 404 of the CWA EPA retains shared enforcement authority Federal citizen suits can be filed against facilities	Effectively unchanged ADEQ will employ staff to ensure CWA § 404 compliance through compliance assistance or enforcement actions, when necessary

NEXT STEPS

ADEQ is pursuing § 404 assumption based on the agency's demonstrated ability to deliver balanced, leading-edge environmental protection while supporting environmentally responsible economic growth. The regulated community and Arizona's economy will benefit from ADEQ's experience creating radically simple permit processes and the agency's technical expertise in protecting Arizona's unique environment.

After reviewing the Roadmap, please complete an online survey by **Oct. 4, 2019**. ADEQ values your input and hopes to determine if the state § 404 program will add value to the regulatory process and environment in Arizona. ADEQ would also like your input about potential gaps in the Roadmap that need to be addressed if the state moves forward designing a program.

Take an Online Survey: surveymonkey.com/r/CWA404Survey >
or leave any feedback by:
Emailing: cwa404@azdeq.gov
or
Mailing:
ADEQ
Attn: WQD | 404 Roadmap
1110 W. Washington St.
Phoenix, AZ 85007

APPENDICES

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A. PRELIMINARY RULES STRUCTURE

The following is the preliminary rules sturcture for a state § 404 program.

1. APPLICABILITY

- Applicability statement – Conditionally effective upon EPA approval date.
- Definitions – Generally incorporate federal definitions by reference.
- Exemptions – 404(f); "incidental fallback" exemptions in 40 C.F.R. § 232.2.
- Best management practices to support exemptions – presumptively retain the same, currently-applicable road BMPs for forestry, agriculture, and mining.

2. TRANSITION

- USACE continues to administer and enforce issued general and individual permits until the state notifies USACE.
    - Individual permits are in effect and enforceable by the USACE until renewal or modification.
    - General permits administered by USACE until the state issues its own, likely by EPA's approval applicability date.
- ADEQ processes transferred permit applications from the USACE.
- Establish streamlined process for minor modifications to USACE-issued permits (if ADEQ assumes administration of issued permits).
- Compensatory mitigation management transfer of responsibilities, as negotiated.

3. JURISDICTIONAL DETERMINATIONS/APPROVALS

- Application process:
    - ADEQ provides form.
    - Applicant fills out form and supplies additional attachments as required.
    - ADEQ reviews for administrative and substantive completeness.
- Preliminary JD application process (generally aligns with USACE process, set in rule).

- Approved JD process (generally aligns with USACE current process, set in rule).
- Appeals:
    - PJDs not appealable.
    - AJDs appealable only by "party affected by AJD."
        - Specific definition aligns with current USACE definition and interpretation.

4. PERMIT APPLICATION PROCESS

- Applicant may request pre-application meeting.
- Form provided by director.
- Required information per 40 C.F.R. § 233.30 and as required by director.
    - Includes 404(b)(1) compliance demonstration:
        - For federal nexus projects, submit federal documentation if/as available (NEPA/ ESA/ NHPA- related documents).
    - Also includes identifying threatened and endangered species effect likelihood demonstration.
    - ADEQ reviews for administrative and substantive completeness.

PERMIT TYPES

- General permits:
    - Nationwide general permits (NWP):
        - Generally adopt NWP, but modify few general conditions to assure state-enforceability.
        - Special conditions to ensure state water quality is protected.
    - Regional general permits (RGP):
        - Generally adopt those generally used in Arizona (RGPs 63, 81, 96.)
        - Modify few general conditions to ensure state-enforceability.
    - Modifications and updates.

- Individual (standard) permits:
    - Regular and complex.
    - Letter of permission.
    - Emergency permits:
        - Provide for potential emergency option that does not fit RGP 63.
    - Major and minor modification.

