

Assessment of Permit Process Current State and Recommendations for an Arizona Department of Environmental Quality-Assumed Clean Water Act Section 404 Program

Permit Process Technical Work Group White Paper

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This white paper is solely a product of the volunteer technical work group members and should not be considered an ADEQ decision document.

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Acronyms

AAC	Arizona Administrative Code
ADEQ	Arizona Department of Environmental Quality
ADOT	Arizona Department of Transportation
ALJ	Administrative Law Judge
APA	Administrative Procedure Act of 1946, as amended
APP	Aquifer Protection Permit
ARS	Arizona Revised Statute
AZPDES	Arizona Pollutant Discharge Elimination System
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
CWA	Clean Water Act (aka Federal Water Pollution Control Act of 1972, as amended)
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act of 1973, as amended
FHWA	Federal Highways Administration
HCP	Habitat Conservation Plan
JD	Jurisdictional Delineation/Determination
LOP	Letter of Permission
MOA	Memorandum of Agreement
MSCP	Multi-Species Conservation Plan
NEPA	National Environmental Policy Act of 1969, as amended
NHPA	National Historic Preservation Act of 1966, as amended
NMFS	National Marine Fisheries Service
NWP	Nationwide Permit
OAW	Outstanding Arizona Water
OHWM	Ordinary High Water Mark
PCN	Pre-construction Notification
RGP	Regional General Permit
RHA	Rivers and Harbors Act of 1899, as amended
Section 401	33 U.S.C. 1341, Clean Water Act Section 401
Section 402	33 U.S.C. 1342, Clean Water Act Section 402
Section 404	33 U.S.C. 1344, Clean Water Act Section 404
Section 408	33 U.S.C. 408 (Section 14 of the Rivers and Harbors Act)
SHPO	State Historic Preservation Office
TWG	Technical Work Group
USACE	U.S. Army Corps of Engineers
USC	United States Code
USFWS	United States Fish and Wildlife Services
Waters	Waters of the United States
WRDA	Water Resources Development Act of 1986, as amended
WQAB	Water Quality Appeals Board

Executive Summary

The Arizona Department of Environmental Quality (ADEQ) created the Permit Process Technical Work Group (TWG) to prepare recommendations for a potential ADEQ assumption of the Clean Water Act Section 404 (Section 404) program.

The Permit Process TWG was charged with analyzing seven topics: permit transition, permit types, licensing time frames, forms and online tools, public process, federal nexus projects, and Environmental Protection Agency role. Where group consensus was not reached, multiple options are provided for consideration.

This white paper is the result of the efforts of the TWG and reflects recommendations drawn from a review of regulatory requirements, existing permits, consideration of the practices of other states, data from the Arizona Regulatory Branch of the U.S. Army Corps of Engineers, other pertinent documents, and personal experience.

Recommendations specific to each of the covered topics in this white paper are included in the section dedicated to that topic. For ease of reference, a compiled list of the main recommendations presented in this white paper have been included in the Executive Summary ([Table ES-1](#)). Each recommendation has been hyperlinked to the relevant section for more detail.

This paper does not analyze the feasibility of ADEQ assuming the Section 404 program. A separate feasibility study, including economic study, would be required to evaluate that overarching question.

Table ES-1 lists all main recommendations included in the report with key sub-recommendations included. The Gaps and Options sections also provide important details and are hyperlinked in the section headers. To see the full recommendations with all accompanying details and explanation, follow the hyperlinks attached to the Section No. in the left-most column. These recommendations are listed by order presented in the paper.

Table ES-1. Abbreviated List of Report Recommendations

Section No.	Main Recommendation	Key Sub-Recommendations
Section 2. Permit Transition (More detail is available at the hyperlinked section and additional information can be found in Section 2.3 Gaps and Options, Table 2)		
2.2.1(A)	All pending permit applications in areas under state authority must be transitioned to ADEQ upon approval by EPA of the state Section 404 program (33 USC § 1344(h)(4) and 40 CFR § 233.4(b)(2)).	ADEQ is directed by state law to negotiate with USACE to have USACE take action on as many pending permit applications as possible before the state assumes the program.
2.2.1(B) and 2.3 Table 2	When a permit is pending at the time of transfer to ADEQ, permit decisions already agreed to between the applicant and the USACE should be grandfathered in to ADEQ’s permit unless otherwise requested or agreed to by the applicant.	For pending applications, clarify in the ADEQ/USACE MOA that USACE will identify the status and summarizing all areas where decisions have already been made.
2.2.2	USACE individual permits and NWP or RGP authorizations that are valid as of the date of program transfer remain in effect until those permits need to be modified or reviewed.	<p>A. If USACE-issued permits are transitioned to ADEQ for administration prior to the expiration date or a modification request, those permits should be accepted as approved by the USACE without modification.</p> <p>B. Requests for modifications or renewal (extension) of existing USACE permits should be directed to ADEQ.</p>

Section No.	Main Recommendation	Key Sub-Recommendations
		<p>C. Requirements associated with existing USACE permits that require regulatory agency involvement would transition to ADEQ at the time the permit transitions to ADEQ (e.g., inspection obligations, annual report receipt, enforcement actions, etc.).</p> <p>D. When USACE permits involving permittee-responsible mitigation are transitioned to ADEQ, the USACE/ADEQ MOA should address which agency will be responsible for ongoing mitigation requirements.</p>
2.2.3	Establish a streamlined process for extension/minor modification of individual permits. This should apply to simple requests such as straightforward time extension requests or for requests where modifications are considered “minor” (see 40 CFR § 233.36(c)(2)(iv)).	<p>A. These renewals should be virtually automatic in this scenario with no need for ADEQ to re-do prior analyses.</p> <p>B. These renewals should fall under the EPA waiver (see 40 CFR § 233.51).</p> <p>C. ADEQ should develop a list of basic information to be provided with renewals requests, to help it differentiate between cases where renewal should be virtually automatic and those where additional review (and time) is required.</p>
2.2.4	Allow for administrative continuance of permits.	To account for cases where ADEQ requires more time to make a decision on a request to renew a permit, the state Section 404 rules should include an administrative continuance provision stating that previously approved discharge activities remain authorized under an existing permit provided that the permittee has submitted a timely renewal request.
2.2.5	Options for state transition of general Section 404 permits. The TWG identified three options for the	Option 1. ADEQ would need to determine how some general conditions contained within the NWP and RGP, such as the ESA and cultural provisions, would be administered.

Section No.	Main Recommendation	Key Sub-Recommendations
	<p>transition of general Section 404 permits. No TWG consensus was reached on a preferred option.</p> <ol style="list-style-type: none"> 1. Administer and enforce all relevant USACE NWP and RGPs 2. ADEQ develops and adopts its own general permits 3. Hybrid whereby state elects to administer and enforce some existing NWP/RGPs but also adopts some state-specific permits 	<p>Option 2. Any state general permits would have to comply with the general requirement that activities permitted under the general permit must not cause more than minimal adverse effects when considered separately or cumulatively and be consistent with 404(b)(1) guidelines.</p> <p>Option 3. A variant of the hybrid approach would be to administer all relevant NWP and RGPs at the time of assumption, and develop state-specific general permits at a later time.</p>
<p>Section 3. Permit Types (More detail is available at the hyperlinked section and additional information can be found in Section 3.3 Gaps and Options, Table 4)</p>		
<p>3.2.1</p>	<p>Provide individual permits with analysis reflective of the anticipated level of impact.</p>	<ol style="list-style-type: none"> A. Individual permits should be available for project activities in Waters that don't fall under the terms and conditions of a general permit. B. Individual permits should address the requirements of the 404(b)(1) guidelines (40 CFR Part 230). C. The state should define a "single and complete project" similar to the USACE definition (33 CFR § 330.2(i)) and frame it carefully so permittees cannot artificially divide a project to fit under a general permit when a consideration of the full project impacts in Waters would more appropriately be permitted under an individual permit. D. Provide appropriate and substantive opportunity for public comment to stakeholders and provide time in the permit process for substantive changes in response to formal public comment period.

Section No.	Main Recommendation	Key Sub-Recommendations
		<ul style="list-style-type: none"> E. Letters of Permission (LOPs) should be utilized where needed to streamline the individual permit process. F. Refer to the ESA and Cultural TWG white papers for details on coordination for these resources as part of the individual permit process. G. Develop a modified state-specific version of the USACE public interest review (three options discussed; refer to Section 3.2.1(G) for details). H. The TWG is split on a recommendation regarding a NEPA-equivalent analysis for Section 404 permitting (54% of votes for no state-equivalent and 46% of votes for developing a state-equivalent. See Section 3.2.1(H) for details).
3.2.2.1	Provide general permits: general permit options 1 and 3 (first introduced in Sections 2.2.5.1 and 2.2.5.3 , respectively). These options involve the administration of relevant NWP and RGP (either entirely or as part of the hybrid option).	<ul style="list-style-type: none"> A. State-specific supplemental conditions or procedures will be needed to address general conditions that require federal to federal consultation. B. Retain the conditional Section 401 certifications associated with the NWP and RGP. C. For state-specific general permits developed under Option 3, the state should define linear and non-linear “single and complete project” similar to the USACE definition and with consideration of independent utility. D. For state-specific general permits developed under Option 3, the state should only allow the use of multiple general permits for a single and complete project as long as the total acreage loss of

Section No.	Main Recommendation	Key Sub-Recommendations
		Waters authorized doesn't exceed the acreage limit of the general permit with the highest specified acreage limit.
3.2.2.2	Provide general permits: general permit option 2 (first introduced in Section 2.2.5.2). If ADEQ develops their own state-specific general permits (either entirely or as part of the hybrid option), the TWG identified three alternative approaches, but did not come to a consensus on a preferred approach.	<p>Option 1: Provide one general permit that is based on area of impact, not activity type (18 percent of the TWG vote received). This option would provide one permit up to a certain acreage of impact that could be used for any type of activity in Waters.</p> <p>Option 2: Provide activity-specific general permits (36 percent of the TWG vote received). Activity-specific permits may allow for a more robust analysis of potential impacts across the state and, as a result, may be able to have expanded disturbance limits for specific types of activities.</p> <p>Option 3: Hybrid approach with a lower-acreage impact-specific permit and higher-acreage activity-specific permits as a second-level general permit option for activities in Waters (45 percent of the TWG vote received).</p>
3.2.3	Provide a general permit to cover repair and protection activities for imminent environmental risk.	This permit should cover repair and protection activities that are needed to address imminent environmental risk. This would be in addition to RGP 63 as the intent of this permit is not covered by the limited terms of RGP 63.
3.2.4	Streamline general permitting, where possible.	A. Maintain allowances for Section 10 ESA programs and cultural agreements for small impact permits.

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		<p>B. Refer to Section 7. Federal Nexus for recommendations on streamlining Section 404 permitting for projects that would impact Waters and have a federal nexus.</p> <p>C. Refer to the ESA, Cultural, and Tribal TWG white papers for recommendations on streamlining coordination with USFWS, SHPO, and tribal parties.</p>
3.2.5	Provide clear language in general permit conditions identifying triggers for notification levels and general permit eligibility.	<p>A. Notification tiers should be clearly defined on the first page of the permit in language readily understood by the public.</p> <p>B. Notification triggers and eligibility thresholds under the general permit should be based on an acreage or other unit-based measurement.</p> <p>C. Identify triggers for notification other than acreage or other unit-based measurements (potential examples provided in this section).</p> <p>D. The general permit or its conditions should clearly identify when an individual permit will be required for an activity (examples provided in this section).</p>
3.2.6	Incorporate current Section 401 water quality certification conditions into an ADEQ Section 404 permit.	<p>A. For individual permits, water quality considerations must be properly analyzed during the application process and ADEQ should include necessary conditions to maintain state water quality standards in the Section 404 permit.</p> <p>B. Water quality considerations should be analyzed for the set of activities or level of impact to be covered by general permits during development of the overarching general permit program.</p>

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		<p>C. If the state decides to administer relevant NWP and RGPs, retain the conditional Section 401 certifications associated with those USACE-issued permits.</p>
<p>3.2.7</p>	<p>Provide clear information on conditions under which a permit must be denied. The 404(b)(1) guidelines provide information on when Section 404 permits must be denied. Provide this information in a clear and easily accessible manner to applicants so they can develop and plan their projects accordingly.</p>	<p>Visit the referenced section for a list from 404(b)(1) guidelines of circumstances under which no discharge of dredged or fill material in Waters shall be permitted.</p>
<p>3.2.8</p>	<p>Provide clear expectations related to permit enforcement activities (40 CFR Part 233, Subpart E).</p>	<p>Visit the referenced section for a list of key elements of the requirements, including ADEQ authority requirements.</p>
<p>3.2.9</p>	<p>Maintain Section 404 permitting exemptions as provided under the USACE program.</p>	<p>A. Maintain permitting exemptions as defined in Section 404(f). B. Maintain the equivalent of the “incidental fallback” exemptions as defined in 40 CFR § 232.2 and 33 CFR § 323.2 under “discharge of dredged material”.</p>
<p>3.2.10</p>	<p>Use existing WQAB appeal process for appealable permit decisions.</p>	<p>Arizona has an existing state statute governing appealable agency actions in ARS Title 41, Chapter 6, Article 10. The grant or denial of a Section 404 permit would be subject to this statute and the associated judicial review statute in Title 12, Chapter 7, Article 6.</p>
<p>Section 4. Licensing (Permitting) Time Frames (More detail is available at the hyperlinked section and additional information can be found in Section 4.3 Gaps and Options, Table 6)</p>		

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4.2.1	Provide pre-application meeting opportunities.	<p>A. ADEQ Water Quality Division has an existing pre-application meeting process that provides a 1-hour meeting free and coordination thereafter at an hourly rate. The availability of these meetings should carry forward to the Section 404 program.</p> <p>B. In addition to a clear application form and guidance, checklists are recommended to make the permit application process effective and transparent (further detail in Section 5/Forms and Online Tools).</p>
4.2.2	Acknowledge different review time frames relative to the complexity of the permit.	<p>A. ADEQ's APP provides different time frames for an individual permit, a complex individual permit, and general permits (AAC R18-1-525, Table 10). A similar system is recommended for the Section 404 program.</p> <p>B. General permit authorizations would be expected to take the least length of time.</p> <p>C. Individual permits would be expected to require a longer time frame due to the increased level of coordination and increased complexity of analysis and review.</p> <p>D. Complex individual permits have all the same requirements as any other individual permit but the location or type of project activity in Waters adds a layer of complexity that may require additional time and/or coordination. These are less likely to meet the EPA waiver limits.</p>
4.2.2.1	Time frames for JDs may add to these processing time frames.	<p>A. When a small or well-defined project is being proposed in Waters that can be easily defined, it may make sense and save time for the JD to be submitted simultaneously with the permit application.</p>

Section No.	Main Recommendation	Key Sub-Recommendations
		<p>B. In cases when a project with large or complex activities in Waters is being proposed or when a project is being proposed in Waters that are not so clear cut, it may make more sense and provide more certainty for the applicant to submit the JD prior to submittal of the Section 404 permit application.</p> <p>C. The ADEQ Section 404 program should continue to allow both concurrent and separate JD and permit application submittals.</p>
4.2.3	Develop step-specific individual permit time frames.	Due to the nature and potential complexity of the permitting process, develop an overall permitting time frame that clearly defines within it time frames for individual components (e.g., JD, application review and assessment of completeness, 404(b)(1) analysis review, coordination with other agencies, etc.)
4.2.4	General Permits – Keep the RGP 81 and RGP 96 time frames.	<p>A. The ADEQ program should either adopt equivalent RGPs or create an equivalent general permit with the key features of these permits.</p> <p>B. Adopt the advisory and concurrence notification tiers for simplified submittals and expedited reviews on projects with mid-level general permit impacts in Waters, retaining the 14-day review and presumed authorization features.</p>
4.2.5	General Permits – Extend RGP tiers and time frames to state-equivalent general permits.	If the state develops their own version of general permits similar to NWP, they will have flexibility to include additional levels of notification with time frames such as that included in the RGPs 81 and 96. Potential tiers are discussed in the referenced section.

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4.2.6	Permit Extension and Minor Modification – Assign Licensing Time Frames	<p>A. Develop licensing time frames for processing the extension of existing Section 404 permits. The process to extend an existing permit can vary a little in complexity but in general should be straightforward with minimal effort and time required.</p> <p>B. Develop licensing time frames for a minor modification to an existing permit. ADEQ will need to define in regulation what a Section 404 minor modification would be (partially defined in 40 CFR § 233.36(c)(2)).</p> <p>C. These extensions and modification should fall under the EPA waiver.</p>
4.2.7	Identify clearly when defined time frames begin (administratively complete, public notice readiness, substantively complete).	<p>A. Administrative completeness of the application (defined in AAC R18-1-501). This determination should be transparent so the applicant knows the expectation ahead of time.</p> <p>B. Public Notice Readiness. This determination is recommended as an addition to ADEQ’s existing completeness determinations, falling between administrative and substantive completeness of an application. Public notice should occur at a time when there is sufficient project information to provide for informed public comment, but not so late into the process that public comment could have no substantive impact on the project or permit conditions.</p> <p>C. Substantive completeness of the application (substantive review is defined in AAC R18-1-501). This determination should be transparent with open communication during the application process between ADEQ and the applicant.</p>

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		<p>D. ADEQ currently can stop the permitting clock if they require additional information from the applicant. This should be applied to the Section 404 permitting process.</p>
<p>4.2.8</p>	<p>Incorporate penalties for missed time frames by ADEQ and allow appeal procedure. Use Water Quality Appeals Board appeals process.</p>	<p>ARS 41-1077 penalties should be applied to the Section 404 program as well. Required coordination with other agencies can impact the ability of ADEQ to meet the time frames for Section 404 permitting. An option to place a hold on the permit process while these coordination efforts are underway should be incorporated into the program, to the extent allowed by law.</p>
<p>Section 5. Forms and Online Tools (More detail is available at the hyperlinked section and additional information can be found in Section 5.3 Gaps and Options, Table 8)</p>		
<p>5.2.1</p>	<p>All forms and guidance should be readily and easily available online.</p>	<p>A. ADEQ’s website should have an easy-to-find page specifically providing links to up-to-date application form templates, analysis templates, guidance for completing those forms, and ADEQ decision checklists and should be updated immediately upon release of a new version.</p> <p>B. The page should also include current ADEQ Section 404 program contact information for those applicants less well-versed in Section 404 to ask additional questions.</p>
<p>5.2.2</p>	<p>Develop and provide application forms and analysis templates and clear guidance.</p>	<p>A. Provide standard application forms for each level of available permit, including a form for individual permit requests and for each of the notification tiers for general permit authorizations.</p>

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		<p>B. Provide a joint Section 404 co-permit application form for situations in which the applicant will require a permit from both ADEQ and USACE.</p> <p>C. Guidance for the application forms should be clear and use language that is easily understood, so that the general public understands the information requirements. The USACE method of providing guidance language on a version of the template makes it easy to understand what information is required in which section and a similar method is recommended for ADEQ guidance.</p> <p>D. Forms should be thorough but streamlined and non-duplicative within themselves.</p>
5.2.3	<p>Develop checklists for ADEQ decision-making that are easily available to, and understood by, the public. These should be used by ADEQ to make determinations and the public should be able to use the exact same checklist to help them be sure they are providing the information ADEQ needs to make a decision.</p>	<p>A. ADEQ should provide checklists for the following: application completeness/administrative review, mapping standards, public notice readiness, and substantive review.</p> <p>B. Review the ADOT QC checklist for PCNs and individual permits as a possible starting point for developing checklists under a state Section 404 program.</p> <p>C. ADEQ should robustly engage stakeholders in developing and reviewing forms, checklists, guidance documents, etc. associated with the Section 404 program.</p>
5.2.4	<p>Provide for electronic submittals, automatic application entry into a review queue, and status updates.</p>	<p>A. ADEQ's Section 404 program should allow electronic submittals via an online portal that automatically enters a permit application into a review queue for administrative completeness.</p>

Section No.	Main Recommendation	Key Sub-Recommendations
		<p>B. The online portal should allow the applicant to log on and check on the status of a permit application.</p> <p>C. Electronic submittals should be preferred but not mandatory. The Section 404 permit program includes applicants with a variety of capabilities and smaller entities or individuals may not be able to easily access or use an electronic submittal system.</p>
<p>Section 6. Public Process (More detail is available at the hyperlinked section and additional information can be found in Section 6.3 Gaps and Options, Table 10)</p>		
<p>6.2.1</p>	<p>Provide a process for public input.</p>	<p>A. A state-assumed Section 404 program is required to provide a public notice period for general permit program development and individual permits, generally at least 30 days and allow any interested person to request a public hearing during the public comment period.</p> <p>B. The public notice must be sent to any agency with jurisdiction over the activity or disposal site, adjacent landowners, all persons requesting copies of public notices, any state whose Waters may be affected and shall be advertised publicly. The question of whether tribes should be treated as “adjacent states” was referred to the Tribal TWG (via ADEQ staff) for consideration.</p> <p>C. ADEQ should post the public notice on their website and maintain a hard copy at their office for public review. The public notice should be posted online on ADEQ’s website in a location that is easy to find.</p>

Section No.	Main Recommendation	Key Sub-Recommendations
<p>Section 7. Federal Nexus Projects (More detail is available at the hyperlinked section and additional information can be found in Section 7.3 Gaps and Options, Table 12)</p>		
<p>7.2.1</p>	<p>Projects with NEPA should follow the state Section 404 procedure.</p>	<ul style="list-style-type: none"> A. ADEQ should not assume responsibility for trying to mimic or be inclusive of the varying NEPA programs of the multiple federal entities that could represent a federal nexus in Arizona. B. Any MOAs between ADEQ and other federal entities should describe steps to address state Section 404 permitting requirements for their federal projects.
<p>7.2.2</p>	<p>Provide allowance to adopt applicable NEPA documentation/consultation in the permit process.</p>	<ul style="list-style-type: none"> A. ADEQ should consider ways to streamline duplicative requirements in the general and individual permit processes and a federal agency’s NEPA process. B. The lead federal agency would be required to conduct appropriate analyses and provide technical documentation and associated consultations required under NEPA. C. ADEQ should work with the lead federal agency to determine if the agency’s scope of analysis under NEPA is sufficient to provide the information necessary for ADEQ to determine compliance with 404(b)(1) guidelines and any other Section 404 permitting requirements. If yes, ADEQ should review and, where appropriate, adopt the federal agency’s technical documents to avoid duplication of effort for the applicant and authorizing agencies.

