

## ADEQ WATER QUALITY DIVISION CLEAN WATER ACT § 404 STAKEHOLDER MEETING #6 SUMMARY

**DATE:** Dec. 6, 2018  
**TIME:** 1-3 p.m.  
**LOCATION:** Webinar, conducted from ADEQ, 1110 W. Washington Street, Phoenix

### STAKEHOLDER ATTENDEES (Attached)

#### ADEQ STAFF

Trevor Baggione  
Len Drago  
Jill Hankins  
Andy Koester  
David Lelsz  
Heidi Welborn

### ADDITIONAL ATTENDEES

Kelly Cairo, GCI  
Theresa Gunn, GCI

### AGENDA

The complete agenda is available online and includes:

- Review Agenda and Introductions
- Welcome
- Assumption Program Updates
- Technical Work Group Status
- Stakeholder Input
- Next Steps
- Evaluation

### REVIEW AGENDA AND INTRODUCTIONS

Meeting facilitator Theresa Gunn, GCI, welcomed attendees to the sixth stakeholder meeting and first webinar. ADEQ staff and technical work group chairs were present to conduct the webinar. Approximately 117 stakeholders participated online or by phone. Not all stakeholders identified themselves.

### WELCOME

Water Quality Division Director Trevor Baggione thanked attendees for participating. He expressed his appreciation for all those who have volunteered their time to help the ADEQ design a state 404 program including the 1,200 people who have joined the 404 GovDelivery List Serve, more than 400 who have participated in a meeting or sent comments to ADEQ, and 91 volunteers serving on technical work groups.

Baggione introduced ADEQ staff members comprising the 404 Team including Andy Koester, Heidi Welborn, David Lelsz, Jill Hankins, and Mark Joyner (not present).

EPA's National Dialogue on Assumption (404(g)) meeting was held today with state DEQs to discuss potential changes to 404(g) assumption implementing regulations at 40 CFR part 233. States have until January 11, 2019 to submit comments. A formal rulemaking process is expected to follow. According to EPA's schedule, they plan to have a proposed rule in March 2020 and a final rule in March 2021. Baggiore shared highlights of this meeting, including EPA's request for comments on the following:

- Clarifying the scope of what waters states assume and what is retained at the federal level
- Partial assumption options (ADEQ's recommendation was to leave options for partial assumption as flexible as possible)
- Enforcement and compliance – clarity of requirements
- Costs and benefits of the rulemaking to industry and government
- Any other potential issues

Highlights of questions follow:

- You mentioned EPA wants cost/benefits for state and industry. What about individuals, particularly property owners?
- Will the prospective Arizona assumption occur under the terms of the current or of the revised future regulations? In other words, is there grandfathering?

An executive work group is being formed and will function as an advisory group chaired by Baggiore. Seventeen organizations/agencies are being invited to participate in the committee, with a kickoff meeting expected to occur in January. Members/organizations of the Executive Work Group will be published as have the volunteers in the technical work groups.

ADEQ presented information to tribal leaders at the ITCA Listening Session, where leaders indicated interest in a Tribal Work Group. The purpose of group will be to discuss how the Corps consults with the tribes regarding 404 permits currently, identify opportunities for improvement, and create an ideal state for how ADEQ should consult with tribes on 404 permits under state assumption.

The Tribal Work Group does not meet ADEQ's tribal consultation obligation, but will be conducted in addition to these efforts. ADEQ is contacting tribes to identify their representatives for the TWG and the first meeting is expected to occur in January.

- (Question): Aren't the tribes "federal"? Is there clear legal authority for the state taking over regarding the tribes and the feds? (Response): State assumption would not include tribal lands or the Colorado River. The agency intends to consult with tribes regarding impacts that state assumption of the 404 program (over nontribal lands) may have on tribal interests.