PERMIT CONTENT (DISTINCTIONS TO BE MADE BETWEEN INDIVIDUAL AND GENERAL PERMITS)

- Generally align with USACE general conditions to extent possible.
- 404(b)(1) compliance assurance conditions:
    - Ensure water quality is protected through special conditions.
    - Effects-limiting conditions.
    - ESA technical letter avoidance conditions, etc.
- Compensatory mitigation requirements.
- Monitoring/reporting/records.
- Term and expiration.
- 5-year term.
- Termination:
    - Notice of completion of construction.
    - Renewal and extension provisions.
        - Streamlined process.

PERMIT RENEWALS, EXTENSIONS, ADMINISTRATIVE CONTINUANCE

- Streamlined process for renewals and extensions
- Administrative continuance
    - General permits — Administratively continued until agency issues new permit
    - Individual permits — Administratively continued as long as lawful application

for extension or renewal

PERMIT PUBLIC NOTICE AND PARTICIPATION

- Public notice of complete application
    - Notice will be sufficient to generally understand the scope, nature, and location of the project
        - *Note: not part of rules but ADEQ intends to post individual permits in process online.*
- Public notice and formal comment period at draft permit stage
    - Notice to include draft permit and technical support document showing evaluation of 404(b)(1) Guidelines, including mitigation.

404(B)(1) GUIDELINES, ESA, CULTURAL AND HISTORICAL RESOURCES

- Adopt 404(b)(1) Guidelines by reference
- ESA process detail, as needed in rule
    - Application identifies likely effect level and evaluation
- SHPO coordination detail in rule, as needed
- For federal nexus projects, evaluation of available federal documents (ESA/NEPA/NHPA)

COMPENSATORY MITIGATION

- For permitting:
    - Refer to 404(b)(1) Guidelines incorporated by reference 404(b) Subpart J
    - Mitigation ratio-specific rules, as necessary:
        - Follow current process, but some of that process may be in rule.
    - Prescribe procedures if ILFs refuse sale of credits:
        - Mitigation rule allows for permittee responsible mitigation in such cases
- Mitigation management-specific rules, as necessary for management and

coordination of:

- Enabling instruments.
- Continued management of mitigation sites.
- Permittee responsible mitigation establishment.

INSPECTION AND ENFORCEMENT

- Relate inspection authorities and establish schedule for:
    - Periodic inspection.
    - Inspection on conclusion of construction.
    - Inspection of mitigation.
- Restate enforcement authorities.
- Permit suspension, revocation.

LICENSING TIMEFRAMES

- Preliminary jurisdictional determination.
- Approval jurisdictional determination (varies based on complexity).
- General permit (varies based on permit type/complexity).
- Individual permit (varies on permit type/complexity).

FEES (ALL BASED ON INFLATIONARY INDEX)

- Preliminary jurisdictional determination.
- Approved jurisdictional determination.
- General permit.
- Individual permit (including after the fact).
- Major and minor modifications.

B. PROGRAM PERMIT PROCESS

- Exhibit 1: Individual Permit Process Draft — Click here to view or visit static.azdeq.gov/wqd/404/404ind.pdf
- Exhibit 2: General Permit Authorization Process Draft — Click here to view or visit static.azdeq.gov/wqd/404/404GP.pdf
- Exhibit 3: Jurisdictional Determination Process Draft— Click here to view or visit static.azdeq.gov/wqd/404/404jd.pdf

C. ADDITIONAL FEE INFORMATION

Under a state § 404 program, services provided to applicants will include § 404 permit coverage and JDs. Costs to ADEQ for providing such services, including staff salaries, will be recouped through fees.

Determination of appropriate staffing levels was reached by analyzing the number of anticipated actions each year and the estimated time to complete each action. Extensive data review and research were undertaken of the USACE program.

ADEQ contracted an economic consulting firm to assist with the development of a fee schedule that will cover the full cost incurred by ADEQ during the implementation of a state § 404 program.

Hourly rates are anticipated to be charged for individual permits, due to their unique nature and substantial impact to aquatic resources. Flat fees are anticipated to be charged for general permit authorizations and JDs. ADEQ will establish a final fees schedule as part of a formal rulemaking process that will include stakeholder involvement. No reoccurring annual fees are anticipated for issued permits or authorizations; once a discharge is complete, coverage under a permit or authorization is no longer required.