Section No.	Main Recommendation	Key Sub-Recommendations
		<p>D. If the NEPA scope of analysis is insufficient, ADEQ must have the capacity, expertise, and ability to undertake that technical documentation, review, and coordination internally.</p>
<p>7.2.3</p>	<p>Address permitting needs for different federal nexus scenarios.</p>	<p>A. For impacts in Waters on tribal lands or involving Section 10 Waters, the USACE would retain responsibility for Section 404 permitting.</p> <p>B. For impacts in Waters on federal lands or with some other federal nexus affecting Waters for which the state has assumed jurisdiction, ADEQ would issue the Section 404 permits.</p> <p>C. For impacts in Waters on a combination of Section 10/tribal lands and other federal/private lands, both the USACE and ADEQ would have permitting authority, assuming impacts to Waters would occur in both jurisdictions. ADEQ and the USACE should develop a joint permitting process to reduce duplication of effort by the applicant and the permitting entities.</p> <p>D. If impacts in Waters would be conducted under an NWP or other general permit requiring notification, the respective authority (USACE or ADEQ) would be responsible for reviewing, approving, and authorizing those impacts under that general permit. If activities in Waters would be conducted under a non-notifying permit, the permittee would be responsible for any documentation required to support use of that permit.</p>
<p>7.2.4</p>	<p>Licensing time frames are only applicable to ADEQ.</p>	<p>A. Licensing time frames defined by ADEQ for Section 404 permitting may need to be modified when the state is issuing a permit with a federal nexus.</p>

Section No.	Main Recommendation	Key Sub-Recommendations
		<p>B. ADEQ is responsible for meeting time frames within its control. For time frames outside of its control and to the extent allowed by law, ADEQ should have the ability to “stop the clock” to allow time for these external processes to occur.</p> <p>C. ADEQ should coordinate with other federal and state agencies to discuss procedures, policies, and time frames when coordination is necessary for Section 404 permitting. Some of this may be appropriately captured in MOAs but other discussions may be more informal.</p>
<p>Section 8. EPA Role (More detail is available at the hyperlinked section and additional information can be found in Section 8.3 Gaps and Options, Table 14)</p>		
<p>8.2.1</p>	<p>Negotiate shorter federal agency review times.</p>	<p>40 CFR § 233.50 allows for negotiation of the concurrent USACE, USFWS, and NMFS review of those documents not waived for EPA review. NMFS review of Section 404 permits is not anticipated to be necessary in Arizona, but ADEQ’s program should negotiate shorter review times with the USACE and USFWS for this step, while maintaining an adequate length for a full and proper review by these federal agencies.</p>
<p>8.2.2</p>	<p>Include categories of permits for which EPA review will occur (per 40 CFR § 233.51/33 USC § 1344(k)).</p>	<p>A. All mandatory review items as outlined in 40 CFR § 233.51/33 USC § 1344(k).</p> <p>B. Major discharges (subject to negotiation with EPA). Examples included in referenced section.</p>
<p>8.2.3</p>	<p>Provide opportunities for close coordination and clear guidance to streamline EPA review. Any future ADEQ</p>	<p>A. Easily accessible and thorough application guidance documents and clear forms for permittees to use in completing an application for a</p>

Section No.	Main Recommendation	Key Sub-Recommendations
	<p>Section 404 program should include the following to smooth the EPA review process and thereby work toward meeting defined or even shorter review times.</p>	<p>Section 404 permit; ensure such guidance and forms are in compliance with requirements under the CWA, including 404(b)(1).</p> <ul style="list-style-type: none"> B. Develop a tracking system sufficient to handle the program reporting required under 40 CFR § 233.52 and the MOA. C. Thorough ADEQ reviews for application completeness and public notice readiness before issuance of the public notice and submittal of permit documentation to the EPA for review. D. Close ADEQ coordination with states whose Waters might reasonably expect to be impacted by permitted activities to ensure concerns are adequately addressed by the permittee, whenever possible. E. Regular ADEQ contact with the EPA Regional authority to stay engaged and up to date and update ADEQ guidance expeditiously, as needed, to reflect any changes. F. Maintenance (in practice and in legislative authority) of equivalent protection of Waters as provided in the USACE Section 404 program. G. Maintain a state program that meets the legislative requirements of the CWA and adhere to the requirements in 40 CFR § 233.16(b) regarding timelines for revisions to a state program in response to federal statutory or regulatory changes.

1. Introduction

1.1 Technical Work Groups

The U.S. Army Corps of Engineers (USACE) is the current regulatory authority for Clean Water Act (CWA) Section 404 (Section 404) in Arizona. In a June 2018 stakeholder meeting, the Arizona Department of Environmental Quality (ADEQ) requested volunteers with technical expertise in Section 404 permitting to participate on technical work groups (TWGs). Seven TWGs were formed at the end of August 2018, each tasked by ADEQ with developing recommendations for a state-assumed Section 404 program. The TWG topics identified by ADEQ were: Compensatory Mitigation, Cultural and Historic Resources, Endangered Species Act (ESA), Fees, Jurisdictional Determinations Process, Permit Process, and Significant Degradation/Alternatives Analysis/Minimization. An eighth TWG specific to tribal considerations was added in January 2019. This paper summarizes the research and recommendations of the **Permit Process TWG**.

Although the TWGs were specifically charged by ADEQ to not address the question of *if* ADEQ should assume the program, several TWG members desired to include a brief summary of the group's opinions related to ADEQ's decision to pursue the adoption of the Section 404 program. Fifty percent of the TWG responded to this question, with 33 percent responding in opposition to ADEQ assumption, 0 percent in support of assumption, and 67 percent undecided or neutral, at this time. This vote had no impact on the recommendations provided in this paper. The purpose of this TWG is to provide recommendations for what an ADEQ program should look like, *presuming* ADEQ Section 404 assumption. Care should therefore be taken to avoid misinterpreting this paper as a referendum (for or against) on the desire of ADEQ to assume the program. Because the focus of this group was solely on a Section 404 program, the recommendations contained herein are not intended to be applied to other surface water programs.

The Permit Process TWG was tasked with evaluating and providing recommendations for seven topics: permit transition, permit types, licensing time frames, forms and online tools, public process, federal nexus projects, and Environmental Protection Agency (EPA) role. The TWG had its first meeting on September 4, 2018 with a deadline from ADEQ to complete the research and provide recommendations by December 20, 2018. That deadline was subsequently extended to March 21, 2019.

The TWG originally consisted of 21 members of varying backgrounds with experience in Section 404. Between December 2018 and January 2019, two members of the TWG withdrew. The 19 remaining members completed the paper (comprising votes on recommendations with multiple options, the Gaps/Options sections and full draft review and discussion). To organize their efforts, the TWG divided into five sub-groups, each tasked with developing draft language for assigned topic categories. The draft language was placed on Google Docs for review and comment by the entire TWG. At the biweekly TWG

meetings, the draft language was discussed as a group, using the written comments to focus the discussion. Many of the recommendations had TWG consensus. For those that did not, the TWG voted to determine if there was a majority opinion. A short description of each option voted upon is included in this paper. The text indicates the percent of the group that was present for the vote and the percent of that number that voted for each option. In situations where more than one option had significant support from members, all supported options were included. For minority opinions that didn't receive significant support, the option to write a minority opinion for inclusion in the white paper was provided.

Because all seven TWGs worked concurrently and under an aggressive schedule, the ability to have the groups coordinate to develop one integrated recommendation for a Section 404 program was limited. Therefore, recommendations expressed in this white paper may not directly correlate with recommendations from other TWGs. Attempts were made, generally via email and chair meetings, to keep the chairpersons of other TWGs apprised of Permit Process TWG discussions that affected their subject matter. The Permit Process TWG was careful to stay focused on the topics assigned to this group and did not attempt to provide recommendations related to other TWG efforts (e.g., although ESA compliance is part of permit process, this TWG did not attempt to recommend an ESA compliance process for an ADEQ-assumed program, instead referencing the reader to the ESA white paper).

Please note that this white paper does not address other USACE permitting authorities (such as Section 14 of the Rivers and Harbors Act, 33 U.S.C. 408, [Section 408]) for which authority will remain with the USACE, but stays focused on Section 404 as the permit program ADEQ may assume.

1.2 Overview of Section 404 Permit Types

This white paper frequently refers to different types of Section 404 permits. To provide a baseline for those discussions, a brief overview of the different types of permits follows (more information can be found at <https://www.spl.usace.army.mil/Missions/Regulatory/Permit-Process/>):

- Individual (Standard) Permits – these are used for activities that will have more than minor impacts in Waters of the U.S. (Waters). Under the USACE program, these permits require a public notice period, a public interest review, 404(b)(1) guidelines analysis (40 CFR Part 230), and evaluation under the National Environmental Policy Act (NEPA). These permits are generally provided for a period of five to 10 years.
- Letters of Permission (LOP) – these are a type of individual permit that can be used under Section 404 for categories of activities, as determined by the district engineer (and in consultation with the U.S. Fish and Wildlife Service (USFWS), state fish and wildlife agencies, EPA, and the state water quality agency). The proposed category of activities must go out for public notice which defines the LOP procedures for authorization of future activities proposed under that LOP. Once approved, individual actions that fall under the umbrella of the LOP can apply for permit coverage

via that avenue with an abbreviated process that does not require additional public notice (33 CFR § 325.2(e)(1)). Other permit requirements (e.g., 404(b)(1), public interest review, consultations, etc.) still must be completed for individual actions. An LOP has only been used for activities in Section 10 Waters in Arizona in at least the last 10 years and no local guidance for LOPs under Section 404 exists. As a result, the TWG looked to the USACE Sacramento District for guidance on Section 404 LOPs ([https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/LOP-procedures9-16-2013FINAL\(rev\).pdf](https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/LOP-procedures9-16-2013FINAL(rev).pdf)).

- Regional General Permits (RGP) – these are a type of general permit issued by USACE Districts (for Arizona, the Los Angeles District) for a period of no more than five years for activities expected to have minimal impacts. RGPs can authorize certain categories of activities within a specified geographic region. In Arizona, three RGPs are generally used: RGP 63 for emergency actions (USACE 2018b), RGP 81 for certain types of activities in Pima County, Arizona (USACE 2017), and RGP 96 for Arizona Department of Transportation (ADOT) activities (USACE 2016). RGPs are intended to streamline permitting requirements for approved activities, but individual actions may still require some form of notification or approval from the USACE.
- Nationwide Permits (NWP) – these are a type of general permit for categories of activities expected to have minimal impacts. The NWP program is published every five years and must go through public notice, public interest review, NEPA, and 404(b)(1) analysis prior to finalization. Currently there are over 50 general permits in the NWP program, each specific to a type of activity (USACE 2017b, USACE 2017c). Some NWPs have a non-notifying threshold, meaning that the activity in Waters can occur immediately if the activity in Waters falls under that threshold, provided all applicable general conditions are followed. Activities in Waters above that threshold (but still within the overall threshold allowed for the NWP) or working under NWPs without a non-notifying option must submit a pre-construction notification (PCN) to the USACE.

Under the USACE, all Section 404 permits are required to have an accompanying CWA Section 401 (Section 401) Water Quality Certification. In Arizona, Section 401 certifications are provided by ADEQ.

1.3 Content Organization

This paper is organized by the seven topics assigned to the Permit Process TWG. Each topic has sub-headings for a description of the current state, recommendations for an ADEQ-assumed Section 404 program, and the identification of key gaps with options to close those gaps. Following the seven topic sections and conclusion is a minority opinion. The TWG has used hyperlinks for reference documents where available either in the document or in [Section 11/References](#). This paper recommends the drafting of certain documents (e.g., guidance, checklists, etc.) but it is not in the scope of this group to provide recommended drafts.

2. Section 404 Permit Transition

Federal regulations include provisions for permit transition upon state assumption of the Section 404 permitting program. This section addresses the transition of permits and any associated mitigation and enforcement provisions to ADEQ from the USACE upon EPA approval of the ADEQ Section 404 program. This section also briefly addresses the transition of permits within an approved program (e.g., permit extensions, general permit program re-authorizations, etc.) This section introduces options that are also addressed later in [Section 3/Permit Types](#) (e.g., adoption of the NWP program). After a description of the current state, the section transitions to a discussion of considerations and recommendations specific to ADEQ's effort to assume the Section 404 program.

2.1 Current State of Regulations and Program

2.1.1 Geographic scope of an ADEQ assumption

Section 404 permit transition provisions (40 CFR Part 233) apply to activities in assumable Waters. Even under a state-assumed program, the USACE would retain Section 404 permitting authority pursuant to CWA Section 404(g)(1) for non-assumable Waters, which were defined in a USACE memo dated July 30, 2018 as Waters subject to Section 10 of the Rivers and Harbors Act (excluding those subject to Section 10 due solely to historical navigability) and wetlands adjacent to such Waters (USACE 2018a). In Arizona, this definition would include only the Colorado River and adjacent wetlands. The administrative boundary for adjacent wetlands in this context is to be defined between the state and the USACE prior to a state's assumption. The USACE would also retain jurisdiction over activities occurring in Waters located on tribal lands, because ADEQ has no jurisdiction on tribal lands.

2.1.2 Pending permit applications

The CWA and state assumption regulations make it mandatory for the USACE to transfer permits in process to the state for a final decision upon state assumption, stating “. . . the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such state program to such state for appropriate action.” (33 USC § 1344(h)(4); refer also to 40 CFR § 233.14(b)(2); 40 CFR § 233.15(h); 33 CFR § 323.5). There appears to be no ability to allow the USACE to complete processing of the application, even if the permit is nearing issuance. Per 40 CFR § 233.14(b)(3), the state's Memorandum of Agreement (MOA) with the USACE shall include processes for the transfer of pending permit applications to the state.

By contrast, when ADEQ assumed the Arizona Pollutant Discharge Elimination System (AZPDES) program in 2002, the enabling legislation and the MOA between ADEQ and EPA allowed permittees, at their discretion, to request that applications pending at that time before EPA be processed to completion by

EPA, though ADEQ would ultimately issue the final permit (EPA and State of Arizona 2001, Section III(C)(3)). The prescriptive language included in the Section 404 assumption statute and regulations cited above appears to preclude a similar approach in the case of Section 404 permit applications pending before the USACE at the time the state assumes the Section 404 program. Session law included as part of the legislation authorizing the state to seek assumption of the Section 404 program requires ADEQ to negotiate with USACE for USACE to process as many pending permit applications and requests for jurisdictional delineations as possible before the program is transferred to ADEQ (State of Arizona 2018).

2.1.3 Individual Permits

Individual permits already issued by the USACE remain in effect and under USACE jurisdiction until their stated expiration date (40 CFR § 233.38), with any renewal/extension request then directed to the state once the state has assumed the program. This approach is reflected in the New Jersey/USACE MOA, page 3, section V.A (USACE and State of New Jersey 1997). A request for a renewed/extended permit would then presumably result in issuance of a new state permit.

The New Jersey/USACE MOA also states that requests for modification of existing USACE individual permits should be directed to the state, even during the original effective period of those permits. The state presumably would then re-issue the modified permit as a state permit, with only the conditions being modified reopened (40 CFR § 233.36(c)(1)).

2.1.4 Nationwide permits and regional general permits

Under the CWA, a state may choose to administer and enforce some, or all, of the existing USACE general permits, which (pursuant to CWA Section 404(e)) encompasses both NWP and RGP (33 USC § 1344(h)(5); 40 CFR § 233.21(a)). The MOA between the state and USACE must identify USACE general permits that the state intends to administer and enforce upon receiving program approval (40 CFR § 233.14(b)(3)). If that occurs, then for all NWPs and RGPs taken over by the state: (1) currently authorized activities under an NWP or RGP would remain authorized and would be overseen by the state going forward; and (2) requests for NWP or RGP verification that are pending at the USACE would transfer over to the state for final evaluation and decision. Under the current regulations, a state could also choose to develop additional or different general permits as part of its state program, or even to adopt no general permits whatsoever (although adopting no general permits whatsoever would not be consistent with ARS 41-1037).

For activities currently authorized under an NWP (including non-notifying NWPs) or an RGP that the state chooses not to adopt, the activities presumably remain authorized under the federal permit until that permit expires or until the project-specific authorization expires, if that authorization was for a lesser period than the duration of the NWP or RGP. However, new activities in areas subject to the state Section

404 program could not be authorized under the federal NWP or RGP, unless these are formally adopted by the state to be part of the state Section 404 program.

2.1.5 USACE permit modification and extension procedures

2.1.5.1 Individual permits - modification

Upon request by a permittee or at the initiative of the USACE, a permit may be modified. If the USACE and the permittee can mutually agree on changes to the permit, the USACE will notify the permittee in writing of the modifications, which become effective on the date specified by the USACE (33 CFR § 325.7(b)). In the event the permittee does not agree to changes proposed by the USACE, the USACE will either suspend the permit or notify the permittee of changes that the USACE will unilaterally make to the permit. No such changes can be finalized until at least 10 days after the permittee receives notification of the intended change; the permittee may request a meeting with the USACE or a public hearing within that 10-day period (*id.*). Before modifying a permit term in a fashion that would result in greater impacts, the USACE must consult with resource agencies that expressed significant interest in the permit term proposed to be modified (*id.*).

A significant increase in the scope of a permitted activity will be processed as a new application, rather than a permit modification (33 CFR § 325.7(a)).

2.1.5.2 Individual permits - extension

USACE permits are not limited in their potential duration (33 CFR § 325.6), though five-year permit durations are common for many types of activities. By contrast, under a state-assumed program, permits may not be issued for longer than five years (33 USC § 1344(h)(1)(A)(ii) & 40 CFR § 233.23(b)). A permittee may request a permit extension, which the USACE will grant unless doing so would be contrary to the public interest (33 CFR § 325.6(d)). Public notice and comment may occur with respect to a proposed extension but are not required (and typically not undertaken) in cases where the USACE determines that there have been no significant changes in the attendant circumstances since the authorization was issued (*id.*).

2.1.5.3 General (nationwide) permits – modification

Modifications to activities authorized under an NWP may occur, so long as the modified activities still fall within the scope of activities allowed by the NWP (e.g., do not result in exceeding any acreage thresholds in the NWP) and maintain compliance with all the nationwide permit conditions applicable to the NWP. For NWPs requiring a PCN, the USACE typically reviews the modified activity to determine if any special conditions imposed on the activity as part of the original verification require modification or supplement, and notifies the permittee in writing if this is the case (33 CFR § 330.6(a)(3)(i)).

