Arizona Department of Environmental Quality

presentation for
Clean Water Act § 404 Assumption
Input Summary and Workgroup Concept

June 26, 2018, Phoenix, AZ
June 28, 2018, Tucson, AZ
Tips for a Good Meeting

- Restrooms, phones, breaks
- Online participants chat with host
- Be willing to work together to develop best program possible
- LISTEN to others
- ADEQ needs your input to develop this program
Agenda

- Introductions
- Overview of Previous Meeting
- Summary of Stakeholder Input
- Technical Work Group Discussion
  - Potential Workgroup Topics
  - Structure and logistics
- Next Steps
What is Clean Water Act § 404 Dredge and Fill?

**Section 404 of the Clean Water Act (CWA):**

- Establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.
- Requires a permit before dredged or fill material may be discharged into waters of the United States.

CAP Tonopah Desert Recharge Project  
Source: AZTEC TYPSA Group

Soldier Wash downstream of Brewer Road  
Source: Redrocknews.com
404 Assumption Components

- Jurisdictional Determinations
- Permitting (including mitigation)
- 404(b)(1) “guidelines” rules review
- Corps and EPA MOAs
- Enforcement Authority

404 Primacy
Next Steps: Proposed Process and Timeline

Initial Stakeholder Meetings & Workgroups
- Jun. 2018-Nov. 2018

Assumption Roadmap Document
- Nov. 2018-Feb. 2019

Draft High Level Program and Rule Components

Rule Draft Development
- Feb. 2019-Aug. 2019

Formal Rule Process; MOA Development; Program Description
- Aug. 2019-Apr. 2020

Submit
- May/Junie 2020
Exercise A - Pros and Cons to State Assumption

<table>
<thead>
<tr>
<th>Pros</th>
<th>Cons</th>
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[Image of desert landscape]
Stakeholder Input - Pros to State Assumption

access accountability administrative agency appeals applicants apply approval arid better change clear conditions consistency consultation control decisions definition development electronic environment expedited familiar faster federal frames greater increase involvement issues knowledge local needs nepa opportunity possible potential projects reduce response review rules specific staff stakeholder streamlining stringent subject understanding work
## Exercise B – Plus Delta of Current Process

<table>
<thead>
<tr>
<th>Jurisdictional Determination</th>
<th>Application for General or Individual Permit</th>
<th>Technical Review (e.g. NEPA/404(b)(1))</th>
<th>Inter-Agency Coordination (e.g. FWS)</th>
<th>Compensatory Mitigation</th>
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<th>Other</th>
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</table>
Pluses (+):

**Corps has resources and process is working**

*Keep full ESA/NHPA Reviews*

*Corps has defined timeframes*

Deltas (Δ):

**Improve/Add timeframes**

*Formalize interagency coordination*

*Clarify data requirements*

*Lack of resources affects consultation*

*Improve ESA and Cultural Resources Consultations*
Pluses (+):

**Keep full ESA/NHPA reviews**
Corps has resources, expertise and process is working

Deltas (Δ):

**Streamline/Clarify Process**
Clarify cost of mitigation and alternatives analysis
Clarify alternatives analysis
Full ESA/NHPA Reviews
Timeframes
Pluses (+):

**Keep in-lieu fee based programs**
- Corps has resources, expertise and process is working
- Good flexibility built into mitigation program
- Defined mitigation ratio and standards
- Active facilitation between mitigation providers and IRT

Deltas (Δ):

**Create better standards & account for ephemeral waters**
- Need more in-lieu fee based programs
- Mitigation should occur in same watershed
- Long-term planning for mitigation projects
- Clarify mitigation costs
Plus-Delta Input: Jurisdiction Determinations

Pluses (+):

JD process is clear
Corps has resources, expertise and process is working
Good application
Consistent determinations
No fees

Deltas (Δ):

Clarify Determination Criteria
JD Timeframes
Make all waters jurisdictional
Inconsistent determinations
Create JD maps
Exercise C – Other Issues for Consideration

• Potential roadblocks (e.g. ESA)

• Other Information Needed to Determine Path Forward

• Areas of Focus to Consider in Developing Program and Rule
• Concern regarding increased EPA oversight, while similar to AZPDES, level of gray area in 404 creates more uncertainty.