Fees are based on geographically separate discharges within WOTUS. *(See pg 14 for a draft fee schedule and scenerio examples.)*

USACE general permits, to be developed as state general permits, which will always require fees:

- RGP 63 – Emergency Authorizations
- RGP 70 – Bioengineered Bank Stabilization Activities

- NWP 7 – Outfall Structures and Associated Intake Structures
- NWP 17 – Hydropower Projects
- NWP 21 – Surface Coal Mining Activities
- NWP 29 – Residential Developments
- NWP 31 – Maintenance of Existing Flood Control Facilities
- NWP 37 – Emergency Watershed Protection and Rehabilitation
- NWP 38 – Cleanup of Hazardous and Toxic Waste
- NWP 39 – Commercial and Institutional Developments
- NWP 40 – Agricultural Activities
- NWP 42 – Recreational Facilities
- NWP 44 – Mining Activities

D. ENDNOTES

[1] *See generally* 33 U.S.C. § 1251 et seq.

[2] 33 U.S.C. § 1251(a).

[3] 33 U.S.C. § 1344.

[4] 33 U.S.C. § 1251 (stating that "[i]t is the policy of Congress that the States... implement the permit programs under §§ 1342 and 1344 [CWA § 404] of this title").

[5] *See* 33 U.S.C. §§ 1344(g)(2)(A), (h)(1).

[6] *See* 33 U.S.C. §§ 1344(h)(1), (h)(2)(A).

[7] *See* 33 U.S.C. § 1344(h)(3).

[8] *See* 40 C.F.R. § 233.10.

[9] *See generally* 40 C.F.R. § 233.11.

[10] Much of the MOA requirements focus on EPA-state coordination and EPA oversight procedures. 40 C.F.R. § 233.13.

[11] Much of the MOA will focus on procedures for transferring the existing § 404 program data, USACE-ADEQ coordination, and the waters over which the USACE will retain jurisdiction. 40 C.F.R. § 233.14.

[12] Stating in part that the laws of the state provide adequate authority to carry out the described program and that the program meets the applicable requirements of 40 C.F.R. Part 233. 40 C.F.R. § 233.12(a).

[13] S.B. 1493, 53rd Leg., 2nd Reg. Sess. (amending title 49, chapter 2, Arizona Revised Statutes, by adding article 3.2).

[14] 33 U.S.C. § 1344 (g)(1). This provision has been interpreted by the USACE as those waters which are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, and certain adjacent wetlands, provided that retained waters do not include waters that qualify as navigable solely because they were used in the past to transport interstate or foreign commerce. U.S. Dep't of the Army, Office of the Assistant Sec'y, Memorandum for Commanding General, U.S. Army Corps of Engineers, Clean Water Act Section 404(g) – Non-Assumable Waters, June 30, 2018.

[15] A.R.S. § 49-256.01(A) states that ADEQ "may establish by rule a dredge and fill permit program that is consistent
with and no more stringent than the Clean Water Act dredge and fill program, including a permitting process" (emphasis added).

[16] *See generally* 33 U.S.C. §§ 1318, 1344(i); 40 C.F.R. § 233.16; 40 C.F.R. § 233.52.

[17] *See generally* 33 U.S.C. §§ 1319, 1344(n).

[18] *See* 40 C.F.R. § 233.53.

[19] *See* 40 C.F.R. § 233.16(b).

[20] 40 C.F.R. Part 231.

[21] *See generally* EPA, Chronology of 404(c) Actions, www.epa.gov/cwa-404/chronology-404c-actions

(last visited Aug. 5, 2019).

[22]This is the issuance of the general permit itself, not each requested coverage under an issued general permit.

[23]33 U.S.C. § 1344(k).

[24] *See* 40 C.F.R. § 233.51(b).

[25] *See* 33 U.S.C. § 1344(j).