2.1.5.4 General (nationwide) permits – extension

Unlike individual permits, USACE NWP carry a maximum five-year duration (33 USC § 1344(e)(2); 33 CFR § 330.6(b)). Activities authorized under an NWP that are under construction or are under contract to commence as of the expiration date of an NWP remain authorized under that NWP provided that (1) the authorized work is completed within 12 months of the expiration date of the NWP and (2) the USACE does not exercise discretionary authority to revoke the authorization for the specific activity (33 CFR § 330.6(b)).

If the activity requires longer than 12 months from the expiration of the authorizing NWP to complete or is not under contract or construction at the time the new permit program begins, a new authorization for any remaining work must be obtained via either a reissued NWP or an individual permit. A new NWP authorization under these circumstances may not require the submittal of a completely new PCN but often requires updates to documentation. This generally includes a response to new or changed general conditions, species listed under the ESA since the prior verification, etc. The USACE can request additional documentation. If a scope change is also part of the re-verification request, additional documentation (e.g., additional mapping, permanent and temporary impacts calculations, discussion of avoidance and minimization and mitigation, etc.) may be required.

2.1.6 Benefits and drawbacks summary

Table 1 summarizes the benefits and drawbacks of the permit transition current state identified by the TWG.

Table 1. Permit Transition Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
States have flexibility in developing a general permit program and can develop their own general permits or adopt USACE NWPs/RGPs	USACE cannot complete processing a permit application once state assumes program, even if it's close to complete.
The USACE process for simple time extensions or minor modifications on individual permits is streamlined.	Federal regulations restrict a state-provided individual Section 404 permit to a term not to exceed five years.
USACE can provide individual permits for a time frame longer than five years.	

Activities underway or under contract under an NWP program have 12 months after NWP expiration to complete that activity without having to re-certify under the new NWP program.	
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2.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

Key recommended components of the permit transition process are described in this section and are key to a smooth transition from USACE to ADEQ.

2.2.1 Transition of pending permit applications

- A.** All pending permit applications in areas under state authority must be transitioned to ADEQ upon approval by EPA of the state Section 404 program. This is required pursuant to 33 USC § 1344(h)(4) and 40 CFR § 233.14(b)(2). As noted previously, ADEQ is directed by state law to negotiate with USACE to have USACE take action on as many pending permit applications as possible before the state assumes the program.
- B.** When a permit is pending at the time of transfer to ADEQ, permit decisions already agreed to between the applicant and the USACE should be grandfathered in to ADEQ's permit unless otherwise requested or agreed to by the applicant (e.g., results of compensatory mitigation negotiations, 404(b)(1) guidelines analyses, special conditions, ESA and/or cultural resources analysis and consultation, etc.).

2.2.2 Transition of previously issued permits

USACE individual permits and NWP or RGP authorizations that are valid as of the date of program transfer remain in effect until those permits need to be modified or renewed.

- A.** Previously approved, active permits may not automatically transfer from USACE to ADEQ upon ADEQ assumption of the Section 404 program until a modification or extension is needed. However, if any of these active permits are transitioned to ADEQ for administration prior to the expiration date or a modification request, ADEQ should accept those permits as approved by the USACE without modification.

- B. Requests for modification or renewal (extension) of existing USACE permits for activities in assumable Waters would be directed to ADEQ¹ and the resulting modified or renewed permit would be issued as a state permit.
- C. Requirements associated with existing USACE individual permits or NWP authorizations that require regulatory agency involvement would transition to ADEQ at the time the permit transitions to ADEQ. This includes inspection obligations, annual report receipt and review, and enforcement actions.
 - 1. Enforcement actions already substantially underway by the USACE (or EPA) at the time of transition to ADEQ should be retained and completed by the USACE (or EPA).
 - 2. Provisions for transfer of relevant file materials related to these permits or authorizations from USACE to ADEQ should be addressed in the MOA between those two agencies, and ADEQ or USACE should take steps to notify permittees of the change in regulatory agency.
- D. When USACE permits involving permittee-responsible mitigation are transitioned to ADEQ for administration, the USACE/ADEQ MOA should address which agency will be responsible for the ongoing mitigation requirements (e.g., annual reports, acceptance of complete mitigation, site-protection instruments such as restrictive covenants, etc.).
 - 1. The MOA needs to address these mitigation details for both active or pending permits transitioned to ADEQ, and also active or expired permits that remain with the USACE. A transfer of **knowledge** at a minimum is critical (even if the permit is not transitioned to ADEQ) to ensure the state is aware of mitigation sites protected “in perpetuity” as they approve future Section 404 permits that could have the potential to affect those protected sites. Refer to the Compensatory Mitigation TWG white paper for details on the transition of mitigation requirements.

2.2.3 Establish a streamlined process for extension/minor modification of individual permits

A streamlined process should be established for renewals of individual permits where there have been no significant changes to the permitted activities or significant non-compliance with the permit. This process should apply to both ADEQ renewing current USACE permits that expire after state program assumption and to ADEQ renewing its own permits (limited to five-year durations per 33 USC § 1344(H)(1)(A)(ii)).

¹ Based on the current draft MOA between Florida and the USACE (USACE and State of Florida 2018 *Draft*), the state appears to be taking the position that the USACE could continue to process modifications of USACE-issued permits that did not involve a significant increase in scope, as well as requests to modify the general or special conditions of existing USACE permits. The USACE position appears to be that upon assumption, the state would process all requests for modification of existing USACE permits.

This streamlined process should apply to simple requests such as straightforward time extension requests or for requests where modifications are considered “minor,” with minor actions defined using language from 40 CFR § 233.36(c)(2)(iv) as “. . . changes to project plans that don’t significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact.”

- A. These renewals should be virtually automatic in this scenario with no need for ADEQ to re-do prior analyses. This is in alignment with USACE practice, who often renews permits by letter after a basic review of compliance with permit conditions.
- B. These renewals should fall under the EPA waiver, as allowed under 40 CFR § 233.51 (the EPA waiver is discussed in more detail in [Section 8/EPA Role](#)) and this should be specified in the EPA/ADEQ MOA. If for some reason EPA feels that review of some of these renewals cannot be waived under 40 CFR § 233.51, then the MOA should specify that in any such cases EPA’s review is limited to changed circumstances from the time of permit issuance, if any. If a permit has undergone full review and approval under USACE processes or state equivalents, then there is no basis for EPA to engage in further review unless and to the extent that conditions have changed in a significant fashion.
- C. ADEQ should develop (by rule, guidance or as part of application form) a list of basic information to be provided with renewal requests, to help it differentiate between cases where renewal should be virtually automatic and those where additional review (and time) is required (e.g., an updated jurisdictional delineation (JD) is needed, newly listed species under ESA, etc.).

2.2.4 Allow for administrative continuance of permits

It is incumbent upon ADEQ to process permits in a timely manner after receipt of a complete application and in a manner that Waters are not significantly degraded. However, to account for cases where ADEQ requires more time to make a decision on a request to renew either a USACE-issued or a state-issued permit, the state Section 404 rules should include an administrative continuance provision stating that previously approved discharge activities remain authorized under an existing permit provided that the permittee has submitted a timely renewal request. Such a provision would be consistent with (and may even be required by) ARS § 41-1092.11.

A similar concept exists in EPA’s National Pollutant Discharge Elimination System program rules (40 CFR § 122.6) and in the analogous Arizona Pollutant Discharge Elimination System (AZPDES) regulations (AAC R18-9-B904). Without this provision, discharge would be prohibited after the expiration date of the permit for which renewal is being sought, even while ADEQ is processing the application (40 CFR § 233.38, which provides that authorized states may continue permits past their effective date if state law allows).

2.2.5 Options for state transition of general Section 404 permits

The TWG identified three options for the transition of general Section 404 permits. No consensus was reached on a preferred option. 63 percent of the TWG members voted on these options.

2.2.5.1 General Permit/Option 1 - Administer and enforce all relevant USACE NWP and RGPs

This option received 33 percent of the vote within the TWG.

The state could elect to administer and enforce all relevant existing USACE NWP and RGPs, as it is entitled to do pursuant to 33 USC § 1344(h)(4), 40 CFR § 233.14(b)(2) & 40 CFR § 233.15(h). This option would maintain the USACE National Environmental Policy Act (NEPA) process undertaken when USACE issues the NWP. The TWG compiled a list of the current NWP and RGPs and have noted which appear to be potentially applicable in Arizona. This list can be found in [Appendix A](#) and is not re-stated here.

If the state elects to administer and enforce some or all NWP and RGPs, ADEQ will need to determine how some general conditions contained within the NWP and RGPs, such as the ESA and cultural provisions, would be administered. The ESA and Cultural and Historic TWGs developed recommendations on these topics and the reader is referred to their white papers for recommendations on how those provisions might be addressed.

2.2.5.2 General Permit/Option 2 - ADEQ develops and adopts its own general permits

This option received 17 percent of the vote within the TWG.

The state would adopt its own general permits as part of the rule package to be submitted to EPA for program approval. These could be state versions of the relevant existing NWP and RGPs, possibly with some tailored or modified conditions (e.g., different acreage limits, notifications, etc.). These could also be entirely new general permits that cover different activities than those covered by the USACE NWP and RGPs.

Any state general permits (whether versions of the current USACE permits or entirely new ones) would have to comply with the general requirement that activities permitted under the general permit must not cause more than minimal adverse effects when considered separately and cumulatively. General permits must also be consistent with the 404(b)(1) Guidelines (40 CFR § 233.21(b)).

This option appears to be the route Florida is contemplating. Their draft Section 404 rules from May 2018 (State of Florida 2018 *Draft*) contain the text of 34 general permits, all but one of which (a proposed general permit for certain reversion activities) mirror activities covered in the current USACE NWP. This is also the approach Michigan and New Jersey currently implement; both states have adopted state general Section 404 permits, most (but not all) of which cover the same general types of activities covered by the USACE NWP.

2.2.5.3 General Permit/Option 3 - Hybrid approach

This option received the most support (50 percent of the votes) within the TWG.

The state could choose a hybrid approach whereby the state elects to administer and enforce some existing NWP and RGP but also adopts some state-specific general permits (either modified versions of existing NWP or entirely new permits). A variant of the hybrid approach would be to administer all relevant NWP and RGP at the time of program assumption, and develop state-specific general permits at a later time (e.g., when the current NWP expire in 2022).

2.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 2.2](#). Since this is a new program, a new rule will be required and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 2. Gaps and Options Summary Table – Permit Transition

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
For permit applications pending (e.g., under review) before USACE at the time ADEQ assumes the program, 1) negotiate with USACE to have USACE take action on as many of those pending applications as possible before the state assumes the program; and 2) for applications where the USACE doesn’t take action before the state assumes the process, develop a process for grandfathering permit	This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.	Clarify in the ADEQ/USACE MOA that when pending applications are transferred from the USACE to ADEQ, USACE will identify the status of pending applications and summarize all areas where decisions have been made. To the extent necessary, include language in the ADEQ/USACE MOA or the state Section 404 assumption rules clarifying that ADEQ will not reverse decisions already made by USACE with respect to pending applications transferred to ADEQ.

<p>decisions already agreed upon by USACE into ADEQ’s permit (Section 2.2.1(B)).</p>		
<p>Determine what agency will administer existing USACE permits (which remain valid even after state assumption) (Sections 2.2.2(A) and 2.2.2(C)).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.</p> <p>Note for option to resolve (a): When ADEQ assumed the NPDES program, ADEQ administered existing permits in addition to pending permits (AAC R18-9-A902(A)). But no similar state rule exists for Section 404.</p> <p>Note for b.: When the state assumed the NPDES program, this was clarified in rule (AAC R18-9-A902(A)(4)).</p>	<p>a. Identify administering agency in ADEQ/USACE MOA. If ADEQ will administer existing USACE permits, include in ADEQ permit rules. If USACE will continue to administer such permits, it would only do so until such time as the permit needs to be modified or extended.</p> <p>b. Clarify in the state regulations and/or the ADEQ/USACE MOA that the terms and conditions contained in any active USACE permits to be administered by ADEQ remain the same until the permit is modified.</p>
<p>Section 404 enforcement actions “substantially underway” by USACE or EPA at the time of state assumption should be continued by those agencies (Section 2.2.2(C)(a)).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.</p>	<p>a. Clarify enforcement roles and primacy in ADEQ/EPA and ADEQ/USACE MOAs.</p> <p>b. Clarify in MOAs that when, at the time of assumption, a complaint, administrative order, or formal cease and desist order (i.e., “substantially underway”) has been filed by USACE or EPA, the filing agency would retain control of those actions unless it elected to transfer that action to ADEQ.</p>
<p>Develop a process for transfer of relevant existing permit information (both individual and general) and</p>	<p>This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.</p>	<p>Clarify these procedures (e.g., timing, content, manner of transfer - electronic, paper, or both) in ADEQ/USACE MOA.</p>

JDs from the USACE to ADEQ (Section 2.2.2(C)(b)).		
Develop a process to notify permittees of the change in administering regulatory agency (Section 2.2.2(C)(b)).	This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.	Clarify the responsible agency and the timing and method of such notification in the ADEQ/USACE MOA. Note: when the state assumed the NPDES program, it took the lead in providing notice to permittees of the change (AAC R18-9-A902(A)(1)).
Determine which agency is responsible for ensuring compliance with long-term permittee-responsible mitigation obligations, especially for expired USACE permits or USACE permits active at the time of state assumption but that do not end up being re-issued as state permits (Section 2.2.2(D)).	This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.	Clarify this responsibility in the ADEQ/USACE MOA and ensure USACE transfers mitigation location information to ADEQ.
Establish a streamlined process to extend individual permits with no significant changes in permitted activity and no significant non-compliance issues. Prior decisions made by USACE at the time of permit issuance should not be reopened absent significant changes in activity or significant permit non-compliance (Section 2.2.3).	This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.	<ol style="list-style-type: none"> a. Clarify in ADEQ rules and ADEQ/EPA MOA that the review for such extension requests will be minimal. Ideally, EPA would waive review of extension requests under these circumstances. b. Develop a list of basic information to be provided with extension requests (to allow ADEQ to assess status of activities in Waters including identifying any significant changes).
Establish an abbreviated process for making minor modifications to individual	This is specific to an assumed Section 404 program and is not	Include this abbreviated process in state regulations and in the

<p>permits, as allowed by 40 CFR § 233.36(c)(2) and as currently provided by USACE (Section 2.2.3).</p>	<p>currently addressed in ADEQ regulations or policies. Note: ADEQ has similar regulations for Aquifer Protection Permits (APP) and AZPDES permits (AAC R18-11-A211(B)-(C) and AAC R18-9-9-B906(B)).</p>	<p>assumption submittal package to EPA.</p>
<p>Establish administrative continuance for permits (Section 2.2.4).</p>	<p>ADEQ currently lacks a rule allowing for administrative continuance of existing Section 404 permits while extension requests are being processed. Note: when the state assumed the NPDES program, a provision along these lines was included in the assumption regulations (AAC R18-9-B904(C)).</p>	<p>Develop an administrative continuance rule as part of the program rules submitted to EPA as part of any assumption package.</p>
<p>Clarify how states will address general permitting at the time of program assumption. The TWG identified three options: 1) administer existing NWPS/RGPs relevant to Arizona; 2) develop state-specific general permits; 3) a hybrid of administering some existing NWPs/RGPs and developing some state-specific general permits (either at the time of program assumption or later). The latter approach received the most TWG support (Section 2.2.5).</p>	<p>This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.</p>	<ol style="list-style-type: none"> a. Whichever option is selected, it will need to be addressed in the ADEQ program assumption rules, the ADEQ/EPA MOA, and perhaps the ADEQ/USACE MOA. b. If ADEQ adopts relevant NWPs/RGPs, develop procedures to replace/modify general conditions applicable to those permits that do not apply to ADEQ as a non-federal agency (e.g., Section 7, Section 106 consultations).

3. Permit Types

Permit types currently offered by the USACE program include individual permits (including LOPs) and general permits (including RGPs and NWP). The type of permit received depends on the proposed activity and extent of permanent impacts within Waters. This section describes the current types and key considerations of Section 404 permits provided by the USACE, including violations and enforcement of Section 404 permitting requirements. This section does not discuss in detail the public process, time frames, forms, or the EPA role in permitting as those are covered in other sections. This section expands on [Section 2/Permit Transition](#) in discussing the types of general permits that may be appropriate for an ADEQ Section 404 program. After a description of the current state, the section transitions to a discussion of considerations and recommendations specific to ADEQ's effort to assume the Section 404 program.

3.1 Current State of Regulations and Program

This section will discuss the different types of permits under the current USACE program. Regardless of the type of permit (individual or general), permits are required for each single and complete project that will discharge dredged or fill material into Waters. A single and complete project is generally defined by "independent utility" (33 CFR § 330.2(i) and USACE 2017c [p. 2006]). A project is considered by the USACE to have independent utility (and thus constitute a single and complete project) if it would be constructed absent the construction of other projects in the area. A multi-phase project where each phase depends on the others is considered one single and complete project. Projects with impacts in Waters cannot be artificially segmented into multiple projects/phases in order to fit under a lower-level permit unless these phases have independent utility and can thus be considered single and complete projects (e.g., each phase does not depend on the others). The USACE generally considers each crossing of a Water for linear projects as single and complete projects.

The USACE may not issue a permit if it does not comply with 404(b)(1) guidelines or if it's determined by the district engineer to be contrary to the public interest (33 CFR § 320.4). The unnecessary alteration or destruction of wetlands is discouraged in 33 CFR § 320.4(b)(1) as contrary to the public interest. In addition, 404(b)(1) guidelines states that where the activity doesn't require access, proximity, or siting within a special aquatic site (i.e., wetlands) to fulfill its basic purpose, practicable alternatives that avoid special aquatic sites are presumed to be available and that those practicable alternatives are presumed to have less adverse impact on the aquatic ecosystem (40 CFR § 230.10(a)(3)).

3.1.1 Individual Permits

3.1.1.1 Individual (Standard) Permits

Standard individual permits are required for projects with more than minimal individual or cumulative impacts or that otherwise do not meet the criteria for a general permit. The USACE is the final decision-maker on the type of permit required and has discretion to decide if a proposed activity requires an individual permit even if it appears to qualify for a general permit. Each project is evaluated individually and must include all reasonably related activities.

The process to obtain an individual permit starts with a pre-application consultation (if requested by applicant), submittal of application materials, a project review by the USACE, followed by decision-making. Primary components for individual permit decisions include:

- A. USACE ENG 4345 form with content as specified in 33 CFR § 325.1 (discussed in more detail in [Section 5/Forms and Online Tools](#)).
- B. Public notice as required under 33 CFR § 325.3 and NEPA; identified as a critical step to gather information needed to evaluate the possible impacts on public interest.
 1. An application is considered complete when there is sufficient information to publish the public notice. The 404(b)(1) analysis and NEPA components can be completed after the public notice is published.
- C. 404(b)(1) guidelines analysis (addressed in more detail by the Significant Degradation/Alternatives Analysis white paper) is required for proposals to discharge dredged or fill material into Waters (40 CFR § 230.2) under the USACE Section 404 program.
 1. These guidelines require an alternatives analysis to avoid or minimize impacts in Waters as the result of a project.
 2. An approved project in Waters must show that it 1) is the least environmentally damaging practicable alternative, 2) won't cause or contribute to the violation of specified state or federal laws (e.g., water quality standards, ESA, etc.), 3) won't result in significant degradation of Waters, and 4) has appropriately minimized adverse impacts (<https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>).
 3. A state program must also review applications under these guidelines or an equivalent developed by the state.

- D. A public interest² review as described in 33 CFR § 320.4.
1. The public interest review evaluates the proposed project activities to determine if the issuance of the permit is not contrary to the public interest. Each factor is weighted as part of a whole to determine the outcome.
 2. Permit decision should reflect the national concern for both protection and utilization of important resources (balanced approach).
 3. Three criteria are considered:
 - a) extent of the public and private need for the structure or work;
 - b) practicability of using reasonable alternative locations and methods where there are unresolved conflicts; and
 - c) extent and permanence of beneficial or detrimental effects on the public and private uses to which the area is suited.
 4. Factors are weighted by relevance to the proposed project; full consideration and weight is given to all comments, including those from federal, state, and local agencies and experts.
 5. If wetlands are involved for a project undertaken or funded by a federal, state, or local agency, there are additional requirements on wetland considerations as a productive and valuable public resource for which unnecessary alteration or destruction should be discouraged.
- E. USACE permits are federal actions subject to NEPA requirements, generally an Environmental Assessment (EA) or Environmental Impact Statement (EIS).
1. Per 40 CFR § 230.10, the alternatives analysis to comply with NEPA can often also meet the required alternatives analysis for 404(b)(1).
 2. If the NEPA document does not include sufficient information on alternatives as required under 404(b)(1), supplemental information would need to be submitted.
 3. Public input³ is required as part of the NEPA process.