#### **ASSUMPTION PROGRAM UPDATES**

Andy Koester reviewed Section 404 of the Clean Water Act, which establishes a program to regulate the discharge of dredged or fill material into Waters of the United States, including wetlands. Highlights of the presentation include:

- "Assumption" means:
  - Determine what waters are regulated under the Clean Water Act
  - Prevent and mitigate impacts from dredge and fill activities in Waters of the United States in Arizona
  - Assume primary responsibility to issue and deny dredge and fill permits, with EPA oversight
- Assumption does not include Section 10 waters (Colorado River) or tribal waters
- 404 Primacy components include:
  - Corps and EPA MOAs

- Jurisdictional Determinations
- Permitting (including mitigation)
- 404(b)(1) “guidelines” rules review
- Enforcement Authority
- Senate Bill 1493 provided statutory authority, allowing ADEQ to adopt a CWA 404 program. The program may be no more or less stringent than CWA requirements.
- In addition to statutory authority, stages of the process include a robust stakeholder process (current phase), rule process and program development, and program approval by EPA.
- Timeline
  - TWG White Papers: December 20, 2018 through March 21, 2019
  - Roadmap Executive Committee: January through June 2019
  - Rule Draft Development: June through December 2019
  - Formal Rule Process: January through October 2020
  - Submit to EPA: October 2020
    - EPA will provide a decision in 2021 with an effective date to be determined

Highlights of questions follow:

- The speaker just noted the stringency issue, suggesting that ADEQ is not allowed to be more stringent than the federal process. What is the basis for that determination?
- How will ADEQ meet the standard, at 40 CFR 233.1, for states to provide equivalent resource protections: “(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While states may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”
- Will the EPA rulemaking provide guidance on meeting this requirement for specific resource areas (TE species, cultural, etc.)? If not, what general management direction from ADEQ is available to assure this standard is met?

### **TECHNICAL WORK GROUP STATUS**

TWG chairs provided an update on key features of the ideal state recommended by the work group, obstacles to this ideal state, areas of disagreement, and any questions to pose to the larger stakeholder group. Gunn encouraged attendees provide comments and questions via the Webex chat function or by email at CWA404@azdeq.gov. Highlights of the presentation, questions and comments follow.

### **Permit Process TWG, Tricia Balluff, Chair**

- Consensus recommendations:
  - Tiered notification system for general permits (similar Arizona-specific RGP). This could push more projects with little to no potential for significant environmental impacts into a streamlined review process.
  - Letter of Permission alternative for large-scale, phased projects with long timeframes.
  - ADEQ Section 401 water quality certifications are not required for a state-issued permit; appropriate water quality conditions should be included in the state 404 permit.
  - On federal nexus projects, adopt (as needed for permitting decisions) the technical documentation and consultation of the federal agency.
  - On projects with USACE and ADEQ 404 permitting requirements, develop a joint permitting process.
- Obstacles:
  - Involvement of federal entities (either as a result of 404 permitting or due to a federal nexus), will often be necessary and can easily impact licensing timeframes. Close coordination and the

development of review protocols with these agencies will be critical to timely permitting and acquisition of relevant technical documentation and consultation results to inform permitting decisions.

- Ongoing Discussion Topics:
  - Gaps and options
  - Activity-specific general permits vs. area of impact-specific general permits (or a tiered approach with both)
  - NEPA and public interest review gaps
- Request for input, regarding potential options for general permit options:
  - Administer and enforce all relevant existing NWRPs and RGPs
  - ADEQ develops and adopts its own general permits as part of the initial program rules submitted to EPA for review (MI and NJ have both taken this route)
  - Hybrid approach with a short-term adoption of the relevant NWRPs while the state develops and adopts its own general permits prior to the expiration of the current USACE NWRPs in 2022
- Stakeholder feedback:
  - Keep NWP permits and administer and enforce as is.
  - It should be noted the making ADEQ specific permits will require a significant effort.
- (Question): Isn't the 404 program, when administered by the Corps, exempt from NEPA under CWA Section 511(c)? (Response): Balluff said that no, NEPA still applies to Corps-issued permits. Welborn stated that CWA 511(c) prescribes that the EPA Administrator's actions are generally exempt from NEPA except for two specified types of federal actions, including issuance of federal new source permits under CWA 402 (NPDES) and certain financial assistance for publicly owned treatment works.