[26] *See* 40 C.F.R. § 233.50(f).

[27] *See* 40 C.F.R. § 233.50(j).

[28] 40 C.F.R. § 230.1(a).

[29] *See* 40 C.F.R. § 230.10(b)(1).

[30] See 40 C.F.R. § 230.10.

[31] *See* 40 C.F.R. § 233.20(a).

[32] *See* 40 C.F.R. § 230.6(a)-(b).

[33] Sections 9 and 10 of RHA prohibit construction in "navigable waters of the United States," as defined under RHA, unless such construction is federally approved. 33 U.S.C. §§ 401 and 403.

[34] *See* 33 C.F.R. § 331.2.

[35]A state program would only determine the jurisdiction of a waterbody under CWA § 404 pursuant to the definition of "navigable water" under the CWA.

[36] *See* A.R.S. §§ 49-256.01(C)(5); 49-256.01(C)(5)(a).

[37] As defined in A.R.S. § 49-256(7).

[38] *See* A.R.S. § 49-256.01(D).

[39] Likewise, citizen suit rights of action against facilities are maintained upon state assumption. *See generally* 33 U.S.C. § 1365.

[40] TWG White Paper, 15.

[41] *See* 16 U.S.C. § 1532(6).

[42] *See* 16 U.S.C. § 1532(20)

[43] *See generally* 16 U.S.C. § 1531(b); see also 16 U.S.C. § 1532(5) (definition of "critical habitat").

[44] *See generally* 16 U.S.C. § 1533. No species under the National Marine Fisheries Service's jurisdiction are within Arizona.

[45] 16 U.S.C. § 1538(a). To "take" means "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[46] *See generally* 16 U.S.C. § 1540.

[47] *See generally* 16 U.S.C. § 1536.

[48] *See generally* 16 U.S.C. § 1539.

[49] It is legally possible for states to assume ESA review authority from USFWS, but the path to do so is likely long and complicated. See generally 16 U.S.C. § 1535.

[50] *See* 40 C.F.R. § 230.10(b)(3).

[51] *See* 40 C.F.R. § 230.30.

[52] 40 C.F.R. § 230.54(a).

[53] 40 C.F.R. § 230.54(a).

[54] A.R.S. §41-511.04; see generally A.A.C. Title 12, Chapter 8, Article 3 (This includes rules for listing properties on the Arizona Register of Historic Properties, which is composed of "districts, sites, buildings, structures and objects significant in this state's history, architecture, archaeology, engineering and culture that meet criteria that the board establishes or that are listed on the national register of historic places." A.R.S. § 41-511.04(A)(9). Therefore, historic properties and eligible traditional cultural properties (TCPs) that may be listed on the National Register of Historic Places are also eligible for listing on the Arizona Register of Historic Places.).

[55] A.R.S. § 41-151.20; see generally A.A.C. R12-9-302 and -302 (These rules prescribe duties and privileges of the state's Historic Sites Review Committee established under A.R.S. § 41-151.20. The Committee shall assist the State Historical Advisory Commission in executing its duties, including providing advice to state agencies on the state's

[56] A.R.S. § 39-125 (allows the state to withhold the "location of archaeological discoveries as described in section 41-841 or 41-844 or places or objects that are included on or may qualify for inclusion on the Arizona register of historic places as described in section 41-511.04, subsection A, paragraph 9. An officer may decline to release this information if the officer determines that the release of the information creates a reasonable risk of vandalism, theft or other damage to the archaeological discoveries or the places or objects that are included on or may qualify for inclusion on the register").

[57] A.R.S. § 41-861 et seq.

[58] Implemented by the Arizona State Museum, the Arizona Antiquities Act pertains to lands owned or controlled by the state. The Act protects archeological sites, ruins, burial sites, and paleontological sites from defacement or knowing excavation or collection without a permit issued to an appropriate institution (e.g., scientific entities and research organizations). A.R.S. §§ 41-841 – 846 (Arizona State Museum).