² The USACE considers the following public interest factors: conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and the needs and welfare of the people.

³ For projects cleared under a Categorical Exclusion (CE) or EA, the USACE generally considers the Section 404 public notice process to satisfy NEPA public participation requirements as well.

4. The NEPA analysis results in either a) for an EA, a finding of no significant impact or decision to move to an EIS, or b) for an EIS, a record of decision. The USACE decision document combines the 404(b)(1) guidelines analysis, public interest review, and NEPA review.

No Section 404 permit may be issued if the project is found to be contrary to the public interest or contrary to the 404(b)(1) guidelines (33 CFR § 320.4(a)(1)).

Certain categories of impacts that will result in the “loss” of special aquatic sites or critical resource Waters (e.g., wetlands, mudflats, shallows, or riffle and pool complexes) in Arizona automatically require an individual Section 404 permit application. NWP General Condition 22 and Regional Condition 2 identify when an individual permit is required for impacts in these types of Waters.

The applicant can administratively appeal an individual permit at the USACE division office level within 60 days of permit issuance or denial if they don’t agree with the permit conditions provided or if the permit has been denied (33 CFR Part 331). 33 CFR Part 331 includes flow charts (<https://www.gpo.gov/fdsys/granule/CFR-2012-title33-vol3/CFR-2012-title33-vol3-part331>) showing the appeal process and have not been included here.

3.1.1.2 Letter of permission

Under Section 404, LOPs can be issued for a category of activities that the USACE determines are unlikely to have significant impacts but that are not otherwise encompassed by a general permit (33 CFR § 325.2(e)(1)). The LOP for the category of activities must go through public notice, with the possibility of a public hearing. Once approved, individual projects that fall under the LOP category of activity can be authorized using an abbreviated process. This process still requires individual projects to have a 404(b)(1) analysis, USFWS coordination, public interest review and NEPA (categorically excluded by the terms of an LOP), but no separate public notice. Interested parties (e.g., resource agencies, adjacent landowners) may still be notified. According to the USACE data and via personal conversation with the USACE on October 23, 2018 (between Tricia Balluff, TWG Chair and Sallie Diebolt, USACE Arizona Regulatory Branch Chief), the Arizona USACE has only issued LOPs for project activities associated with Section 10 Waters during the past 10 (or more) years, which are not assumable by the state. Prior to that time, LOPs may have been issued in Arizona for non-Section 10 Waters but no information on these projects was obtained by the TWG.

3.1.2 General Permits

3.1.2.1 Regional General Permits

There are four RGPs (CWA 404(e)(1)) currently available for assumable Waters in Arizona: RGP 63 for repair and protection activities in emergency situations (USACE 2018b); RGP 70 for bioengineered bank stabilization activities (USACE 2014); RGP 81 for maintenance and bank stabilization activities in Pima

County (USACE 2017); and, RGP 96 for routine transportation activities bid and administered by ADOT (USACE 2016). Three of these (63, 81, and 96) are commonly used in Arizona.

RGP 63 is for emergency repairs in Waters, including wetlands, where there is imminent threat to life or property. Follow up documentation must be completed and ex post facto mitigation payments may be required. Over the last 10 years, the vast majority of these permits have been issued in order to quickly respond to the effects of catastrophic wildfires. Less than 20 of the 93 issued over the last 10 years were unrelated to wildfire recovery efforts and those were mostly in response to flood events. In practice, the USACE often prefers to identify an NWP that can be used in lieu of RGP 63 whenever possible as the more straightforward option.

RGPs 81 (USACE 2017) and 96 (USACE 2016) are for various maintenance and bank stabilization activities in Pima County and for ADOT activities, respectively. These are tiered permits, extending the limits of non-notifying or limited notification activities in Waters above the available NWP non-notification limits. These RGPs provide increased flexibility to the applicants/projects that qualify to use them.

Pima County (RGP 81) has an ESA Section 10 Habitat Conservation Plan (HCP) and this has allowed them to enter an agreement with the USACE that allows NWP and RGP permits in the covered area to be processed without the need to provide a full endangered species technical document for each permit application. RGP 81 cannot be used for impacts within wetlands, while RGP 96 can authorize up to 0.025 acre of permanent or temporary impact (for geotech borings) within wetlands with the submittal of a PCN.

Per USACE permit processing guidance

(<https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>), general permits are not included in the USACE administrative appeal process. Going directly to the courts appears to be the only method to object to a final regional general permit.

3.1.2.2 Nationwide Permits

NWPs were introduced in [Section 1/Introduction](#) and are issued by the USACE for periods of no more than five years (33 USC § 1344(e)(2)). Not all NWPs are applicable to Arizona. Prior to approval, the NWP program is subject to environmental analyses and review, including a public interest review, public notice and comment, 404(b)(1) analysis, and NEPA compliance (33 CFR Part 330.5).

The approved NWP program provides a streamlined process for projects with minimal individual and cumulative impacts to Waters. Key components of NWPs include:

- A. Notification limits (not universal across NWPs), under which project activities can proceed in Waters without notifying the USACE as long as all applicable general and regional permit conditions and conditions of a Section 401 water quality certification from ADEQ are followed.

Project activities that exceed the notification threshold require the submittal of a PCN to the USACE.

1. The non-notifying threshold provides an incentive to permittees to minimize their impacts in Waters and impacts to biological and cultural resources to avoid cost and time impacts of the permitting process.
 2. Impacts in special aquatic sites (e.g., wetlands, riffle and pool complexes, etc.) always require either the submittal of a PCN or a full individual permit. NWP General Condition 22 and Regional Condition 2 (2017 NWP program) identify which NWPs cannot authorize impacts to special aquatic sites.
 3. The use of multiple NWPs to complete different activities that are part of a single and complete project in Waters (e.g., NWP 13 for bank stabilization and NWP 14 for a road crossing) is allowed as long as the combined loss of Waters does not exceed the limit of the NWP with the highest allowed impact (e.g., total of ½-acre for activities under both the NWP 13 and NWP 14) (33 CFR §330.6(c); 2017 NWP General Condition 28).
- B. Non-notifying limits do not supersede the requirements of the NWP general conditions. Certain general and regional conditions require the submittal of a PCN (even if the project activities are below notification limits) and federal consultation if impacts to identified resources will occur.
1. Regional Condition 4 requires a PCN for:
 - a) regulated activity resulting in a “loss⁴” of perennial and intermittent Waters and special aquatic sites;
 - b) activity in water bodies designated as Outstanding Arizona Waters (OAWs) or 303(d) impaired waters or within one mile upstream or a half-mile downstream of a designated OAW or 303(d) impaired water, and on tributaries within one mile of the OAW, 303(d)-impaired surface waters;
 2. General Condition 16 requires a PCN for activity that will occur in a river designated as Wild and Scenic or as a “study river” for possible inclusion in the Wild and Scenic River system.
 3. General Condition 18 requires a PCN and Section 7 consultation under the ESA if the project has the potential to impact endangered species or critical habitat.

⁴ Loss of Waters is defined in the 2017 NWP program as “Waters of the U.S. that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody.” Temporary impacts (which are restored to pre-construction contours and elevation after construction) are not considered “loss.”

4. General Condition 20 requires a PCN and Section 106 consultation under the National Historic Preservation Act (NHPA) if the project has the potential to impact cultural resources.
5. General Condition 31 requires a PCN for activities that require a Section 408 permit due to alteration of a USACE Civil Works project area.

No data on the number of permits that are subject to the notification or consultation requirement of these general conditions is available, although it is believed at least one would apply in many instances.

NWPs cover a large range of activities including survey, maintenance, utility activities, linear transportation, stormwater management facilities, recreation, residential and commercial development, habitat restoration, and many others. NWP 20 for oil spill cleanup and NWP 37 for emergency watershed protection provide some emergency response capability in addition to RGP 63. A list of permits relevant to Arizona has been included in [Appendix A](#).

3.1.3 Permit enforcement

The EPA and USACE share enforcement authority for Section 404. The EPA role for enforcement is discussed briefly in [Section 8/EPA Role](#). The USACE enforcement rule is found at 33 CFR Part 326 and in a January 1989 MOA between the USACE and EPA entitled “Federal Enforcement for the Section 404 Program of the Clean Water Act” (EPA and USACE 1989).

A violation of Section 404 can occur by 1) a failure to acquire a Section 404 permit prior to work in Waters, and 2) a failure to comply with the conditions of a Section 404 permit once work in Waters has commenced.

Under the terms of the USACE-EPA MOA, the USACE acts as the lead enforcement agency for all violations of USACE-issued permits (including violations of any permit conditions) and for unpermitted discharge violations which don’t meet the criteria for forwarding to EPA. EPA is the lead enforcement agency when an unpermitted activity involves repeat violators, flagrant violations, when EPA requests a class of cases or a particular case, or when the USACE recommends that an EPA administrative penalty action may be warranted.

If a violation is identified, the USACE has discretion in determining enforcement. Considerations such as the extent of the unauthorized impact and the violator’s previous knowledge of Section 404 permitting can be taken into consideration. Voluntary compliance or administrative enforcement are generally the preferred tool but civil or criminal enforcement can be used for flagrant violations.

33 CFR §§ 326.3 and 326.4 state that the USACE will take reasonable measures to inspect permitted activities (generally no fee to the permittee) but also encourages other entities/members of the public to

report suspected Section 404 violations to the USACE. If a violation is identified, USACE tools of enforcement include:

- A. Cease and desist orders (for project activities in Waters not yet complete) prohibiting further work (the USACE has discretion on this if the work is an emergency).
- B. Notices of violation (if the project activities in Waters are complete) provided to the responsible party.
- C. USACE may solicit the views of USFWS, EPA or other relevant state (e.g., State Historic Preservation Office [SHPO]) or federal agencies as needed to determine appropriate corrective actions (a Section 404 permit is not needed for initial corrective actions directed by the USACE).
- D. after initial corrective actions, the USACE can accept an after-the-fact permit application unless:
 - 1. the USACE determines no further actions are needed to correct,
 - 2. the USACE determines legal action is required,
 - 3. a permit has already been denied,
 - 4. enforcement litigation by another state/federal entity is underway unless USACE review determines an after-the-fact permit is still appropriate;
- E. Civil or criminal legal action may be taken to obtain penalties for violations, including fines by number of violations or by the number of days the violation(s) continues. The USACE can also assess administrative penalties (33 CFR § 326.6).

Citizen suits can also be brought against potential violators when the agency fails to enforce on violations under Section 404, and against the government for the failure to perform a non-discretionary duty. Under the CWA, the bulk of CWA citizen suit enforcement cases are brought pursuant to CWA Section 505 (Ryan 2017). CWA 505(a)(1) allows a citizen suit to be brought (after providing requisite notice under CWA 505(b)) against any person alleged to be in violation of an effluent standard or limitation. For purposes of the Section 505 citizen suit provision, an effluent standard or limitation would include discharges of dredged or fill material without a permit, but would not include all alleged violations of Section 404 permit conditions (CWA Section 505(f)). CWA Section 505(g) defines “citizen” as any person(s) having an interest which is or may be adversely affected. As long as an individual or group can show that standing, they can use a citizen suit as an enforcement tool.

Citizens may also bring suit against federal defendants under the Administrative Procedure Act (APA), 5 USC § 706(2)(A). Under the APA, a reviewing court shall set aside agency action, findings, and conclusions found to be (*inter alia*), “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations. . . .” This provision may be used to challenge issuance of a Section 404 permit by the USACE.

According to Ryan (*id.*), in 2016, 50 of 79 reported CWA decisions were citizen suits (individual or non-governmental organization) and 41 of the 79 cases had the United States (primarily USACE or EPA) as the defendant.

3.1.4 Exemptions

While the discharge of dredged or fill material is regulated under Section 404, 40 CFR § 232.2 states that the definition of “discharge of dredged material” does *not* include:

- discharge of pollutants resulting from the onshore subsequent processing of dredged material extracted for any commercial use (other than fill),
- the cutting or removing of vegetation above the ground, or
- incidental fallback.

33 USC § 1344(f), 40 CFR § 232.2 and 40 CFR § 232.3 lists activities that are exempt from Section 404 permitting. These exemptions do not apply to Section 10 Waters, which are not assumable by the state. Section 404 exempt activities are:

- incidental addition, including redeposit, of dredged material,
- incidental movement of dredged material occurring during normal dredging operations (does not apply to wetlands),
- normal farming, silviculture and ranching activities (plowing, seeding, cultivating, minor drainage, harvesting for food, fiber, and forest products) or upland soil and water conservation practices,
- maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures,
- construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches,
- construction of temporary sedimentation basins on a construction site which doesn't include placement of fill into the navigable Waters,
- construction or maintenance of farm or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained with best management practices to assure flow/circulation patterns, and chemical and biological characteristics of the water are not adversely impacted,
- any activity for which a state has an approved program under 33 USC § 1288(b)(4) (areawide waste management treatment plan) and meets the requirements of subparagraphs (B) and (C) of that section.

Within the last decade, Michigan has received a notice to correct their Section 404 program from the EPA to address, among other items, inappropriate exemptions in their assumed program (EPA 2008). The full report documenting the results of EPA’s review of Michigan’s Section 404 program can be found here: https://www.michigan.gov/documents/deg/wrd-epa-mi_558424_7.pdf.

3.1.5 ADEQ programs

ADEQ currently manages a Section 401 water quality certification program that applies to Waters in Arizona not on tribal lands. A Section 401 certification is required for a federal Section 404 permit and is intended to ensure project activities authorized under Section 404 does not result in a violation/exceedance of state water quality standards. The USACE currently enforces conditions of the Section 401 certification as the certification is incorporated by reference into the Section 404 permit (refer to NWP General Conditions 25 and 27 for NWPs and to 33 CFR § 325.4(a)(1) for individual permits) (USACE 2017c).

Under the current system, individual Section 404 permits and RGPs require an individual Section 401 certification. The Section 404 NWP program is conditionally certified by ADEQ with general conditions, but an individual certification is still required for an NWP if project activities occur within the OHWM of an impaired or non-attaining water, in an OAW, or in a lake.

3.1.6 Benefits and drawbacks summary

Table 3 summarizes the benefits and drawbacks of the permit types current state identified by the TWG.

Table 3. Permit Types Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
USACE Section 404 permit program has minimal fees (maximum of \$100 upon receipt of some individual permits).	USACE project managers have a great deal of autonomy in permit processing decisions, resulting in inconsistency in the process.
The process for complying with ESA and NHPA obligations is clear.	ADEQ staff currently lacks expertise in Section 404 permitting; which could result in increased litigation risk.
ESA Section 7 consultation provides protection to the permittee in ESA compliance via an incidental take statement (in appropriate cases).	Broad application of NEPA and USACE public interest review outside of Waters can bog down permit processing (e.g., expansive scope of analysis beyond USACE jurisdictional limits).

USACE staff is knowledgeable with extensive Section 404 permitting experience.	ESA and HPA compliance processes can be slow and questions can arise about the proper scope of analysis.
NEPA and USACE public interest review requirements allow for analysis of a wider range of potential activity impacts on environmental considerations.	

3.2 Recommendations for an ADEQ-assumed Future State Which Maintains Equivalent Protection of Waters

The below are key permit type recommendations from the TWG for an ADEQ-assumed Section 404 permitting program.

3.2.1 Provide individual permits with analysis reflective of the anticipated level of impact

ADEQ can provide individual permits not to exceed a length of five years.

- A. Individual permits should be available for project activities in Waters that don't fall under the terms and conditions of a general permit.
 - 1. ADEQ should maintain the discretion to require an individual permit even for activities which would normally fall within a general permit, similar to the current discretionary authority of the USACE (per 33 CFR § 330.4(e)). In practice, the USACE has included activities in Waters deemed highly controversial in nature, which ADEQ could choose to carry forward as part of their discretionary authority. In addition, ADEQ should be able to revoke general permits based on non-compliance with permit conditions (ARS 41-1037(B)).
- B. Individual permit applications should address the requirements of the 404(b)(1) guidelines (40 CFR Part 230).
 - 1. Per 40 CFR §§ 230.2, 233.23, and 233.34, an ADEQ assumed Section 404 program must comply with 404(b)(1) guidelines or the equivalent. With the directive from ADEQ to provide recommendations that provide equivalent protection of Waters, the TWG recommends ADEQ adopt the 404(b)(1) guidelines as described in 40 CFR Part 230.
 - 2. To the extent it is relevant in analyzing alternatives for a particular project, analysis of cost considerations in determining the practicability of an alternative in Waters should be

project-specific. A specific percentage should not be identified in statute but any determination of practicability from a cost perspective should be done in the context of 40 CFR § 230.10(a)(2), “an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”

3. Specific recommendations associated with the significant degradation, avoidance and minimization, and alternatives analysis (including scope of analysis) sections of 404(b)(1) are being addressed by the Significant Degradation TWG and the reader is referred to their white paper for more information.
- C. The state should define a “single and complete project” similar to the USACE definition (33 CFR § 330.2(i)) and frame it carefully so permittees cannot artificially divide a project to fit under a general permit when a consideration of the full project impacts in Waters would more appropriately be permitted under an individual permit. Under the USACE program, the determination of a “single and complete project” involves an assessment of “independent utility” (see the USACE definition of independent utility here: <https://www.poa.usace.army.mil/Portals/34/docs/regulatory/2017/2017-Nationwide-Definitions.pdf>). See also 33 CFR § 325.1(d)(2), which requires an applicant to include all activities reasonably related to the same project in a single permit application.
- D. Provide appropriate and substantive opportunity for public comment to stakeholders and provide time in the permit process for substantive changes in response to formal public comment period.
1. A public notice period, with the potential for public hearings, is required as part of the state-assumed Section 404 program per 40 CFR §§ 233.32 and 233.33.
 2. Public notice should be provided upon receipt of sufficient information to provide an understandable and complete picture of the activity in Waters and the impacts of that proposed discharge.
- E. LOPs should be utilized where needed to streamline the individual permit process. An ADEQ-assumed Section 404 program can only issue permits for a period of five years. An LOP may be able to provide an umbrella authorization under which phased permits can be issued for activities in Waters that are anticipated to extend for much longer than a five-year period, such as a master-planned community development.
1. LOPs still require many of the elements of a traditional individual permit application but public notice is provided during LOP approval and does not need to occur on an individual project basis. In addition, an LOP would provide a clear opportunity to analyze and

understand the cumulative impacts of a series of similar actions that will occur beyond a single five-year permit term.

- F. Refer to the ESA and Cultural and Historic TWG white papers for details on coordination for these resources as part of the individual permit process.
- G. Develop a modified state-specific version of the USACE public interest review to be part of the analysis for individual permits issued by ADEQ in assumed Waters. As part of the development of this review, ADEQ would need to determine whether the scope of analysis for a public interest review would be limited to the area of discharge of dredged or fill material or the project area as defined by a future ADEQ Section 404 program. (**Note: this would also apply to the analysis associated with an overall state general permit program but not to any assumed NWP or RGPs since the USACE would have already performed a public interest review.**) The TWG identified three options when considering the public interest review. While all three options are shown here, Option 1 received the majority of votes in a poll of those present (68 percent of the TWG was present).
 - 1. Option 1 (69 percent of TWG votes received): Partial replacement of the USACE public interest review. Because Waters are a public resource, the public interest should be considered in an ADEQ Section 404 program. This option has two main features: 1) Inclusion of those USACE public interest review topics from 33 CFR § 320.4(a) that are relevant to Arizona and not otherwise addressed by 404(b)(1) guidelines (e.g., water quality and wetlands are comprehensively addressed in the guidelines and shore erosion and accretion may not be a significant issue for assumable Waters); and 2) apply the review only to certain Waters that may be more likely to involve sensitive public interest considerations (e.g., wetlands, perennial or intermittent Waters, or impacts that may have a significant impact on one or more of the relevant public interest review topics not otherwise addressed by other required permits). This is similar to programs that Michigan and New Jersey have in place (both apply the public interest analysis to discharges to wetlands).
 - a) The state’s public interest review should be framed similar to the USACE’s public interest review in 33 CFR § 320.4(a)(1), specifically that (assuming the activity complies with other required aspects of the Section 404 program such as the 404(b)(1) guidelines), a permit will be issued “unless. . . it would be contrary to the public interest.”
 - b) Because the public interest review is not mandated by the CWA Section 404 or the assumption regulations in 40 CFR Part 233, EPA should not be able to object to the issuance of a proposed state Section 404 permit as being contrary to the

public interest if ADEQ has reached a different conclusion. The TWG recommends clarifying this in the ADEQ/EPA MOA.