• Federal guidance shouldn’t be automatically binding.

• Need long-term political commitment to the process, including to appropriate environmental review.

• ADEQ is not prepared for this—does not yet have experienced staff

• Political influence is a concern. Lack of transparency, trust concerns, from legislation to finish.

• Assumption cuts out federal trust responsibility to tribes.

• Litigation
Did we miss any key input or issues?
Workgroup Structure and Logistics

Expectations

- Roll up your sleeves
- Recommendations relative to current law
- Final deliverable due November 20th

Charter

- Ground rules
- Responsibilities
- Deliverable description

Selection Process

- Application – Due July 11th
- Balanced interests
- 12-15 members
List of Potential Work Group Topics

• Permit Process
• Fees
• Endangered Species Act
• Significant Degradation & Alternatives Analysis & Minimization
• Compensatory Mitigation
• Cultural Resources and Tribal Considerations
Potential Workgroup Topics

- Federal nexus projects
- Appeals
- JD process
- LTF
- Types of Permits
- Transition
- Public Process
- Forms and online tools
Potential Workgroup Topics

- Fees
  - Cost of program
  - Proposed fee structure
  - Staffing
  - Inflation
  - Lifecycle/Oppportunity cost
  - Types of fees
Potential Workgroup Topics

- Endangered Species Act
- Litigation/Liability Risk
- Public Process
- Memorandum of Agreement Considerations
- Consultation process
- Section 10 evaluation
Potential Workgroup Topics

- Significant Degradation & Alternatives Analysis & Minimization
- Minimization process
- Public participation
- Alternatives analysis process and clarity
- Risk/litigation (alternatives)
- Project purpose clarity
Potential Workgroup Topics

- Compensatory Mitigation
- Ratio methodology
- Functional assessments/Valuation of quality & quantity
- Type and location
- Permittee responsible mitigation approval process
- IRT review
- Mitigation bank/in-lieu fee formation
Potential Workgroup Topics

Cultural Resources and Tribal Considerations

- Current state pluses and deltas
- Data gathering
- Tribal involvement
- SHPO involvement
- Public Process
Potential Workgroup Topics

Other?
Work Group Selection Process

- Online Application – **Due July 11^{th}**
  - Identify which group(s)
  - Briefly explain your experience with 404.
  - List your technical expertise.
  - Why are you interested?
- Balanced interests
- 12-15 members
Stakeholder Meetings and Announcements

- To subscribe to ADEQ announcements via Govdelivery, click “subscribe” on bottom right of ADEQ home page

- **Subscribe** specifically to the “CWA 404 Stakeholder Communications” list
Questions, concerns, input on CWA 404 assumption?

Contact Krista Osterberg, Surface Water Quality Section Manager
Andy Koester, AZPDES Permit Unit Manager, or
Heidi Welborn, Water Quality Division Legal Specialist at:

CWA404@AZDEQ.GOV
The following slides are just for reference.
CWA 404 Assumption Process

Statutory Authority

Robust Stakeholder Process

Rule Process & Program Development

Program Approval by EPA

WE ARE HERE
Dredge and Fill permits are the only state assumable section of the Clean Water Act for which Arizona does not have primary authority.
Section 404 of the Clean Water Act (CWA):

• Establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.

• Requires a permit before dredged or fill material may be discharged into waters of the United States.
What does “assumption” mean?

- 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
Statutory Authority: What does SB1493 do?

- Allows ADEQ to adopt a CWA 404 program
  - Jurisdictional determinations (JDs),
  - 404(b)(1) project impact review,
  - Compensatory mitigation, and
  - Enforcement
- No more stringent than CWA requirements
What does the statutory authority mean?

- ADEQ *MAY* adopt 404 permit program
  - The program would be fee based
  - Need a roadmap document to ensure value-added
  - Legislation will allow for smooth transition to rulemaking and submittal
  - Authority expires in 5 years if not approved by then
- Army Corps will continue to process JDs and permits until state program approval
Off the Table

- Waters of the US definition
- Current permits under Corps review
- CWA Triennial Review
- Outstanding Arizona Waters