[59] Arizona burial laws are implemented by the Arizona State Museum. A.R.S. § 41-865, applicable to private lands, mandates that no person shall intentionally disturb human remains or funerary objects without obtaining written permission from the Arizona State Museum, and anyone who unintentionally does so shall report the disturbance and shall not further disturb the remains or funerary objects without obtaining written permission. A.R.S. § 41-844, applicable to lands owned or controlled by the state, counties, and municipalities, and provides for a duty to report the existence of any archaeological, paleontological, or historical site and take steps to secure preservation. If the objects discovered are human remains, funerary objects, sacred ceremonial objects, or objects of national or tribal patrimony, notice shall be given to kinsmen or tribes affected and the Arizona State Museum shall work toward an agreement to dispose of such objects or remains.

[60] Requires state agencies seek input from (consult with) tribal officials before "undertaking any action or policy that will, or is reasonably believed to, have the potential to affect a tribal community or its members." A.R.S. § 41-2051(C)(2)-(3). An agency must also, within its authority, "integrate the input generated from tribal consultation into the agency's decision-making processes to achieve mutually

acceptable solutions." A.R.S. § 41-2051(C)(3).

[61] A.R.S. § 41-1493.01(D) (Actionably limits the state government from substantially burdening a person's free exercise of religion, unless the state can demonstrate the burden is "[i]n furtherance of a compelling governmental interest" and "[t]he least restrictive means of furthering that compelling governmental interest.").

[62] A.R.S. § 41-865.

[63] A.R.S. §§ 44-841 through 847.

[64] Native American Graves Protection and Repatriation Act (NAGPRA) 25 U.S.C. § 3001 et seq. and Archaeological Resources Protection Act (ARPA) 16 U.S.C. §§ 470aa-mm (both only apply to Federal lands and tribal lands).

[65] A.R.S. § 41-863.

[66] A.R.S. § 41-863.

[67] *See* 33 Fed. Reg. 18670 (Dec. 18, 1968) (USACE rulemaking establishing public interest review under USACE authorities).

[68] *See generally* A.R.S. § 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. This paragraph does not adversely affect standards adopted by an Indian tribe under federal law.) and A.R.S. § 49-256.01(A) (For purposes of implementing the permit program established by 33 U.S.C. § 1344, the director may establish by rule a dredge and fill permit program that is consistent with and no more stringent than the Clean Water Act dredge and fill program, including a permitting process).

[69] 40 C.F.R. § 230.54(a).

[70] 40 C.F.R. § 230.10(c).

[71] A.R.S. § 41-2051(C)(2).

[72] A.R.S. § 41-2051(C)(3).

[73] A.R.S. § 41-2051(C)(1).

[74] A.R.S. § 49-104(A)(2).

[75] A.R.S. §39-125 (stating that "nothing in [the public records statutes] requires the disclosure of public records....that relate to the location of archeological discoveries as described in section 41-841 or 41-844 or places or objects that are included on or may qualify for inclusion on the Arizona register of historic places as described in section 51-511.04, subsection A, paragraph 9. An officer may decline to release this information if the officer determines that the release creates a reasonable risk of....damage to the archeological discoveries...").

[76] *See* Permits in Process (PIP) Report and Map, available at azdeq.gov/PIP_Report.

[77] *See* 40 C.F.R. § 233.20(a) and A.R.S. § 49-256.02(A); 40 C.F.R. part 230, subpart J; 40 C.F.R. § 230.91.

[78] *See* 40 C.F.R. § 230.93(a)(2).

[79] *See* 40 C.F.R. § 230.93(e)(1)-(2).

[80] *See* 40 C.F.R. § 230.93(b).

[81] *See* 40 C.F.R. § 230.91(b)(4).

[82] *See* 40 C.F.R. § 230.93(f)(1).

[83] Comp. Mit. TWG White Paper, Appendix A.