2. Option 2 (23 percent of TWG votes received): Provide a replacement of the USACE public interest review that would be required for all activities requiring a Section 404 permit, with no exceptions. Similar to the previously described option, the replacement public interest review would include those topics from 33 CFR § 320.4(a) that are relevant to Arizona and not otherwise addressed by 404(b)(1) guidelines.
 - a) The state’s public interest review should be framed similar to the USACE’s public interest review in 33 CFR § 320.4(a)(1), specifically that (assuming the activity complies with other required aspects of the Section 404 program such as the 404(b)(1) guidelines), a permit will be issued “unless. . . it would be contrary to the public interest.”
 - b) Because the public interest review is not mandated by the CWA Section 404 or the assumption regulations in 40 CFR Part 233, EPA should not be able to object to the issuance of a proposed state Section 404 permit as being contrary to the public interest if ADEQ has reached a different conclusion. The TWG recommends clarifying this in the ADEQ/EPA MOA.
 3. Option 3 (8 percent of TWG votes received): No public interest review. This is a USACE-specific requirement for USACE permits, not a Section 404-specific requirement. Removal of this review would streamline the permit process compared to Section 404 permits obtained through the USACE today. Some members of the group believe that this option may not meet the equivalent protection standard for Waters. A minority opinion has been provided discussing this option in more detail in Section 10 of this report.
- H. The TWG was split on a recommendation regarding a NEPA-equivalent analysis for Section 404 permitting, based on votes received when 68 percent of the TWG was present. ***(Note: this would also apply to the analysis associated with an overall state general permit program but not to any assumed NWP or RGP since the USACE would have already performed NEPA analysis.)*** Due to the split nature of the TWG poll, both options are included for ADEQ evaluation.
1. Option 1 (54 percent of TWG votes received): Do not provide a state equivalent to the USACE NEPA analysis undertaken during general permit program development and individual permit review.

- a) NEPA itself does not apply to state actions. ADEQ has no authority to adopt NEPA-like regulations, or to base permit decisions on a NEPA-like analysis, without a specific statutory mandate to do so. A.R.S. § 41-1030.
- b) Congress could have, but did not, require states to employ a NEPA-like analysis as a condition of assuming the Section 404 program.
 - i. Moreover, Congress made clear that EPA itself did not have to follow NEPA when approving state assumption of the Section 404 program. 33 U.S.C. § 1371(c)(1)
- c) NEPA was adopted in 1969 to make sure the federal government took environmental issues into consideration when making decisions. It predates adoption of the major state and federal statutes where environmental considerations drive decision-making.
 - i. The period since the adoption of NEPA has seen the adoption of (inter alia) the Clean Air Act, CWA, RCRA, TSCA, CERCLA, EPCRA, the Safe Drinking Water Act, the ESA, and the Oil Pollution Act; state equivalents to many of those statutes; and unique state programs like Arizona's APP program. That period has also seen the adoption of the detailed 404(b)(1) Guidelines specifically to analyze and control proposed discharges of dredged and fill material into Waters.
 - ii. These later-adopted federal and state programs require not just analysis of environmental impacts, but also compliance with substantive and/or permitting requirements. Where permits are required, public notice and comment opportunities and third-party appeal rights typically exist as well
 - iii. Collectively, state Section 404 assumption requirements (including public notice requirements and compliance with the 404(b)(1) Guidelines), in conjunction with the requirements of these other environmental protection statutes, fulfill NEPA's core purposes of disclosure of environmental effects and involving the public in decision-making
- d) NEPA is a purely procedural statute and does not impose substantive requirements or mandate a particular decision, nor does it provide an agency with additional authority to mandate mitigation measures not otherwise authorized by law.

- i. By contrast, the 404(b)(1) Guidelines, with which states must comply in order to assume the Section 404 program, contain substantive requirements to minimize impacts to Waters, avoid significant degradation to the aquatic ecosystem, and mitigate unavoidable impacts to waters of the U.S. Compliance with the Guidelines will ensure that a state assuming the Section 404 program provides equivalent protection of Waters to that provided by the USACE.
 - e) Even under NEPA, the USACE scope of analysis in most cases is limited to the effects of the discharge of dredged or fill material (33 C.F.R. Part 325, Appendix B, § 7(b)) – precisely the impacts analyzed and substantively controlled under the Guidelines.
 - f) Projects with a federal nexus (federal funding, requirement to obtain another federal permit or approval) will still be subject to NEPA.
 - g) EPA has generally exempted itself from NEPA requirements under the doctrine of functional equivalence. For example, EPA takes the position that it need not comply with NEPA when issuing RCRA, UIC and PSD permits. 40 C.F.R. § 124.9(b)(6).
 - h) The two states that currently have assumed the Section 404 program, Michigan and New Jersey, do not have state NEPA statutes.⁵
2. Option 2 (46 percent of TWG votes received): Provide a state equivalent to the USACE NEPA analysis undertaken during general permit program development and individual permit review.
- a) The objective of the CWA generally is to restore and maintain the chemical, physical, and biological integrity of Waters (33 USC § 1251(a)). The objective of NEPA is to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation” (42 USC § 4321).
 - b) The current USACE process incorporates NEPA analysis as part of Section 404 permit review. Section 404 analysis does not substitute for NEPA analysis, nor

⁵ A New Jersey executive order (E.O. 215) requires that for actions initiated by the state, or for which the state provides 20 percent or more of the funding, an EA or EIS must be prepared for review by the state Department of Environmental Protection. This order does not apply to actions where the state is merely the permitting agency.

vice versa. As a general rule of federal law, absent clear statutory authority, one federal law cannot be “substituted” for another federal law.

- i. There are some similarities between Section 404 and NEPA, but these similarities have different implementation and analysis bars. For example, both 404(b)(1) and NEPA require an alternatives analysis: 404(b)(1) guidelines stating that a permit cannot be granted if there is a practicable alternative that would have a lesser impact on the aquatic ecosystem (33 CFR § 230.10(a)); and NEPA requires agencies to identify the environmentally preferable alternative and to state whether all practicable means to avoid or minimize environmental harm from the selected alternative were adopted and if not, why not (40 CFR § 1505.2(b)(c)).
- c) Assuming the Section 404 program with a NEPA-equivalent analysis would provide for a similar level of analysis of impacts as the current USACE process, including the direct, indirect, and cumulative effects of a proposed action on the ecological, social, economic, health, and aesthetic components of the surrounding environment, on communities, and on wildlife. The public would also benefit from a more complete view of the impacts and increased opportunities to review and comment on this broader analysis of effects.
- d) Having a NEPA-equivalent also appears to be consistent with ADEQ’s intent in pursuing adoption of the Section 404 program. When asked if there was a plan to duplicate the NEPA process or if NEPA would be dropped in an ADEQ-assumed Section 404 program during the Arizona House Energy, Environment and Natural Resources subcommittee meeting that covered SB1493 (the bill that provided ADEQ authority to work toward assuming the Section 404 program) on March 6, 2018, Director Cabrera (ADEQ) stated, “we will have a process that, in substance, accomplishes the same as that process in the USACE. . . . But you are correct, NEPA in itself won’t be triggered because it’s no longer a federal program, but it’s our intent and we believe that it’s requisite to get approval from EPA that we adopt the substance of the program. We do not see EPA giving us approval unless we adopt substantively the same protections as what’s accomplished today by the USACE.”

3.2.2 Provide general permits

A general permit program can be authorized for a period of five years and must comply with 404(b)(1) guidelines and public notice requirements. [Section 2/Permit Transition](#) previously described three options

to transition general permits to an ADEQ-assumed Section 404 program. This section discusses key considerations for the different proposed options.

3.2.2.1 General Permit/Options 1 and 3 (see also, [Section 2.2.5.1](#) and [Section 2.2.5.3](#))

If ADEQ elects to administer relevant NWPS and RGPs (either entirely or as part of the hybrid option), the following will need to be addressed:

- A. State-specific supplemental conditions or procedures will be needed to address general conditions that require federal to federal consultation. The state conditions will need to specify how the state will fulfill the requirements of these general conditions in the absence of a federal nexus. These include consultations under ESA and NHPA, but these may not be the only ones.
- B. Retain the conditional Section 401 certifications associated with the NWPs and RGPs if the state decides to administer some of those permits.
- C. For state-specific general permits developed under Option 3, the state should define linear and non-linear “single and complete project” similar to the USACE definition (refer to 33 CFR § 330.2(i) and NWP General Condition 15 in the 2017 USACE NWP program) and with consideration of independent utility (e.g., refer to 33 CFR § 330.6(d) and 2017 USACE NWP 14 Note 1 and NWP 12 Note 2).
- D. For state-specific general permits developed under Option 3, the state should only allow the use of multiple general permits for a single and complete project as long as the total acreage loss of Waters authorized doesn’t exceed the acreage limit of the general permit with the highest specified acreage limit (refer to NWP General Condition 28 in the 2017 USACE NWP program).

3.2.2.2 General Permit/Option 2 (see also, [Section 2.2.5.2](#))

If ADEQ develops its own state-specific general permits (either entirely or as part of the hybrid option), the TWG identified three alternative approaches, but did not come to consensus on a preferred approach if the state elects to adopt its own general permits. 58 percent of the TWG participated in the vote on these options. Under all three of these options, the recommendations on defining a single and complete project and use of multiple general permits on a project should be implemented as described previously.

- A. State-Specific General Permit/Option 1 (18 percent of the TWG votes received): Provide one general permit that is based on area of impact, not activity type. This option would provide one permit up to a certain acreage of impact that could be used for any type of activity in Waters. This option had the least support within the TWG.
 - 1. General conditions would identify circumstances in which the permit could not be used and would need to be developed by ADEQ. Although not specific TWG recommendations, examples of such circumstances could include:

- a) permanent impacts in special aquatic sites, such as wetlands,
 - b) activities in sensitive areas, such as critical habitat.
2. Permit should have tiered notification system (such as that used by RGP 81 and RGP 96 currently). Tiers should include:
- a) Non-notifying - no documentation submittal requirement but permittees should be encouraged to have internal documentation on the applicability of the permit to their activity.
 - b) Advisory notification - minimal documentation submittal required for activities in Waters greater than the non-notifying limit but without complicating factors.
 - c) Concurrence notification - mid-range documentation submittal required for activities in Waters with impacts greater than the non-notifying limit but with minor complicating factors. Appropriate special permit conditions should be added for specific activities in Waters, as needed.
 - d) PCN - more robust notification documentation submittal required for activities in Waters with impacts greater than the non-notifying limit but with complicating factors such the potential for impacts to sensitive resources. Appropriate special permit conditions should be added for specific projects, as needed.
- B. State-Specific General Permit/Option 2 (36 percent of the TWG votes received): Provide activity-specific general permits. Activity-specific permits may allow for a more robust analysis of potential impacts across the state and, as a result, may be able to have expanded disturbance limits for specific types of activities. This option was supported by the TWG almost equally with Option 3 described below (1 vote difference).
- 1. One specific recommendation for a state-specific general permit that is not already included as an allowed activity in a USACE NWP is to allow small impacts to wetlands for geotechnical borings.
 - 2. General conditions should be consistent across all activity types.
 - 3. Permit should have tiered notification system similar to that described previously for the first option.
- C. State-Specific General Permit/Option 3 (45 percent of the TWG votes received): Hybrid approach with a lower-acreage impact-specific permit and higher-acreage activity-specific permits as a second-level general permit option for activities in Waters that don't fit under the general acreage impact permit, but whose impacts don't reach the level of needing an individual permit. This

option had the most support, but not majority support, within the TWG by a very narrow margin (receiving one vote more than Option 2).

3.2.3 Provide a general permit to cover repair and protection activities for imminent environmental risk

- A. This permit should cover repair and protection activities that are needed to address imminent environmental risk. This general permit would be in addition to RGP 63 as the intent of this permit is not covered by the limited terms of RGP 63.
 - 1. The same tiered notification system as discussed previously is recommended but with expedited time frames and with the possibility for ex post facto coordination with other agencies to allow permittees to quickly address and minimize the impacts of the risk. For example, a permittee could use this permit to quickly contain and remediate a spill of a hazardous material that reached a Water; thereby preventing further downstream contamination which may have occurred if the permittee had to wait weeks to receive permit authorization.
 - a) This may require negotiating appropriate procedures with these agencies through the MOA process.
 - b) A process for oral notification to, and authorization by, ADEQ to proceed with dredge and fill activities in Waters would be an important component of this general permit.

3.2.4 Streamline general permitting, where possible

- A. Maintain allowances for Section 10 ESA programs (HCPs, Multi-Species Conservation Plans [MSCP], safe harbor agreements, etc.) and cultural agreements (programmatic agreements, etc.) for small impact permits. This avoids unnecessary duplicative coordination with the USFWS and SHPO.
- B. Refer to [Section 7/Federal Nexus](#) for recommendation on streamlining Section 404 permitting for projects that have impacts in Waters and a federal nexus.
- C. Refer to the ESA, Cultural and Historic and Tribal Nation TWG white papers for recommendations on streamlining coordination with USFWS and SHPO and to the Tribal Nation TWG white paper for recommendations on coordinating with tribal parties.

3.2.5 Provide clear language in general permit conditions identifying triggers for notification levels and general permit eligibility

Similar to USACE NWP, ADEQ's general permits should provide clear triggers for different notification tiers.

- A. Notification tiers should be clearly defined on the first page of the permit in language readily understood by the public. If a technical term is used (e.g., "loss of Waters"), ADEQ should provide the definition for that term in a footnote.
- B. Notification triggers and eligibility thresholds under the general permit should be based on an acreage or other unit-based measurement.
- C. Triggers for notification other than acreage or other unit-based measurements may include:
 1. Impacts within a special aquatic site, such as a wetland, if allowed under the permits
 2. Impacts within an OAW, impaired water, non-attaining water, or lake
 3. Impacts within critical habitat or with a "may effect" under ESA
 4. Impacts within a known archaeological or historic site
- D. The general permit or its conditions should clearly identify when an individual permit will be required for an activity. Such circumstances should include:
 1. Permanent impacts (greater than a geotech boring) within a special aquatic site, such as a wetland
 2. Impacts exceeding the allowed area of impact under the general permit
 3. Match the current discretionary authority of the USACE (per 33 CFR § 330.4(e))

3.2.6 Incorporate current Section 401 water quality certification conditions into an ADEQ Section 404 permit

A Section 401 water quality certification is provided for federal permits; therefore, a state-issued permit would not also include the companion Section 401 certification. While ADEQ will need to maintain the Section 401 program to certify activities permitted by the USACE under Section 404, water quality conditions will also be needed in the state-issued Section 404 permits. 404(b)(1) guidelines require an analysis of water quality considerations and prohibit the issuance of a permit that will result in a violation of state water quality standards (40 CFR § 230.10(b)(1)).

- A. For individual permits, water quality considerations must be properly analyzed during the application process and ADEQ should include necessary conditions to maintain state water quality standards in the Section 404 permit.

- B. Water quality considerations should be analyzed for the set of activities or level of impact to be covered by general permits during development of the overarching general permit program. General conditions included as part of the general permits should include necessary water quality conditions.
- C. If the state decides to administer relevant NWP and RGP, retain the conditional Section 401 certifications associated with those USACE-issued permits.

3.2.7 Provide clear information on conditions under which a permit must be denied

The 404(b)(1) guidelines provide information on when Section 404 permits must be denied. This information should be provided in a clear and easily accessible manner to applicants so they can develop and plan their projects appropriately.

Specifically, the 404(b)(1) guidelines state that no discharge of dredged or fill material in Waters shall be permitted:

- A. if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem as long as the alternative doesn't have other significant adverse environmental consequences (40 CFR § 230.10(a));
- B. if such discharge will cause or contribute, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard (40 CFR § 230.10(b)(1));
- C. if such discharge violates any applicable toxic effluent standard or prohibition under Section 307 of the CWA (40 CFR § 230.10(b)(2));
- D. if such discharge jeopardizes the continued existence of species listed as endangered or threatened under the ESA or results in the likelihood of destruction or adverse modification of critical habitat (40 CFR § 230.10(b)(3));
- E. if such discharge would cause or contribute to significant degradation of Waters (40 CFR § 230.10(c)); or,
- F. unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem (40 CFR § 230.10(d)).

3.2.8 Provide clear expectations related to permit enforcement activities

40 CFR Part 233, Subpart E provides information on the required state enforcement program. Key elements of the requirements include:

- A. maintaining a program designed to identify those who need a Section 404 permit but fail to get one, or those who fail to comply with the terms of their Section 404 permit;

- B. ADEQ authority to enter any site or premises subject to Section 404 regulation (unless inconsistent with Part 233 requirements, should also be in compliance with ARS 41-1009, Inspections and Audits);
- C. providing inspections and gather samples/information in a manner that will produce admissible evidence; and,
- D. maintaining a program for receiving and ensuring proper consideration of information submitted by the public about violations.

ADEQ must have the authority to:

- A. restrain immediately and effectively any person from engaging in unauthorized activity;
- B. sue to enjoin any threatened or continuing violation of any program requirement;
- C. assess or sue to recover civil penalties and to seek criminal remedies
 - a. assessed for each violation and, if violation is continuous, assessed in the maximum amount for each day of violation; and,
- D. provide for public participation in the enforcement process as specified in 40 CFR § 233.41(e).

These and any other applicable enforcement practices and procedures included in the ADEQ program should be clearly specified and provided in an easily accessible location to the public, including methods for citizens to report potential violations to ADEQ. Refer to [Appendix B](#) for a summary of the ADEQ enforcement gap analysis.

3.2.9 Maintain Section 404 permitting exemptions as provided under the USACE program

- A. Maintain permitting exemptions as defined in Section 404(f) in order to meet the charge from ADEQ to identify a future state that is equal to but not exceeding existing protection of Waters.
- B. Maintain the equivalent of the “incidental fallback” exemptions as defined in 40 CFR § 232.2 and 33 CFR § 323.2 under “discharge of dredged material.” This exempts from Section 404 permitting the dredging of material from Waters providing there is no more than “incidental fallback” into Waters.

3.2.10 Use existing WQAB appeal process for appealable permit decisions

Arizona has an existing state statute governing appealable agency actions in ARS Title 41, Chapter 6, Article 10. The grant or denial of a Section 404 permit would be subject to this statute and the associated judicial review statute in Title 12, Chapter 7, Article 6. For enforcement actions on which EPA has taken or requested the lead, those actions would be subject to 33 U.S.C. 1319 (CWA Section 309).

3.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 3.2](#). Since this is a new program, a new rule will be needed and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 4. Gaps and Options Summary Table – Permit Types

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
ADEQ must follow appropriate process to incorporate Section 404 program through state statute and review recommendations in this and other TWG white papers to identify needed statute revisions, if any.	State statute doesn’t currently accommodate the Section 404 program.	If needed, update relevant state statutes to accommodate overall Section 404 program.
<i>Section 401 Gaps and Options</i>		
Water quality conditions must be analyzed as part of general permit development; ADEQ Section 404 general permits should include water quality conditions (Section 3.2.6).	A Section 401 certification will not be required for a state permit, leaving a potential gap in permit conditions compared to the current Section 404 permits.	As part of Section 404 program development, ADEQ should include water quality general conditions as part of a state-specific general permit program and (if the Section 401 certification does not carry over with the NWPS) as a supplement to any adopted NWPs.