#### **Compensatory Mitigation TWG, Mark Edelman, Chair**

- Ideal state:
  - Approval of a quantitative functional assessment method that ensures more consistency in determining functional values
  - Simpler method for determining mitigation ratios
  - Less penalty for preservation to allow for more in-kind mitigation
  - Consider incentives for use of public and State Trust lands as mitigation banks or ILF mitigation areas
  - Larger ILF service areas
- Obstacles:
  - Need to develop a functional assessment methodology
  - Addressing concepts of perpetuity (Federal rule states "long-term management," not defined in Arizona statute)
  - Define service areas by watersheds and ecoregions
  - Improve communication between customer groups and ILF sponsors for credit needs
- Ongoing Discussion:
  - Should USACE remain grantee on Restrictive Covenant agreements or do they need to be transferred or revised with ADEQ as grantee?

#### **Cultural and Historic Resources, Laura Berglan, Chair**

- This group's white paper will remain in draft form until the Tribal Work Group is constituted and coordination occurs.
- Ideal state: The vision of the Cultural and Historic Resources TWG for an ADEQ 404 program is one that ensures protections for cultural resources located on state or private lands, that are equivalent

to those protections that presently exist in the context of the CWA 404 program under federal and state laws. Laws include, but are not limited to:

- (Federal) Section 106 of the National Historic Preservation Act and its implementing regulations, including, 36 C.F.R. § 800; 33 C.F.R. §§ 320.4(a)(a) and 320.4(e) (implementing “public interest” requirements of Sec. 404); the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347; the American Indian Religious Freedom Act, 16 U.S.C. 1996; the Archeological Resources Protection Act of 1979, 16 U.S.C. § 470aamm; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et. seq.; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et. seq., Executive Order 13007 (federal sacred sites), and other applicable laws, regulations and policies.
- (State) The State Historic Preservation Act found at A.R.S. § 41-861 et. seq., and A.R.S. § 41-844 and A.R.S. § 41-965 (state burial laws), and relevant SHPO and THPO guidance documents.
- In implementing the ADEQ 404 program, ADEQ shall engage in advanced and meaningful consultation with Arizona’s 22 federally recognized Indian tribes on the direct, indirect, and cumulative impacts of ADEQ 404 activities on cultural resources as provided by Section 106 of the NHPA, A.R.S. § 41-2051, Arizona Executive Order 2006-14, and applicable policies.
- Obstacles: Implementation of the ideal practical state would likely take state legislative action.
  - The TWG plans to include specific statutes that would need to be changed in its white paper.
- Disagreements: At least one member of the group believes the state should adopt all federal laws.

#### **Endangered Species Act, Carrie Marr, Chair**

- Loss of federal nexus is a primary issue for this group. In the current state, there is a federal nexus and Section 7 consultation between the Corps and FWS occurs when necessary.
- Only two percent of Corps permits resulted in a “may affect,” according to the Corps’ data. This includes formal and informal consultation for both individual and nationwide permits in Arizona.
- Ideal state potential future options:
  - Screening – Are there threatened or endangered species or cultural or historic resources in the permit area?
  - MOA between ADEQ and FWS for early permit review and coordination, especially to avoid and reduce adverse effects
  - Retain Corps nexus – EPA uses its discretion to object to ADEQ’s permits with significant ESA concerns early in the review process. This option is essentially an early off-ramp, to put the applicant on the path of federal oversight more quickly.
  - Statewide/Regional/County/Watershed habitat conservation plan
  - Project-specific habitat conservation plan
- None of the future state options are ideal. The most likely recommendation is a combination of screening/MOA/HCP.
- Disagreements: Does EPA have discretion to object to permits early?
- (Question): Is it true that without a formal section 7 consultation the permittee does not have any protection from an incidental take? Marr said no, there would still be protections for endangered and threatened species with or without assumption. Welborn stated that the Endangered Species Act would still apply.