[84] Quantitative habitat function assessments build from the foundational work of developed by Mark M. Brinson, and the Cowardin Classification system, developed by Lewis M. Cowardin, et al., and assign a number value corresponding to the amount of aquatic functions provided by an evaluated habitat. This value is compared to a maximum value of aquatic functions for that habitat type. *See generally* Mark M. Brinson, A Hydrogeomorphic Classification for Wetlands (1993), available at https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/3348/; Lewis M. Cowardin et. Al., Classification of Wetlands and Deepwater Habitats of the United States (1979), available at fws.gov/wetlands/documents/classification-of-wetlands-and-deepwater-habitats-of-the-united-states.pdf.

[85] *See* 33 C.F.R. Part 325 and 332.

[86] *See* 40 C.F.R. § 230.93(f)(2) and; 12504.1-SPD Regulatory Program – Mitigation Ratio Setting Checklist. U.S. Army USACE of Engineers (Nov. 1, 2011), available at spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/ratio/12501-SPD.01.docx.

[87] 40 C.F.R. § 230.93(l)(1),(2); 40 C.F.R. § 230.94(c)(4); 40 C.F.R. § 230.97.

[88] 40 C.F.R. § 230.93(h)(1)(v).

[89] 40 C.F.R. § 230.97.

[90] 40 C.F.R. § 230.93(k)(2)(iv).

[91] Example: The Jackson Farms Mitigation Site in the Savannah District is a restoration/enhancement project on 49 acres. The plan establishes two levels of long-term. Passive maintenance (e.g., signage) within the conservation easement must be done in perpetuity. However, long-term maintenance actions, such as nuisance animal control and actual stream maintenance must be done for 30 years. Jackson Farms Mitigation Site Final Mitigation Plan, p. 88-89 (Jan. 24, 2017), available at https://ribits.usace.army.mil/ribits_apex/f?p=107:378:23045824032389::NO::P378_PROGRAM_ID:1501. The Georgia-Alabama Land Trust Enabling Instrument underlying the Jackson Farms Mitigation Site plan indicates that, "[l]ong-term site maintenance and stewardship requirements will be determined on a case-by-case basis," rather than strictly perpetuity. Georgia Land Trust In-Lieu Fee Program Instrument p. 8 (November 2013), available at https://ribits.usace.army.mil/ribits_apex/f?p=107:378:23045824032389::NO::P378_PROGRAM_ID:1501.

[92] *See* 40 C.F.R. § 230.98(n)(4) ("land acquisition and initial physical and biological improvement must be completed by the third full growing season after the first advance credits in that service area is secured by a permittee, unless the district engineer determines more or less time is needed...").

[93] *See* https://ribits.usace.army.mil/.

[94] See 33 U.S.C. § 1344(g). The USACE will retain authority over those waters listed within 404(g)

of the CWA.

[95] Based on ADEQ's review of 10 years of historic USACE data.

[96] *See* RGP 63 at https://www.spl.usace.army.mil/Portals/17/docs/regulatory/RGP/RGP63_Permit_19Nov2018.pdf?ver=2018-11-19-173731-523; and RGP 96 at https://www.spl.usace.army.mil/Portals/17/docs/regulatory/RGP/RGP_96_Routine_Transportation_Activities_Arizona.pdf.

[97] 33 U.S.C. § 1344(h).

[98] *See* https://adeq.maps.arcgis.com/apps/webappviewer/index.html?id=c19cf9f856ff49bfb27a91a85f9b9807.

[99] *See* Permits in Process (PIP) Report and Map, available at azdeq.gov/PIP_Report.

[100] 40 C.F.R. § 233.30(c).

[101] 40 C.F.R. § 233.30(d).

[102] *See generally* A.R.S. § 41-1072 et seq.

[103] Elapsed timeframes were estimated by an analysis of standard ADEQ review procedures, required public notices, and required external consultations and review.

[104] E.g. A.A.C. R18-1-525, Table 10.

[105] If a JD is not obtained before a permit application is submitted or separate from a permit application, then this process step may have to account for define the discharge geographic scope of analysis (i.e., the WOTUS).