<p>ADEQ Section 404 individual permits should include water quality considerations/conditions (Section 3.2.6(A)).</p>	<p>No Section 401 certification is required for a state permit, leaving a potential gap in permit conditions.</p>	<p>Water quality considerations must be properly analyzed during the application process and ADEQ should include necessary conditions to maintain state water quality standards, as required by the 404(b)(1) guidelines.</p>
<p>For projects requiring a Section 408 permit, lack of a separate Section 401 certification needs to be included in the ADEQ-USACE MOA.</p>	<p>The USACE Section 408 EC requires a project to have a Section 401 certification prior to approving a Section 408 permit. A state-issued Section 404 permit will not have a separate Section 401 certification.</p>	<p>The ADEQ-USACE MOA should provide for a state-issued Section 404 permit with appropriate water quality conditions to take the place of the required Section 401 certification to receive a Section 408 permit.</p>
<p><i>All Permit Types (individual permits and general permit program) Gaps and Options</i></p>		
<p>The TWG identified two options for a NEPA equivalent: 1) do not institute a NEPA-equivalent as part of the ADEQ Section 404 program; or 2) implement a NEPA-equivalent as part of the ADEQ Section 404 program (Section 3.2.1(H)).</p>	<p>If no NEPA-equivalent is implemented, no gap exists in this area as the state currently has no NEPA equivalent in place. If a NEPA-equivalent is implemented, there is a gap because no current state program for this type of review exists.</p>	<p>If a NEPA-equivalent specific for an ADEQ Section 404 program is developed, a statutory change would be needed. Consult with the State Attorney General's Office on the requirements to adopt a NEPA-equivalent specific to an ADEQ Section 404 program. Include in the assumption submittal package to EPA.</p>
<p>The TWG majority recommendation is to provide a public interest review for topics relevant to Arizona not otherwise addressed by 404(b)(1) analysis and apply this review to certain Waters (Section 3.2.1(G)).</p>	<p>This is specific to an assumed Section 404 program and is not currently addressed in ADEQ regulations or policies.</p>	<p>Develop this partial adoption of a public interest review and adopt in state regulations and in the assumption submittal package to EPA.</p>

<p>ADEQ program must retain 404(b)(1) evaluation or create an equivalent (Section 3.2.1(B) and Section 2.2.5.2).</p>	<p>Existing ADEQ water programs include some water quality and anti-degradation topics but 404(b)(1) guidelines encompass more topics for which ADEQ has no experience or program equivalent (e.g., wetlands, T&E species, water circulation, aesthetics, recreation, historic monuments, etc.).</p>	<p>Adopt 404(b)(1) guidelines as written in 40 CFR Part 230.</p>
<p>Provide a public notice period, with potential for public hearing per 40 CFR §§ 233.32 and 233.33 (Section 3.2.1(D)).</p>	<p>Existing ADEQ water programs include public notice and hearing requirements in 18 AAC 11 and other sections but these do not include a Section 404 program.</p>	<p>Update 18 AAC to include public notice and hearing requirements that matches the requirements in 40 CFR §§ 233.32 and 233.33.</p>
<p>Define “single and complete project” for ADEQ’s Section 404 program as the bar to determine what constitutes a complete picture of impacts in Waters to be permitted (Section 3.2.1(C) and Section 3.2.2.1(C)).</p>	<p>Neither 18 AAC 11 or 18 AAC 9 includes such a definition. The gap left by this lack of a definition would allow segmenting of projects with impacts in Waters to artificially fit within a lower level general permit.</p>	<p>Update 18 AAC to define “single and complete project”, including a consideration of “independent utility” as currently included in the USACE definition.</p>
<p>General Permit Gaps and Options</p>		
<p>If NWPs are adopted (short or long-term) by ADEQ, replacements for federal consultation requirements will be needed (Section 3.2.2.1(A)).</p>	<p>General conditions of the NWPs require certain consultations (e.g., under ESA, NHPA, etc.) or coordination on a federal agency level. ADEQ cannot engage in federal-level consultations but conditions must still be met.</p>	<p>Develop agreements with relevant federal and state agencies and tribes to undertake coordination between ADEQ and relevant agencies at a level that takes the place of the federal consultation process. ESA and Cultural and Historic TWGs may provide more specific recommendations in those areas.</p>

Permit Enforcement and Exemptions Gaps and Options

<p>ADEQ must have authority to enforce Section 404 per 40 CFR Part 233, Subpart E (Section 3.2.8).</p>	<p>ADEQ enforcement authority appears to be adequate to meet EPA requirements for a Section 404 program except possibly for criminally negligent violations committed by individuals, for which state law has a lower fine (\$2,500) than 40 CFR Part 233 requires (\$10,000). See Appendix B for a table summary of the enforcement gap analysis.</p> <p>Note: This same difference did not prevent the state from assuming the NPDES program.</p>	<p>If EPA determines the criminally negligent violations fine amount is inadequate in state law, changes would be needed to meet EPA’s requirements. But per 40 CFR §230.41(d), this may not be necessary as EPA can approve a program with less than the requisite penalty amounts if EPA determines the state has an alternative, demonstrably effective method of ensuring compliance.</p>
<p>Maintain permitting exemptions as provided under the USACE program (Section 3.2.9).</p>	<p>As with other recommendations that are unique to the Section 404 program, ADEQ has nothing currently in rule or statute providing for these exemptions.</p>	<p>New rule is needed to include all Section 404-specific requirements, including a list of exemptions, as discussed in Section 3.2.9 of this paper.</p>

4. Licensing (Permitting) Time Frames

The length of time to acquire a Section 404 permit can vary widely based on the level of permit needed and the location, complexity, and controversial nature of a project. Due to the amount of outside agency interaction, licensing time frames are difficult to define. In addition, Pima County and ADOT both have funded positions within the USACE for processing their permits and these time frames may not represent the time frames for issuing permits that don't have a dedicated funded position. This section describes the current framework of Section 404 permitting time frames in Arizona using regulatory requirements, agency-specific agreements/permits, and USACE data, by permit type where appropriate. This section does not discuss any time frames associated with EPA involvement in a Section 404 permit, that is covered under [Section 8/EPA Role](#). After a description of the current state, the section then transitions to a discussion of considerations and recommendations regarding time frames specific to ADEQ's effort to assume the Section 404 program.

4.1 Current State of Regulations and Program

4.1.1 Individual Permits

This section includes a discussion of time frame considerations for both standard individual permits and letters of permission.

4.1.1.1 Individual (Standard) Permits

The timing of individual permit processing by the USACE is delineated in 33 CFR § 325.2(d), "timing of processing of applications." The times defined in this regulation are based on the receipt of a complete application (defined in 33 CFR § 325.1(d)(10)) as 'when sufficient information is received to issue a public notice'). The following are the key defined time frames in calendar days:

- public notice issued within 15 days of receipt of a complete application
- comment period may be 15-30 days and can be extended up to a total of 60 days
- final decision on a complete application not later than 60 days, unless:
 - precluded by procedures required by law,
 - the comment period is extended (in which case the total time frame is extended commensurately),
 - timely submittal of information or comments is not received from applicant,
 - processing is suspended at the request of the applicant, or

- information needed by the USACE cannot be reasonably obtained within the 60-day period (e.g., NEPA requirements, consultation under ESA or National Historic Preservation Act [NHPA], etc.)
- When USACE submits requests for information to applicant, the applicant will have time (not to exceed 30 days) to respond. If information or request for an extension is not received in this time frame, the application will be considered withdrawn or a final decision will be made.

Pre-application meetings and other up-front coordination with USACE staff has been noted by multiple TWG participants as critical and helpful in reducing the length of review time once the permit application and other components are submitted to the USACE.

ADOT/Federal Highways Administration (FHWA) funds a USACE staff person focused on reviewing permits for projects funded by FHWA (this includes ADOT projects but can also include projects owned by others like cities or counties that are funded through FHWA). Pima County has a contract in place under the Water Resources Development Act (WRDA) that funds a USACE staff person focused on reviewing permits for projects in Pima County and incorporated agencies. Individual permits for these agencies are still subject to the time frame terms identified in 33 CFR § 325.2(d).

The USACE Phoenix regulatory office has provided information on permit time frames for the last 10 years (through February 2018). The time frames are based upon receipt of a complete application to final permit issuance. ADEQ undertook an analysis of this data and provided it to the TWG. As part of that analysis, data associated with non-assumable Waters (e.g., Section 10 Waters), anomalous data (e.g., negative days) and outliers (e.g., data points more than one standard deviation from mean) were dropped. While this group doesn't have data on the number of anomalous data points that were dropped, there were seven outliers that were dropped.

74 data points covering 10 years for individual permits were carried forward in the ADEQ analysis. Results indicate that the USACE issued approximately eight individual permits/year in Arizona in Waters that ADEQ is expected to assume (non-Section 10 and non-tribal Waters) and that an individual permit is issued in an average of 172 calendar days. The outlier permitting times ranged from 485 days to 1,588 days and tended to be projects with large or complex activities in Waters such as master-planned developments, expansion of mining facilities, or extensive habitat restoration. Removing these outliers from the analysis results in an underestimate of ADEQ effort needed to process individual permits. While the permitting times for these actions deviate significantly from the mean in the statistical analysis, the fact that complex projects will continue to pursue and require individual Section 404 permits cannot be discounted.

4.1.1.2 Letter of Permission

Per 33 CFR Part 325, LOPs, as a type of individual permit, can be used to authorize categories of activities under CWA Section 404. The same time frames defined for individual permits in the prior section apply here with a few distinctions.

1. A public notice (with the opportunity for a public hearing) must be issued for the proposed category of activities but once the LOP is approved, individual actions in Waters authorized under the LOP do not require additional public notice.
2. 33 CFR Part 325, Appendix B, § 6(a)(5) also notes that all applications that qualify as LOPs are not considered to be major federal actions significantly affecting the environment and are therefore categorically excluded from NEPA documentation (no Environmental Assessment [EA] or Environmental Impact Statement [EIS] required).

LOPs can also be issued by the USACE for a longer period than individual permits. In a recent example from California, a category of transportation-related impacts in Waters were authorized under an LOP for a period of 30 years (compared to five to 10 years for a standard individual permit) (USACE 2017a).

Many of the other elements of a standard individual permit (e.g., 404(b)(1) analysis, consultation under ESA and NHPA, etc.) are still required for approval of actions in Waters to be authorized under the LOP. Any time frame reduction appears to be in the reduced NEPA requirement and lack of public notice.

The data from the USACE for the last 10 years indicates 70 LOPs were issued for Section 10 Waters with an average of 30 days to issuance. A conversation with the USACE on October 23, 2018 (between Tricia Balluff, TWG Chair and Sallie Diebolt, USACE Arizona Regulatory Branch Chief) confirmed that the Arizona branch of the USACE has only issued LOPs for Waters subject to Section 10 of the Rivers and Harbors Act in the last 10 years.

4.1.2 General Permits

4.1.2.1 Regional General Permits

33 CFR § 325.2(e)(2) also briefly discusses regional permits as a type of general permit that can be issued for a period of no more than five years, but no time frames for the application and approval process through USACE for RGPs are included in this regulation.

Individual RGPs often contain some form of time frames for approval of the use of the permit for specific activities. Four RGPs apply to assumable Waters in Arizona and all but RGP 70 (USACE 2014) (which does not have a history of use in Arizona over the past 10 years) has some form of defined time frames for permitting applicable activities, as discussed below.

RGP 63 for emergency repairs (USACE 2018b) specifies:

- A. the applicant must notify the USACE as early as possible and may not proceed with the activity until confirmation from the USACE – if the danger is so imminent as to make waiting for USACE notice dangerous, the applicant can proceed after notifying the USACE by telephone, email, etc.
- B. activities in Waters must start within 14 days of receiving authorization from the USACE to proceed.

The ADEQ analysis of USACE data show a total of 175 RGPs provided by the USACE over the last 10 years, an average of approximately 17 per year with an average time of 10.6 days to receive authorization to use an RGP. Of these, more than half (54 percent, or 93 permits) were RGP 63 for emergency repairs, all but 20 of which were used for emergency repairs associated with the Wallow Fire.

RGPs 81 (USACE 2017) and 96 (USACE 2016) are for various maintenance and bank stabilization activities in Pima County and for ADOT activities, respectively. The RGPs are similar in that they have a tiered structure (Pima County has four tiers, ADOT has three), each with a different level of impacts and corresponding level of notification to the USACE – non-notification, advisory notification (Pima County only), concurrence notification, and full PCN. Key time frames for authorizing activities under these RGPs follow:

- A. Non-notification – Pima County and ADOT RGP; no time frames associated if the activity falls within the terms of this tier.
- B. Advisory notification (advisory email submittal) – Pima County RGP only
 - 1. Applicant must submit notification email to USACE at least 14 days prior to starting the activity; the USACE may request a higher tier of review during these 14 days. If no response from the USACE, the applicant can presume concurrence.
 - 2. If ESA concerns are determined present during the 14 days, USACE will notify the applicant and work cannot commence until USACE consults with USFWS
- C. Concurrence notification (RGP notification form) – Pima County and ADOT RGPs
 - 1. The same 14-day period and caveats hold true for this tier but the expanded notification provides more information to the USACE.
 - 2. Pima County RGP only includes reference to ESA considerations as extending this time frame; the ADOT RGP references ESA and NHPA.
- D. Full PCN – Pima County and ADOT RGPs
 - 1. USACE must process and complete verification within 45 days of receipt of a complete PCN, unless otherwise delayed by other requirements or consultations under CWA Section 401, Section 408, Section 7 of the ESA, or Section 106 of the NHPA.

RGP 63, 81, and 96 (*id.*) all have conditional Section 401 certifications but ADEQ requires an individual Section 401 certification be obtained if project activities will occur within the ordinary high-water mark (OHWM) of an OAW, an impaired or non-attaining water, or a lake.

The TWG representative from ADOT has indicated that approximately 80 percent of ADOT projects with activities in Waters use the RGP and that the USACE is meeting the stated RGP time frames. Concurrence notifications are routinely processed within 14 days and when not, it's generally due to ESA Section 7 requirements. Other projects with activities in Waters are either on tribal lands or require an individual permit.

The TWG representative from Pima County Flood Control District has indicated that authorization under the middle two tiers of the RGP are generally received in five to 10 days and about 15 days for a PCN if there are no ESA or NHPA considerations. Pima County also has an ESA Section 10 HCP/MSCP, which addresses many of the ESA concerns up front and has streamlined the authorization process from that perspective.

4.1.2.2 Nationwide Permits

The NWP program is detailed in 33 CFR Part 330. The overarching program (currently at over 50 NWPs) is renewed/revised every five years and goes through a public notice and NEPA process prior to the issuance of the new nationwide permits. No information on specific timelines required for a renewal of the overall program has been identified, but the goal is to have the new NWP program start as soon as the prior program expires.

Under the overarching NWP program are more than 50 activity-specific general permits that can be used if an activity meets the criteria (USACE 2017c). Some NWPs have a tiered nature, with non-notifying and PCN options. For those project activities in Waters that qualify for a non-notifying NWP, work can begin immediately assuming all applicable conditions of the NWP and associated conditional Section 401 certification are followed. If an individual Section 401 certification is required by the state (e.g., within an impaired or non-attaining water, OAW, or lake) or tribe/EPA, the activity can still use the non-notifying NWP (unless a PCN is required under Regional Condition 4) but work cannot commence until the Section 401 individual certification is obtained.

For activities that require a PCN, 33 CFR § 330.1 states that notification must be made in writing as early as possible prior to commencing the proposed activity. The key time frame information follows:

- A. The USACE has 45 days from the receipt of a complete PCN to make a permit decision
 1. Per General Condition 32, the USACE has 30 days to determine if the PCN is complete. This runs concurrently with the overall 45-day review period. If the PCN is incomplete, the USACE will request additional information from the applicant and upon receipt, the 45-day review period will start again.

- B. The applicant can presume the project activity in Waters qualifies for the NWP after 45 days unless otherwise notified by the USACE (such as the need for Section 106 or Section 7 consultations).
- C. If the USACE requests information to complete the notification, the 45 days starts anew upon receipt of the revised PCN.

ADEQ's analysis of the USACE data from the last 10 years indicates an average authorization time at the USACE of approximately 42 days from receipt of a complete PCN, with approximately 227 NWPs authorized per year. As with the other analyses, data anomalies and outliers (greater than one standard deviation from the mean) were dropped from the analysis so as not to skew the mean data. A look at the raw data from the USACE shows many permits authorized in just a few days but others that take anywhere from 128 days to 1,185 days to authorize. Many of these outliers with longer time frames were associated with large roadway or bridge projects, residential development, or habitat restoration projects. Some appear to have combined the Jurisdictional Delineation (JD) and PCN review time frames, but it's not fully clear if that is the case for more of the data points.

JDs can be submitted concurrently with a permit application or separately (depending on the USACE project manager and applicant preference), which can impact time frames. The data from the USACE does not clearly detail when a JD was received concurrently versus separately so no analysis of the actual impact on time frames can be provided. The time frames and other considerations for JDs are addressed in the JD TWG white paper.

4.1.3 ADEQ programs

ADEQ currently operates programs under the CWA Section 402 (Section 402) and Section 401. The only reference to timing associated with the Section 401 program is in ARS 49-202(E), which only applies prior to January 1, 1999, indicating those time frames no longer apply. ARS 49-202(F) is the replacement section beginning January 1, 1999 and does not contain any time frames within which ADEQ must respond to a Section 401 certification application. However, per CWA 401(a)(1), a state waives its certification authority if it fails to act within a reasonable time frame of receipt of an application (not to exceed one year). 33 CFR § 325.2(b)(1)(ii) states that the state will be deemed to waive its certification if it fails to act on a request for a certification within 60 days of receipt, unless the USACE determines that a shorter or longer period is reasonable. While TWG representatives are not aware of the 60-day limit being enforced in practice, the Assistant Secretary of the Army (Civil Works) issued a memo in December 2018 emphasizing that the default time frame for states to act on a request for Section 401 certification is 60 days and directing USACE staff to draft guidance which would establish criteria for district engineers to use in identifying reasonable time frames for requiring states to provide Section 401 certification decisions after receipt of an application (USACE 2018c).

In any case, both the Section 401 and Section 402 programs are substantially different from a Section 404 program and are not good proxies to make predictions for time frames under an ADEQ Section 404 program. ADEQ’s APP provides different time frames for an individual permit, a complex individual permit, and general permits (AAC R18-1-525, see Table 10), and may be more similar to a Section 404 program than ADEQ’s Section 401 and Section 402 programs.

4.1.4 Benefits and Drawbacks Summary

Table 5 summarizes the benefits and drawbacks of the licensing (permitting) time frames current state identified by the TWG.

Table 5. Licensing Time frames Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
Pre-Application meetings can streamline the time frames for permit decisions and the USACE has no limitations or fees for meetings with them (also no fees for coordination, consultations, or any other step in the permitting process).	LOPs have not been recently used for streamlined individual permitting processing outside of Section 10 Waters in Arizona.
Applicants can prepare JDs and Section 404 permit documents (public notice, alternatives analysis, consultation letters, NEPA documents, etc.) on behalf of the USACE to expedite permit time frames.	The current ADEQ Section 401 program has no response time frame requirements in Arizona statute.
Individual permits from USACE can be approved for longer than five years, reducing the number of re-applications or extension requests needed.	Limited time frames in place for USACE to process permits.
RGPs allow for region-specific negotiation of notification limits and conditions with defined time frames for response.	USACE project managers and district engineers have flexibility in implementing and managing the Section 404 program and interagency consultations, which affect the permit time frame.

<p>For NWPs, applicant can assume the project activities in Waters qualifies for the NWP after 45 days unless otherwise notified by the USACE, assuming no effects under ESA or NHPA.</p>	
<p>USACE project managers and district engineers have flexibility in implementing and managing the Section 404 program and interagency consultations, which affect the permit time frame.</p>	

4.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

Permitting time frames would apply to all parts of the permitting process. Some aspects of permit process run concurrently (e.g., consultations for endangered species and cultural resources may be occurring simultaneously with each other and other permit review steps). This section provides recommendations for the ADEQ Section 404 program permitting time frames.

4.2.1 Provide pre-application meeting opportunities

With Section 404 permitting, it is key for the applicant to have opportunities to discuss proposed activities and impacts prior to submittal of a permit application with regulatory staff. This is particularly critical for individual permits but can also be quite useful for general permits and can help minimize impacts in Waters and reduce permit review time frames.

- A. ADEQ Water Quality Division has an existing pre-application meeting process that provides a free one-hour meeting and coordination thereafter at an hourly rate. The Fees TWG white paper discusses fees associated with an assumed Section 404 program. The availability of these meetings should carry forward to the Section 404 permit program. Some projects, based on the complexity and potential impacts in Waters, may need multiple up-front meetings. No limit on the length or number of pre-application meetings should be imposed.
- B. In addition to a clear application form and guidance, checklists are recommended to make the permit application process effective and transparent. Checklists are discussed in more detail in [Section 5/Forms and Online Tools](#).

4.2.2 Acknowledge different review time frames relative to the complexity of the permit

As is clear from the USACE data, review and decision-making on permit applications can have greatly varying time frames, depending on the individual circumstances of the project activities in Waters and location. ADEQ should recognize this variability and plan accordingly.