#### **Fees, Jerry Worsham, Chair**

- The Fees Group identified the possible types of 404 Permits/Authorities to be issued by ADEQ.
- ADEQ staff contacted Army Corps staff to get historical information on the 404 permit costs, personnel and timeframes that the Corps has experienced over many years.

- ADEQ staff projected needs of Full Time Employees (FTE) and projected annual costs to run the ADEQ's 404 Permit Program.
- Fees Group has put together basic information needed for an analysis of projected costs for various types of 404 permits/authorities.
- The TWG determined that ADEQ annual fees not generally available for the 404 Permit Program.
- The TWG has made considerable progress on the white paper.

#### **Jurisdictional Determination Process, Jack Moody, Chair**

- Ideal state:
  - Repeatable and defensible process to identify limits of jurisdiction
  - Available guidance from ADEQ with Pre-Application meetings
  - Consistent jurisdictional delineations between ADEQ staff
  - Reasonable turn-around time for approval of JDs – TWG will recommend what we consider “reasonable.”
- Obstacles to ideal state:
  - Ordinary High-Water Mark is subjective
  - Adequate training to ADEQ staff for consistency in jurisdictional limits
  - Inconsistencies in submittals to ADEQ and workload -- Inconsistencies in the submittals themselves contribute to inconsistencies overall.
- Issues where Group does not agree:
  - Availability of previously approved JDs on-line – vs – private property owners rights
  - Upstream limits of jurisdiction, watercourses that should be identified as jurisdictional
- Request for stakeholder input:
  - Reasonable time frame for ADEQ to turn around a Preliminary Jurisdictional Delineation
  - Reasonable time frame for ADEQ to turn around an Approved Jurisdictional Delineation
  - Is the current state of jurisdiction with the USACE over-reaching, under-reaching, or correct?
- Stakeholder responses:
  - No more than 2 months for PJDs.
- The TWG is currently thinking 60 calendar days for a JD, approved or not. Some think both shorter and longer time frames would be appropriate, in part depending on whether it is a PJD or AJD.
- Each of the JDs will include recommendations for time frames.

#### **Significant Degradation, Alternative Analysis, Minimization, Jeremy Casteel, Chair**

- Ideal state:
  - A state program assumption should incorporate the Section 404(b)(1) Guidelines by reference and would be applicable to an “Individual Permit” under the state program assumption. Modifications to the guidelines could be explored.
  - The scope of the guidelines as it applies to a state program assumption should be “...applicable to the specification of disposal sites for discharges of dredge and fill material into waters of the United States.” [40 CFR 230.2(a) “Applicability”].
    - Waters of the United States includes wetlands.
  - A state program would not carry forward the Corps’ current National Environmental Policy Act requirements, including Scope of Analysis considerations.
  - A state program should recognize that, for minor, routine activities, the guidelines emphasize that the level of analysis required for the 404(b)(1) alternatives analysis should be commensurate with the ecological impacts and the scope/cost of the proposed project.
  - Consideration should be given to amending current state anti-degradation regulations since the regulations are currently specific to the current Corps’ 404 program.

- A state program assumption should develop information which assists applicants with the interpretation of avoidance and minimization strategies which can be implemented to assist in avoiding and minimizing impacts to aquatic environment/aquatic resources identified in Subparts C through F of the guidelines.
- Obstacles – EPA’s interpretation on the scope of the guidelines.
- Disagreements – Because Corps’ NEPA requirements, including Appendix B to Part 325-NEPA Implementation Procedures for the Regulatory Program, would not be carried forward under state assumption some members are concerned about the future level of review.