[106] A.R.S. § 49-256.01(C)(6).

[107] A.R.S. § 49-211.

[108] 40 C.F.R. § 233.32(d)(3).

[109] 40 C.F.R. § 233.33(a).

[110] 40 C.F.R. § 233.33(b).

[111] 40 C.F.R. § 233.32.

[112] 40 C.F.R. § 233.33(c)(1).

[113] 40 C.F.R. § 233.22(f).

[114] This does not include receipt of an AJD application as AJDs are not a requirement of CWA § 404 or considered in the state implementation regulations at 40 C.F.R. Part 233. Accord 40 C.F.R. § 233.30(a) (Application for a permit). ("Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into state regulated waters shall complete, sign and submit a permit application to the Director.").

[115] 33 U.S.C. § 1344(h)(5). Nothing in the rules precludes this position.

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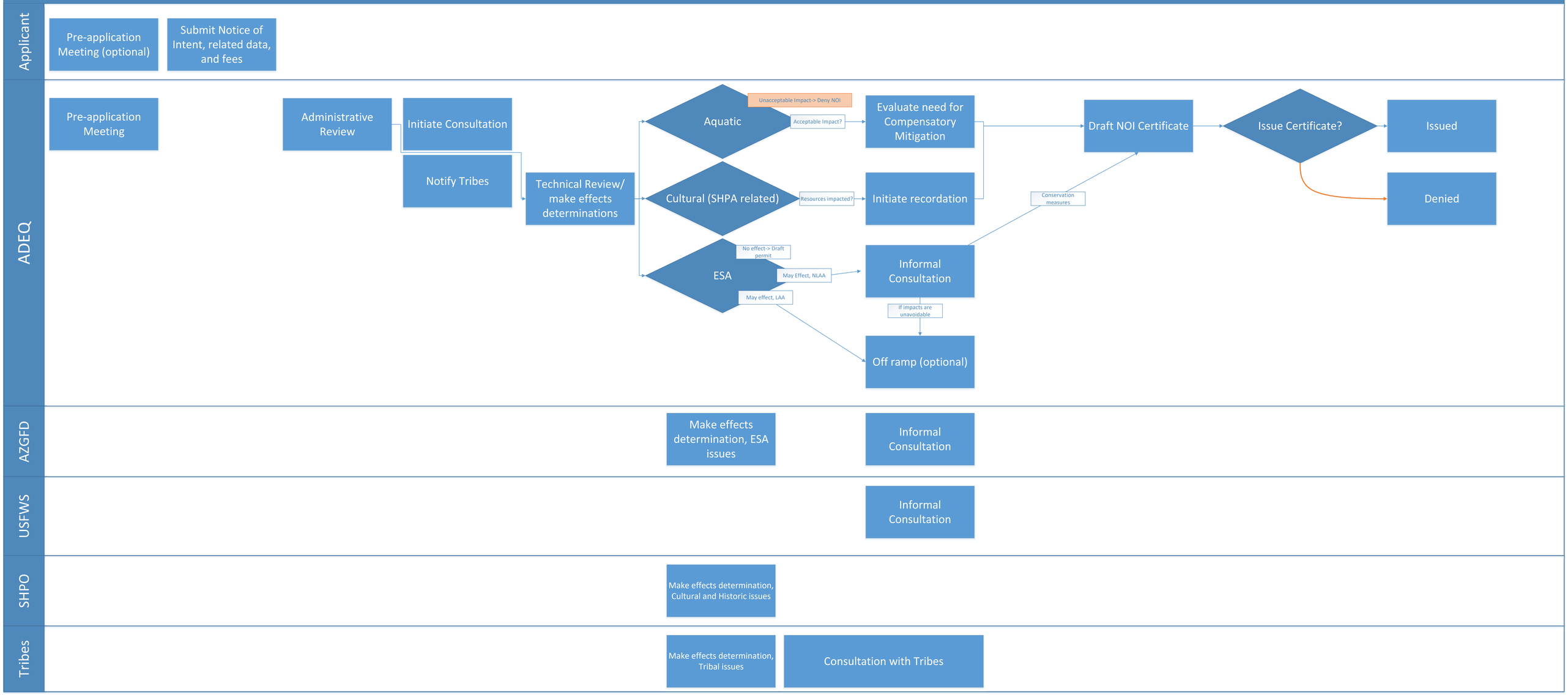
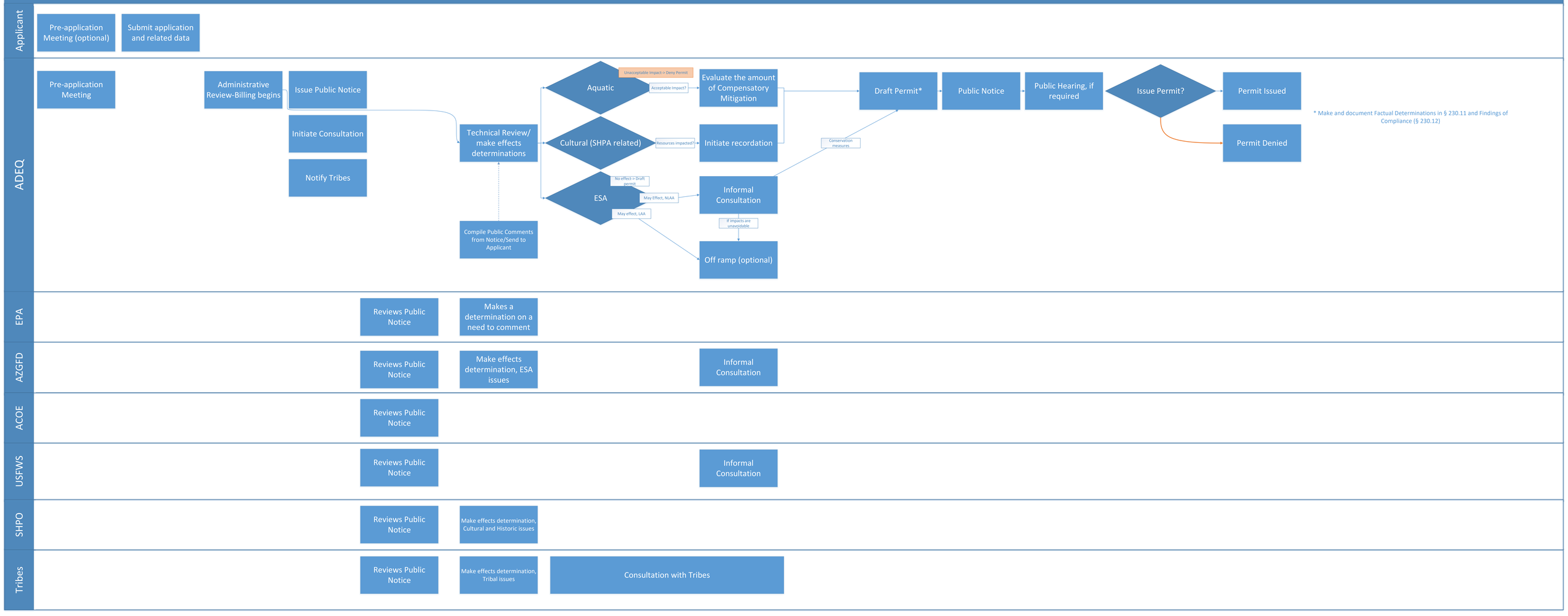
Arizona Assumed Clean Water Act Section 404 General Permit Process-Draft



Arizona Assumed Clean Water Act Section 404 Individual Permit Process-Draft



Arizona Assumed Clean Water Act Section 404 Jurisdictional Delineation Process-Draft

Applicant	Pre-JD Meeting (optional)	Submit JD Materials					
ADEQ	Pre-JD Meeting		Office Review	Field Verification-Optional	Draft JD Approval Letter	Approval	Send JD Approval Letter