- A. ADEQ's Aquifer Protection Permit (APP) provides different time frames for an individual permit, a complex individual permit, and general permits (AAC R18-1-525, Table 10). A similar system is recommended for the Section 404 permitting program.
- B. General permit authorizations would be expected to take the least length of time due to: 1) the up-front analysis and public comment undertaken to approve the overarching general permit program; 2) the lack of a public notice requirement for project-specific authorizations; and, 3) the requirement that a general permit must not cause more than minimal adverse effects (separately and cumulatively).
- C. Individual permits would be expected to require a longer time frame due to the increased level of coordination and increased complexity of analysis and review. Activities in Waters requiring an individual permit must have an analysis of alternatives and impacts under 404(b)(1) guidelines, are more likely to require coordination with other resource agencies, and require a public notice and comment period, with the possibility of a public hearing.
- D. Complex individual permits have all the same requirements as any other individual permit but the location or type of project activity in Waters adds a layer of complexity that may require additional time and/or coordination. For example, the area might have significant environmental resources (e.g., critical habitat under ESA) or the project might have activities with impacts to wetlands or extensive acreage of impacts to Waters. These types of projects are less likely to meet the EPA waiver limits and are therefore more likely to have the additional time frame associated with EPA review. EPA review of permits is detailed in [Section 8/EPA Role](#).

4.2.2.1 Time frames for JDs may add to these processing time frames

JDs may be submitted separately or concurrently with the Section 404 permit application and time frames for permitting will vary based on which is selected and the type of JD provided (e.g., preliminary JD versus approved JD).

- A. When a small or well-defined project is being proposed in Waters that can easily be defined, it may make sense and save time for the JD to be submitted simultaneously with the permit application.
- B. In cases when a project with large or complex activities in Waters is being proposed or when a project is being proposed in Waters that are not so clear-cut (e.g., defining the boundaries of a

wetland or an approved JD with a significant nexus analysis), it may make more sense and provide more certainty for the applicant to submit the JD prior to submittal of the Section 404 permit application even though it may increase the overall permit process time frame.

- C. The ADEQ Section 404 program should continue to allow both concurrent and separate JD and permit application submittals. This TWG has not developed time frames for JDs or wetland delineations; the reader should refer to the JD TWG white paper for more information.

4.2.3 Develop step-specific individual permit time frames

Due to the nature and potential complexity of the permitting process, this TWG recommends an overall permitting time frame for the issuance of a final permit that clearly defines time frames for individual components, including:

- JD (preliminary versus approved)
- application review and assessment of completeness
- 404(b)(1) analysis (including alternatives analysis) review
- coordination with other resource agencies (e.g., cultural, ESA, etc.)
 - there are varying levels for agency coordination depending on impacts in Waters (e.g., simple consultation vs development of a programmatic agreement, HCP, etc.)
 - time frames for ESA and cultural coordination are being addressed separately in the ESA and Cultural and Historic TWG white papers.
- public notice (with the possibility of a Public Hearing) (40 CFR §§ 233.32 – 233.33)
- compensatory mitigation plan and negotiation
- EPA review (if not waived)

These individual components within the overall permit decision-making process occur somewhat independently (but can be concurrent) or require work with other resource agencies or entities (including tribal entities) that require review time as well. Projects with a federal nexus will have additional documentation requirements under NEPA, which can impact the Section 404 permitting time frame. Refer to [Section 7/Federal Nexus](#) for more detail.

Some of these components are always required, some will only be required on projects with more complex impacts in Waters, and the extent and complexity of any coordination is specific to each project and the resources that may be impacted by the activity in Waters.

4.2.4 General Permits - Keep the RGP 81 (USACE 2017) and RGP 96 (USACE 2016) time frames

- A. RGP 81 and RGP 96, are popular with their applicant entities due to their tiered nature and expedited time frames. The ADEQ program should either adopt equivalent RGPs or create an equivalent general permit with the key features of these permits.
- B. Adopt the advisory and concurrence notification tiers for simplified submittals and expedited reviews on projects with mid-level general permit impacts in Waters, retaining the 14-day review and presumed authorization features.

4.2.5 General Permits – Extend RGP tiers and time frames to state-equivalent general permits

- A. If the state develops their own version of general permits similar to NWP, they will have flexibility to include additional levels of notification with time frames such as that included in the RGPs 81 and 96. This will streamline further some of the projects with the lowest potential impacts in Waters. Specifically, tiers could include:
 - 1. non-notifying – no authorization needed (0 days)
 - 2. advisory notification – Authorization time frame 14 days (barring other agency coordination needed)
 - 3. concurrence notification – Authorization time frame 14 days (but with more information submitted and barring other agency coordination needed)
 - 4. full PCN – Authorization time frame 45 days (barring other agency coordination needed)

4.2.6 Permit extension and minor modifications – assign licensing time frames

- A. Develop licensing time frames for processing the extension of existing Section 404 permits. The process to extend an existing permit can vary a little in complexity but in general should be straightforward with minimal effort and time required. The details of these types of extensions are discussed in detail in [Section 2.2.3](#). Extensions of permits should only require re-verifying certain key information and ADEQ should be able to issue a simple letter extending the permit (as the USACE does currently and ADEQ does with Section 401 certifications).
- B. Develop licensing time frames for a minor modification to an existing permit. The details of this type of modification are discussed in detail in [Section 2.2.3](#). Under the APP program, ADEQ has developed time frames for minor modification, which may provide an example. ADEQ will need to define in regulation what a Section 404 minor modification would be (this is partially defined in 40 CFR § 233.36(c)(2)). Consistent with 40 CFR § 233.36(c)(1), such an evaluation should consider the proposed changes, rather than re-evaluating the entire project again. This should allow for a streamlined review of the proposed modification and reduce the amount of time to process.

- C. These extensions and modifications should fall under the EPA waiver, as allowed under 40 CFR § 233.51 (the EPA waiver is discussed in more detail in [Section 8/EPA Role](#)) and this should be specified in the EPA/ADEQ MOA. If for some reason EPA feels that review of some of these renewals cannot be waived under 40 CFR § 233.51, then the MOA should specify that in any such cases, EPA’s review is limited to changed circumstances from the time of permit issuance, if any. If a permit has undergone full review and approval under USACE processes or state equivalents, then there is no basis for EPA to engage in further review unless and to the extent that conditions have changed in significant fashion.

4.2.7 Clearly identify when defined time frames begin

ADEQ currently has a process where they have to determine if the application is administratively complete (all of the components are present), and a determination that the application is substantively complete (all the required analyses are present and are sufficiently detailed and clear). This should be applied to individual permit applications and PCNs or other required notification level (e.g., concurrence notification, etc.). It is important to note that per 33 CFR § 325.1(d)(10), an application is “complete” when there is sufficient information provided for public notice to start. There may still be other pieces pending that are needed for a permit decision (e.g., full mitigation plan, etc.).

- A. Administrative Completeness of the Application (defined in AAC R18-1-501)-This determination should be transparent so the applicant knows the expectation ahead of time. ADEQ should offer the following:
 - 1. Pre-application meetings.
 - 2. Administrative Completeness checklist –this should be made easily available online to applicants and should be the same checklist ADEQ uses in their review of administrative completeness. ADEQ’s APP program offers a current example of this.
- B. Public Notice Readiness - This determination is recommended as an addition to ADEQ’s existing completeness determinations, falling between administrative and substantive completeness of an application. Section 404 permitting can be complex and some pieces of a “substantively complete” application may not be complete until significantly into permit review (e.g., if a mitigation plan is required). Public notice should occur at a time when there is sufficient project information (including broad details on anticipated mitigation, if needed) to provide for informed public comment, but not so late into the process that public comment could have no substantive impact on the project or permit conditions. This would require ADEQ to include a new definition in the state’s Section 404 rules for “Public Notice Readiness.”
- C. Substantive Completeness of the Application - Similar to administrative completeness, this determination should be transparent with open communication during the application process

between ADEQ and the applicant. An easily available checklist to be used by the applicant and during ADEQ review is recommended here as well. Note: a definition for “substantive review” is found in AAC R18-1-501.

- D. ADEQ currently can stop the permitting clock if they require additional information from the applicant. This should be applied to the Section 404 permitting process so an application isn’t dropped while waiting for additional information. The applicant may always request to pull the permit application, however.

4.2.8 Incorporate penalties for missed time frames by ADEQ and allow appeal procedures

ARS 41-1077 sets out penalties if ADEQ fails to meet the identified time frames. These penalties should be applied to the Section 404 program as well. Required coordination with other agencies (USFWS, SHPO, etc.) can impact the ability of ADEQ to meet the time frames for Section 404 permitting. An option to place a hold on the permit process while these coordination efforts are underway should be incorporated into the program, to the extent allowed by law. ADEQ should only be held responsible for meeting those time frames within their control. Refer to [Section 7.2/Federal Nexus Recommendations](#) for a discussion of ADEQ licensing time frames considerations when NEPA is involved in a project as a result of a federal nexus.

The state of Arizona has an appeal process through the Water Quality Appeals Board (WQAB) (ARS 49-323, Chapter 2, Title 49), pursuant to which appeals can be brought challenging individual permit decisions made by ADEQ. The WQAB can render the decision on its own in the first instance, or refer the appeal to an Administrative Law Judge (ALJ) for recommendation, retaining the ability to accept, modify, or reject the ALJ’s recommended decision. Once the WQAB makes a final decision, it becomes a final agency action and can be appealed to the state Superior Court. An appeal of a permit decision may be brought by any person who is or with reasonable probability may be affected by the action and who commented on the action, with the grounds for appeal limited to issues raised in those comments (ARS §§ 41-1092.03(B) and 49-323(A)).

Appeals of Section 404 permit decisions would fall under this statute; no language amendment is needed to specifically include Section 404 permitting.

Citizen suits under a state Section 404 program would be available under CWA citizen suit authority (33 USC § 1365) to the same extent as they are for USACE-issued permits.

4.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 4.2](#). Since this is a new program, a new rule will be required and

each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 6. Gaps and Options Summary Table – Licensing (Permitting) Time Frames

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
<p>Develop time frames for Section 404 permits and its components (e.g., JDs, 404(b)(1) analysis, mitigation plan review, external agency coordination, etc.) (Section 4.2.3).</p>	<p>ADEQ has regulations governing licensing time frames for all of their programs (AAC R18-1-501 - 525; ARS 41-1072-1079) but has no licensing time frames defined for Section 404 permitting. The APP program may have the closest approximation as it includes differing levels of permit complexity in its time frames.</p>	<p>Develop multiple licensing time frames for Section 404 permitting, based on the complexity of the project in Waters and level of permitting required and update Arizona code to include those time frames.</p> <p>Note: Updates to Arizona statutes governing licensing time frames may not be needed. Refer to JD TWG white paper for possible gaps that need to be closed specific to JDs.</p>
<p>Set licensing time frames based on the complexity of the Section 404 permitting action (Section 4.2.2).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies. The closest equivalent is probably the APP program with its time frames for differing levels of permit complexity.</p>	<ol style="list-style-type: none"> a. Develop definitions for significant impacts and level of permit complexity to determine time frame tiers. b. Develop an off-ramp (i.e., the ability to suspend time frames) from licensing time frame requirements for inter-agency coordination c. Develop agreements with key state and federal agencies for review time frames d. Intergovernmental agreements where a position is funded by a state or local agency should include time frames (position funding or interagency service agreements between ADEQ and

		<p>local agencies would likely require statute change).</p> <p>e. Update AAC R18-1-525 Table 10 in the regulation.</p>
<p>An option to place a hold on the permit process while coordination efforts with outside agencies are underway should be incorporated into the program (Section 4.2.8).</p>	<p>It is unclear how this fits into the existing licensing time frame statute.</p>	<p>Coordinate with the State Attorney General's office to determine if statutory change is necessary to "hold" the Section 404 permit process from a time frame perspective while outside coordination is occurring.</p>

5. Forms and Online Tools

Form templates and guidance documents are important components of the Section 404 application process. Applicants can range from large corporations, public entities (utilities, local governments, transportation agencies, etc.), to small business and individual landowners and can have vastly differing levels of Section 404 understanding and ability to hire experts to assist with the process. Clear, understandable forms and guidance that help the applicant provide the information required and understand how the regulating agency makes a permit decision are therefore critical. This section discusses the forms and tools currently available with the USACE program and then transitions to a discussion of considerations and recommendations specific to ADEQ's effort to assume the Section 404 program. Forms and tools associated with JDs are not discussed here; the reader should refer instead to the JD TWG white paper.

5.1 Current State of Regulations and Program

The USACE requests that all forms and other application documentation associated with the permitting process be electronically submitted to the USACE either by email or via an online document transfer server found here (<https://safe.amrdec.army.mil/SAFE/Welcome.aspx>).

5.1.1 Individual Permits

5.1.1.1 Individual (Standard) Permits

This section will focus on the forms currently required under the USACE program to obtain an individual permit. A summary of the USACE permitting process can be found at (<https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>)

ENG Form 4345

This is the application form for an individual permit and is used to capture information on the proposed activities within Waters. Project-specific information, including identification and signature of the applicant, project purpose, project description, cubic yards of discharge or fill material, acreage of impacts, and description of avoidance, minimization and compensation measures are required. Instructions for completing the ENG 4345 form are also provided. Design drawings and other maps detailing the area and proposed impacts are submitted as attachments with this application form.

ENG Form 4345:

https://www.publications.usace.army.mil/Portals/76/Publications/EngineerForms/Eng_Form_4345_2018May.pdf?ver=2018-07-25-134151-150

Instructions for ENG Form 4345: <http://www.glo.texas.gov/coast/coastal-management/forms/files/COE-Instructions.pdf>

USACE Combined Decision Document (404(b)(1) Analysis, NEPA, Public Interest Review) Template

The USACE wraps in the Section 404(b)(1) analysis, NEPA analysis, and public interest review together in one combined decision document. This information is required in addition to the ENG4345 application form (and associated attachments). In 2017, the USACE nationally transitioned to a new template for its combined 404(b)(1) Evaluation/EA (the most common level of NEPA required for an individual permit)/Public Interest Review/Statement of Findings. The template for the form is not easily available online through the USACE website, but a copy obtained from the Phoenix USACE regulatory office has been included with this white paper as [Appendix C](#).

The applicant may draft this decision document and provide it to the USACE for their review, comment, and approval. Many applicants do this to streamline the USACE process and reduce permit process lengths. If the applicant does not draft this decision document, the USACE will prepare it. The applicant may still submit some of the listed documents for review and modification (e.g., the mitigation plan) in this scenario.

The decision document template consists of 12 sections:

1. Introduction and overview
2. Scope of Review for NEPA, Section 7 of the ESA and Section 106 of the NHPA
3. Purpose and Need (it's critical to the analysis to properly identify and describe the purpose and need of the project)
4. Coordination (agencies, tribal partners, public notice comments received and responses)
5. Alternatives Analysis (this is required under both NEPA and 404(b)(1) guidelines)
6. Evaluation for Compliance with the Section 404(b)(1) guidelines (see 40 CFR Part 230)
7. General Public Interest Review (this is a USACE-specific required review per 33 CFR § 320.4)
8. Mitigation (an evaluation of the need for - including actions proposed to avoid and minimize impacts in Waters - and type/amount of compensatory mitigation proposed)
9. Consideration of Cumulative Impacts (this is required under both NEPA and 404(b)(1) guidelines)
10. Compliance with Other Laws, Policies and Requirements
11. Special Conditions
12. Findings and Determinations

The alternatives review is being discussed in more detail in the Significant Degradation/Alternatives Analysis/Minimization TWG's white paper but both NEPA and 404(b)(1) require an alternatives review. NEPA requires, at a minimum, the proposed action alternative and a no action alternative (many projects have multiple action alternatives). The USACE provides guidance on NEPA at 33 CFR Part 325 Appendix B.

404(b)(1) guidelines require a review of practicable alternatives (e.g., activities which avoid discharge to Waters, discharge in other locations in Waters). Alternatives must meet the defined purpose and need of the project. Development of a thoughtful purpose and need is therefore critical.

Design drawings are generally submitted to the USACE as part of the application process so they can review the proposed impacts. Such drawings must be at a sufficient stage to provide the information needed for informed decision-making. In order for the permit to be issued, the USACE must be able to substantiate the selected alternative is the “least environmentally damaging practicable alternative” which meets the purpose and need of the project.

5.1.1.2 Letter of Permission

An LOP is not frequently used in Arizona, as it has only been used in the last 10 years for minor activities in Section 10 Waters. As a result, the TWG looked to the USACE Sacramento District for guidance on filing for a permit under an LOP ([https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/LOP-procedures9-16-2013FINAL\(rev\).pdf](https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/LOP-procedures9-16-2013FINAL(rev).pdf)). The LOP submittal package should include:

- a cover letter from the applicant requesting an LOP
- ENG Form 4345
- the issued JD
- site location maps
- Description of the proposed activity as required by 33 CFR 325.1 (d) “Content of application” (11X17 pages) and total acreage of impacts and aquatic resources identified, description of potential cumulative, secondary or indirect impacts, construction schedule, alternatives review (both on-site and offsite if applicable), mitigation plan, documentation of compliance with ESA Section 7 and NHPA Section 106

5.1.2 General Permits

5.1.2.1 Regional General Permits

RGPs are intended to streamline permitting requirements for approved activities, but individual projects may still require some form of notification or approval from the USACE. This is defined within each RGP.

For RGP 63 (emergency situations), notification should be in writing and consist of applicant information, location, brief and clear description of imminent threat to life or property, scope of work to resolve the situation, and description of the area of impact in Waters and anticipated impact. Coordination with other applicable federal and state agencies and potentially mitigation will still be required but, depending on the nature of the emergency, the bulk of this may be done after the fact. Permit documentation, issuance and use is at the discretion of the District Engineer or designated appropriate USACE representative.

The ENG 4345 form is used here with its associated guidance.

Both RGP 81 and 96 authorizes certain specified activities based on a tiered notification system but RGP-specific form templates exist. Notification under the lower tiers may take the form of a letter. The PCN tier would use the ENG4345 or the South Pacific PCN Form template provided by the USACE (links and more detail provided under NWP's below).

5.1.2.2 Nationwide Permits

Activities that fall within a non-notifying terms and threshold have no notification requirements and no form template is necessary.

PCNs generally consist of a cover letter and either the ENG4345 form or the USACE South Pacific Division PCN Form with Attachment 1: Additional PCN Requirements for LA District Boundaries of Arizona and California. The form and instructions for the South Pacific Division Nationwide Permit PCN may be found at the links below.

Form:

https://www.spl.usace.army.mil/Portals/17/docs/regulatory/Permit_Process/SPD%20NWP%20PCN_FINAL%20SPL%20regional%20conditions%2016-Mar-2017.pdf?ver=2017-03-22-173310-147

Instructions:

https://www.spk.usace.army.mil/Portals/12/documents/regulatory/nwp/2017_nwps/2018.09.04-FINAL-SPD-PCN-Checklist-Instructions.pdf?ver=2018-09-06-120453-200

A complete submittal package must also include design sheets in accordance with the Final Map and Drawing Standards for the South Pacific Division Regulatory Program and technical documents in compliance with all applicable general and regional conditions (e.g., NHPA, ESA, Section 408, etc.).

<https://www.spd.usace.army.mil/Missions/Regulatory/Public-Notices-and-References/Article/651327/updated-map-and-drawing-standards/>

5.1.3 Existing state system and ADEQ Section 401 Water Quality Certification

As discussed previously, within areas of non-tribal lands, ADEQ oversees all the CWA Section 401 Water Quality Certifications associated with USACE Section 404 permitting. The ADEQ CWA Section 401 Water Quality Certification application form was updated in April of 2017 and may be found here: <http://static.azdeq.gov/forms/CWA401%20to%20CWA404%20Application.pdf>.

The package submittal should include all documentation submitted to the USACE for review and approval. Essentially the only distinguishing difference between the documentation is the one-page form provided in the link above.

Submittal of the form is sent via email to the persons noted. ADEQ has developed an electronic permit submittal program called MyDEQ and has started to transfer different permit application processes to this

web-based portal. It is presumed by the TWG that the Section 401 certification will also eventually be transferred to using the MyDEQ portal as well.

5.1.4 Benefits and drawbacks summary

Table 7 summarizes the benefits and drawbacks of the forms and online tools current state identified by the TWG.

Table 7. Forms and Online Tools Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
One form (ENG 4345) can be used for multiple levels of permitting, which provides consistency and familiarity.	USACE forms and guidance can be difficult to locate online. Sometimes the only way to find them is to request a copy from the local office.
Fully electronic submittals (via email or file sharing site) is efficient.	Electronic submittals don't automatically enter a permit application into a queue for processing or provide alerts to USACE project managers on permit process deadlines.
Guidance detailed by application form section or decision document section is helpful, as is supplemental information guidance like mapping guidelines.	Checklists for how the USACE determines an administrative and substantially complete application are not publicly available online.
The USACE decision document template that wraps in multiple, overlapping analyses (404(b)(1), NEPA, and public interest review) reduces redundancy of effort.	South Pacific PCN form with Arizona attachment is cumbersome, redundant and not user-friendly and still requires just as many attachments as the ENG 4345 form.