## **STAKEHOLDER INPUT**

Highlights of additional questions included:

- What about the implication at the start of this TWG exercise that existing traditionally navigable waters may be removed or navigability redefined to change these designations? (Response): ADEQ assumption does include redefining navigable waters. Moody explained it is necessary to know the downstream traditional navigable waters in order to provide for the jurisdictional determination.
- Will existing court rulings (e.g., Tulloch, SWANCC) remain guiding principles on JD limits? Moody said that the TWG’s white paper will reflect current regulations, with a brief discussion on the proposed executive order during Obama administration.
- How does the new approach to this determination, compare to what the Corps does now? Moody said that the TWG is not proposing a new approach.
- What would be the projected timelines, in relation to the overall schedule, for adoption of general permits? (Response): This would have to occur when the permits transition to ADEQ. ADEQ would need to provide this information during submission to EPA.
- ADEQ is committed to providing equivalent protections for the waters of the US. What about other resource types affected by projects that require 404 permits? Does the ADEQ commitment to protections equivalent to federal protections also extend to TE species, cultural resources, and other values and resources affected by 404 permit issuance? Koester said that federal projects will go through same process. If not, ADEQ would have to abide by 404(b)(1) guidelines. Welborn said that regulations require “no less stringent than” approach.
- There are numerous T&E species in Arizona surface waters. Are we looking at cessation of ESA applications to Arizona waters? How will it work to keep protection as stringent as the feds?
- Will agencies with Section 10 ESA Habitat Conservation Plans meet the ESA for 404? Marr said that she hoped this would be true.

## **NEXT STEPS**

Koester reviewed next steps including:

- TWGs will submit white papers. The papers will be posted when received.
- ADEQ review white papers, including drafts.
- An EPA decision is anticipated in 2021, and the effective date would be determined at that time.
- ADEQ will conduct additional in-person stakeholder meetings. The webinar format was used for this meeting since the purpose primarily was to report out.
- Continue sending input via email: CWA404@azdeq.gov.

## **EVALUATION**

Gunn encouraged stakeholders to evaluate the meeting and the webinar format via online survey. The evaluation was available online through Dec. 11; however, stakeholders did not participate in the survey.

## STAKEHOLDER ATTENDEES\* (IN PERSON AND BY PHONE) AND ORGANIZATION

NAME	ORGANIZATION
Lorinda Antone	
Amy Baker	
Tricia Balluff	City of Phoenix
Laura Berglan	Pascua Yaqui Tribe
Rion Bowers	Bowers Environmental Consulting
Erin Broussard	
Jeremy Browning	GovGroup
Joan Card	
Jeremy Casteel	Hilgart Wilson, LLC
Corey Caulkins	Arcadis
Kevin Costello	
Lauren Dempsey	U.S. Air Force
Mark Edelman	Arizona State Land Department
Nichole Engelmann	USF&W
Marina Estrella	City of Phoenix
Ryan Fitzpatrick	
Nicole Gillett	Tucson Audubon Society
Andrea Hamilton	
Christina Hoppes	City of Tempe
Laura L	
Brett Lindsay	
Carrie Marr	USF&W
Amanda Mcgennis	Arizona Chapter Association of General Contractors
Roger Mcmanus	
Linda Palumbo	City of Phoenix
Kris Randall	U.S. Fish and Wildlife Service
Karla Reeve-Wise	PDEQ
Meghan Scott	Noble Law Office
Randy Serraglio	Center for Biological Diversity
Jon Sherrill	City of Chandler
Marcia Sorensen	City of Peoria
Rebecca Sydnor	Wood
Jennifer Varin	
JR Welch	Archaeology Southwest
Jerry Worsham	The Cavanagh Law Firm, P.A.
Duane Yantorno	ASARCO
Sam Ziegler	EPA Region 9
Melody Zyburt	

*\*(Please note: Not all stakeholders provided their names and/or organizations.)*