5.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

Key components of forms and online tools recommended for adoption by the ADEQ Section 404 program are described in this section. Form templates provided by ADEQ should avoid unnecessary redundancy within the application form. JDs will also require forms but those recommendations will be provided by the separate JD TWG white paper.

5.2.1 All forms and guidance should be readily and easily available online

- A. ADEQ's website should have an easy-to-find page specifically providing links to up-to-date application form templates, analysis templates (e.g., 404(b)(1)), guidance for completing those forms, and ADEQ decision checklists and should be updated immediately upon release of a new version.
- B. The page should also include current ADEQ Section 404 program contact information for those applicants less well-versed in Section 404 to ask additional questions.

5.2.2 Develop and provide application form and analysis templates and clear guidance

- A. Provide standard application forms for each level of available permit, including a form for individual permit requests and for each of the notification tiers for notifying general permit authorizations.
 - 1. Each form should capture important basic information such as land ownership, project location, Waters that will be impacted, and a brief description of the proposed activity and permanent and temporary impacts in Waters.
 - 2. The level of detail and information needed for an application will vary based on the level of permit being requested. The lowest level of tiered notification for notifying general permit authorization recommended by this TWG would require only very basic and limited information for project authorization (the ADOT Concurrence Notification form for RGP 96 and the multi-level notification form for RGP 81 are provided in [Appendix D](#) as examples of the type of form ADEQ might consider and improve upon for their own Section 404 concurrence notification form). A full PCN or an individual permit application would require more information (see 40 CFR § 233.30 for details on information needed for a complete individual permit application).
 - 3. Additional details needed could include such information as a statement about known cultural resources or ESA species/habitat present, methods to avoid and minimize impacts to Waters and water quality, broad overview of a proposed compensatory mitigation strategy, etc. Each form should also clearly list potential supplemental information needed for an application to be considered substantively complete (e.g., biological evaluation document, cultural survey, compensatory mitigation plan, etc.). This list must be flexible since a final determination of required supplemental information should be based on the resources present and the potential of the project to impact those resources.

4. Similar to the ENG4345 form, the form fields should be expandable so larger and more complex projects have sufficient space to provide an appropriate level of detailed information to ADEQ without running into text box limitations.
- B. Provide a joint Section 404 co-permit application form for situations in which the applicant will require a permit from both ADEQ and USACE.
 1. The form should be developed in cooperation with the USACE and incorporate all state and federal rule and regulation requirements with clear guidance on completing the form and submitting to both regulatory entities.
 - C. Guidance for the application forms should be clear and use language that is easily understood, so that the general public understands the information requirements. The USACE method of providing guidance language on a version of the template (see their decision document template in [Appendix C](#)) makes it easy to understand what information is required in which section and a similar method is recommended for ADEQ guidance.
 - D. Forms should be thorough but streamlined and non-duplicative within themselves (i.e., does not require the applicant to re-state information provided previously).

5.2.3 Develop checklists for ADEQ decision-making that are easily available to, and understood by, the public

These checklists should be used by ADEQ to make determinations and the public should be able to use the exact same checklist to help them be sure they are providing the information ADEQ needs to make a decision. The informal checklists ADEQ developed for APP applications provides an example, but Section 404 forms should improve upon these examples to be more user-friendly (e.g., more white space for better legibility, fillable PDF with expandable fields for comments/info, etc.). These checklists should be easily available online. They should be written in clear, comprehensible language with minimal technical jargon (and where technical terms are needed, terms should be clearly defined). Checklists for ADEQ decisions or actions should clearly delineate the time frames within which those actions should occur and a response provided to the applicant.

- A. ADEQ should provide checklists for the following:
 1. Application completeness/administrative review checklist – Everything an applicant needs to submit to provide a complete application to ADEQ (mapping, application forms, other supplemental information). This may not include all technical documents that may be required prior to permit decision (e.g., results of cultural consultation, mitigation plans, etc.). There should be a checklist for the tiers of general permits and one for individual permits (or a combined form that clearly delineates what additional

information is needed for an individual permit). The term “administrative completeness” is defined in AAC R18-1-501.

2. Mapping standards checklist – Information needed on maps for ADEQ to do an adequate desktop review (scale and age of aerial, transparency of impact layers, Waters designation, wetlands present, location labeling, direction of flow, etc.).
 3. Public Notice Readiness - Elements needed to determine the permit submittal is accurate and provides sufficient information to allow public notice to move forward. These requirements may differ depending on the complexity of the project. The checklist should be flexible enough to account for these differences.
 4. ADEQ substantive review checklist – Elements needed to determine the permit submittal is substantially complete (information is sufficiently detailed and clear) and no further information is anticipated for an eventual permit decision. The term “substantive review” is defined in AAC R18-1-501.
- B. ADOT has a quality control checklist for PCNs and individual permits which provides a starting place for consideration regarding what needs to be included in an application. This quality control checklist can be found on the following website under ‘404 Permit Applications’, ‘Quality Control Checklist’ (<https://www.azdot.gov/business/environmental-planning/biology/section-404-401-procedures>). The TWG suggests that ADEQ review this document as a possible starting point for developing any checklists under a state Section 404 program.
- C. ADEQ should robustly engage stakeholders in developing and reviewing forms, checklists, guidance documents, etc. associated with the Section 404 program.

5.2.4 Provide for electronic submittals, automatic application entry into a review queue, and status updates

- A. ADEQ’s Section 404 program should allow electronic submittals via an online portal that automatically enters a permit application into a review queue for administrative completeness. If ADEQ elects to do this, the assumption regulations (40 CFR § 233.39) require it to ensure that its process for accepting electronic submissions is consistent with EPA’s cross-media electronic reporting rule (40 CFR Part 3).
- B. The online portal should allow the applicant to log on and check on the status of a permit application (e.g., it’s in review for administrative completeness, anticipated completion date of XX/XX/XXXX; public notice period underway, anticipated completion date of XX/XX/XXX; etc.).
- C. Electronic submittals should be preferred but **not mandatory**. The Section 404 permit program includes applicants with a variety of capabilities and smaller entities or individuals may not be

able to easily access or use an electronic submittal system. ADEQ should continue to accept the receipt of hard copy permit applications in perpetuity.

5.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 5.2](#). Since this is a new program, a new rule will be needed and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than requiring new draft documents (e.g., application forms, checklists, etc.).

Table 8. Gaps and Options Summary Table – Forms and Online Tools

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
All forms and guidance should be easily and readily available online and ADEQ contact information easily available (Section 5.2.1).	ADEQ currently has a compliance assistance page on their website with a liaison by county but the contact information for specific people at ADEQ is not easily available.	ADEQ’s website should be updated to include Section 404 guidance, forms, and, whether on a separate Section 404 page or on the compliance assistance page, the ADEQ Section 404 team should be listed with contact phone numbers and email addresses.
Provide a joint co-permitting application form for projects that will need both ADEQ and USACE Section 404 permitting (Section 5.2.2(B)).	The TWG is not aware of any similar co-permitting situation in ADEQ and no cooperative agreements or rules are in place to allow such joint permitting.	<ul style="list-style-type: none"> a) Negotiate co-permitting details during the MOA process with the USACE; Michigan can provide an example of this. b) Determine if there are circumstances when one permit could be issued jointly by ADEQ and USACE rather than applicant receiving two separate permits.
Electronic submittals should result in automatic entry into a review queue and automatic online	ADEQ’s MyDEQ system is currently used for simple permit applications that have a minimal number of steps to completion. There is a gap in MyDEQ capability for providing	<ul style="list-style-type: none"> a) All Section 404 permit applications that require notification need to be reviewed by ADEQ staff; update MyDEQ to enter all Section 404

<p>status updates (Section 5.2.4).</p>	<p>the level of status updates needed for a Section 404 permit application.</p>	<p>applications automatically into a review queue. b) Update MyDEQ to provide status updates as described in Section 5.2.4 of this paper.</p>
<p>Encourage electronic submittals but provide the option of hard copy submittals (Section 5.2.4(C)).</p>	<p>ADEQ currently uses MyDEQ for electronic submittals and, on prior permits, has not allowed the option for continued hard copy submittals.</p>	<p>a) ADEQ electronic submission mechanisms to be consistent with 40 CFR Part 3. b) When updating MyDEQ to incorporate Section 404 permits, make sure the process accommodates hard copy submittals of all required permitting documents. c) Hard copy submittals will need to be added to the electronic queue and status update system by ADEQ staff upon receipt.</p>

6. Public Process

Public processes are defined in the USACE Section 404 program under 33 CFR §§ 330.1(b) and 330.5(b), 33 CFR §§ 325.2 – 325.3 and 33 CFR Part 327 and through NEPA requirements and apply whenever a Section 404 permit is required from the USACE. Under a state-assumed program, public notice/hearings would continue to be required under the terms of 40 CFR § 233.32 and 40 CFR § 233.33; however, NEPA analysis would no longer be consistently required (NEPA would only apply in cases where some other federal nexus exists on the project, as discussed further in [Section 7/Federal Nexus](#)). The purpose of this section is to identify current public processes (including a brief discussion of agency and tribal coordination) under the USACE Section 404 program and develop recommendations for public processes within an ADEQ Section 404 program.

6.1 Current State of Regulations and Program

The USACE Section 404 process includes a broad range of public participation and outreach, including consultation with federal and state agencies and tribal nations and outreach to the general public. In addition, although there's no formal process for this outside of the USACE public comment period, the public and organizations may contact the USACE and EPA regarding jurisdictional and permit concerns. The USACE retains final decision-making authority; EPA's role is further described in [Section 8/EPA Role](#). The formal consultations with federal and state agencies and tribal nations start at the beginning of the permit process with the intent of determining impacts of the project on various protected resources (direct, indirect and cumulative).

The USACE conducts an impact analysis pursuant to 404(b)(1) guidelines and NEPA to evaluate potential impacts including temporary, permanent, direct, indirect and cumulative impacts. This evaluation begins and sets the stage for what studies and information will be required from the applicant, and the public process. As part of this evaluation process the USACE may coordinate with other agencies, including (but not limited to) the EPA, the USFWS, Arizona Game and Fish Department, SHPO, and Native American nations and tribes for tribal consultation, as required. These critical agencies, or consultation/coordination partners, are engaged during the permit process to ensure the impact review identifies other federal and state laws and regulation may apply. For individual permits, the applicant is asked to identify other applicable permits required for the discharge as part of the application (33 CFR § 325.1(d)(1) and Item 26 of ENG 4345 Form).

CWA Section 404(a) requires that the USACE may issue permits only after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable Waters at specified disposal sites.

6.1.1 Individual Permits

6.1.1.1 Individual (Standard) Permits

Public Engagement

Under 33 CFR § 325.3, an individual permit requires a public notice. This notice must include “. . . sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” This comment period, per 33 CFR § 325.2(d)(2) should be not more than 30 days nor less than 15 days from the date of the notice, but can be extended an additional 30 days, if warranted. 33 CFR Part 327 also includes a provision for public hearings associated with a USACE permit. Any person can request a public hearing during the public notice period. “The district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing” (*id.*).

Public notices are distributed for posting on the USACE website and in post offices or other appropriate public places (e.g., libraries) in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian tribes or tribal representatives, to concerned federal agencies, to concerned business and conservation organizations, to appropriate river basin commissions, to appropriate state and area wide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices are sent to all parties who have specifically requested copies of public notices, to the U.S. senators and representatives for the area where the work is to be performed, the field representative of the secretary of the interior, the regional director of the USFWS, the regional director of the National Park Service, the regional administrator of the EPA, the regional director of the National Marine Fisheries Service (NMFS), the head of the state agency responsible for fish and wildlife resources, the SHPO, and the district commander of the U.S. Coast Guard.

Public notice period and review is also required under NEPA and other applicable federal laws. In certain circumstances, an EIS may be required which will trigger public process for public scoping. Frequently, individual permits are addressed under NEPA through an EA. The applicant may provide to the USACE any necessary technical supporting documents (e.g., cultural resources surveys, biological assessments, alternative analyses to avoid and minimize adverse impacts, hydrology and hydraulic studies, etc.) The district engineer may determine that additional investigations and/or mitigation plans are necessary in consultation with federal and state partners.

Other permits required for the project (e.g., AZPDES permit, APP, etc.) may also have specific public process for review, comments and public hearing.

Agency and tribal coordination

While the engagement of the USACE with tribes is not a public process, *per se*, tribal consultation (government to government consultation) is an equally important outreach obligation on the part of the

USACE that must be completed by the USACE in advance of the issuance of any individual permit. When the USACE considers the issuance of an individual permit, this implicates the federal trust responsibility of the United States to those federally recognized Indian tribes that could be significantly affected by the project. There are 22 federally recognized Indian tribes in Arizona with tribal lands constituting approximately 28 percent of the state. Given the breadth of tribal lands located in Arizona, a decision by the USACE to issue a Section 404 permit has the potential to impact water, water rights and tribal resources on downstream or nearby tribal reservation lands. In addition, the Arizona is located within the ancestral lands of numerous southwestern tribes, meaning that the issuance of Section 404 permits often have a tribal nexus, even when projects are permitted off tribal reservation lands. Impacts that the USACE must consider in the Section 404 permitting process, include activities that have the potential to significantly affect tribal resources, tribal rights, including treaty and water rights, archeological resources, as well as traditional, religious and cultural properties as defined under Section 106 of the NHPA, and sacred sites within the meaning of Executive Order 13007.

The principal federal statutes that require federal agencies to engage in tribal consultations before deciding on certain undertakings are the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.); American Indian Religious Freedom Act (14 U.S.C. §§1996 et seq.); Archeological Resources Protection Act of 1979 (16 U.S.C. §470aamm); and Native American Graves Protection and Repatriation Act (25 U.S.C. §§3001 et seq.). In addition to the foregoing, the USACE has a Tribal Consultation Policy that defines its commitment to tribal consultation, and sets forth how tribal consultation is to be conducted, when, and at what levels of authority as between the USACE and the affected Indian tribe. See USACE Tribal Consultation Policy and related documents (USACE 2013), USACE Tribal Nations Community Practice (2013), available at: http://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf

Tribal consultation and coordination on cultural resources is discussed in greater detail in the Cultural and Historic Resources TWG White Paper and the Tribal Nation TWG White Paper.

6.1.1.2 Letter of Permission

LOPs are required to follow individual permit public notice requirements when a category of activities is proposed for approval but specific impacts in Waters authorized under an approved LOP, while still requiring some consultation with federal and state fish and wildlife agencies, do not require public notice.

6.1.2 General Permits

6.1.2.1 Regional General Permits

Review of proposed RGPs by the public and consulting partners is solicited by the USACE within the region where the permit may be used (33 CFR § 325.3(b)). The three commonly used RGPs in Arizona (63, 81,

and 96) have similar conditions as the NWP program for tribal interests, Section 106 of the NHPA, and sections 7 and 9 of the ESA. No public notice is required for individual actions authorized under an RGP since that was undertaken at the time of approval of the RGP.

6.1.2.2 Nationwide Permits

Public Engagement

The NWP program is revised every five years and this process for issuing NWPs is a rulemaking activity. For the current 2017 permits, the proposal to reissue the NWPs was published in the Federal Register on June 1, 2016, for a 60-day public comment period ending on August 1, 2016. Approximately 54,000 comments were received in response to the Federal Register notice. The final rule publishing the NWPs was in January 2017 with an implementation date in March 2017. Concurrent with the Federal Register notice on the draft program, districts issued local public notices to solicit comment on proposed regional conditions.

The public process when USACE Headquarters issues or reissues NWPs, it conducts a national scale cumulative impact assessment in accordance with the 404(b)(1) guidelines and NEPA definition of “cumulative impact” at 40 CFR Part 1508.7 and the public process is based on the USACE Section 404 regulations at 33 CFR §§ 330.1(b) and 330.5(b)(2) and NEPA requirements. Additionally, NWPs issued must only be for activities that will result in no more than minimal individual and cumulative adverse environmental effects (see 33 USC § 1344(e)(1) and 33 CFR § 330.1(b)).

During the public notice period, members of the public, including organized citizens, conservation groups, and consultation partners may advocate for the assertion of regulatory jurisdiction over activities that impact the environment and demand permit review and approval where otherwise not required by providing technical information, demonstrating impacts to special aquatic resources, threatened and endangered species, cultural resources, etc. Impact analysis includes both beneficial and adverse impacts. Public commenters and consultation partners may also suggest alternatives to proposed actions during the permit application process including requesting substantive analysis of the application and supporting documents. Regulated entities may also choose to comment on the scope of nationwide permits and associated conditions.

No additional public comment is required for individual projects authorized under the NWP program. As noted previously, public comment instead occurs during the development of the 5-year general permit program.

Agency and Tribal Coordination

While this process is similar to Arizona’s rulemaking process, the federal process has more extensive consultation with other agencies and always includes review and approval by the Office of Management

and Budget. The USACE determines whether the NWP program triggers EO 13175 but also seeks tribal input as part of the NWP rule making process, even if EO 13175 is not triggered (USACE 2017c [p. 1982]).

Certain general conditions of the NWP program also define when certain consultations must be implemented. Most of these were noted briefly in [Section 3/Permit Types](#) as reasons for requiring a PCN and wider discussions on these consultations are included in the relevant TWG white papers but these can also require consultation efforts:

- General Condition 17 – No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.
- General Condition 18 – May result in a PCN and consultation under Section 7 of the ESA.
- General Conditions 20 – May result in a PCN and consultation under Section 106 of the NHPA.

6.1.3 Public notice nexus – other regulations

Public notice/involvement or agency consultation is also required under (and many times conducted on a parallel path or in conjunction with) a number of other statutes, including:

- ESA (16 USC § 1531) requires consultation under Section 7 and allows qualified citizens to file suit to enforce the ESA if the citizen believes ESA has not been complied with as part of the Section 404 permitting process. ESA requirements and consultation are discussed in more detail in the ESA TWG white paper.
- NHPA (36 CFR Part 800) requires consultation with SHPO, THPOs, affected Indian tribes and other interested parties. Cultural and historic property consultation requirements are discussed in more detail in the Cultural and Historic TWG white paper.
- Floodplain Development – the conditional letter of map revision process requires public review and informing affected parties on how the floodplain will be impacted.

6.1.4 Benefits and drawbacks summary

Table 9 summarizes the benefits and drawbacks of the public process current state identified by the TWG.

Table 9. Public Process Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
USACE review incorporates a broad consultation and public notice process under both Section 404 and NEPA (and often can provide one public notice to meet the requirements of both of these laws).	On occasion, the public notice process may occur too early. Significant project changes may occur after the public notice that would not be captured by public comment.

USACE has specific guidance on who receives a public notice and where such notice is posted.	Extensive consultation processes can result in lengthened permit process times.
Extensive tribal coordination is incorporated in the USACE Section 404 process and NWP general conditions.	
Early consultation with federal and state agency partners can help determine additional coordination or mitigation requirements early so applicants can plan accordingly.	

6.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

Key components of an ADEQ Section 404 public process are described in this section. This section includes minimal recommendations on the logistics of how consultation for cultural, tribal, or ESA consultations should occur as those are being addressed in other TWG white papers.

6.2.1 Provide a process for public input

Under a state-assumed Section 404 program, the state must assure that the public, and any other state the Waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application (40 CFR §§ 233.32 – 233.33).

- A. A state-assumed Section 404 program is required to provide a public notice period for general permit program development and individual permits, generally at least 30 days and allow any interested person to request a public hearing during the public comment period.
- B. The public notice must be sent to any agency with jurisdiction over the activity or disposal site, adjacent landowners, all persons requesting copies of public notices, any state whose Waters may be affected, and shall be advertised publicly as well (e.g., via newspaper or similar) (*Id.*).
 1. Michigan treats federally recognized tribes within the state similar to adjacent states whose Waters may be affected. The question of whether Arizona should do the same was referred by this TWG to the Tribal Nation TWG (via ADEQ staff) for consideration.

- C. In addition to the federal requirements above, ADEQ should post the public notice on their website and maintain a hard copy at their office for public review. The public notice should be posted online on ADEQ’s website in a location that is easy to find.

6.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 6.2](#). Since this is a new program, a new rule will be needed and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 10. Gaps and Options Summary Table – Public Process

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
Provide a process for public input consist with 40 CFR §§ 233.32 – 233.33 (Section 6.2.1).	ARS 49-111 requires notification to local governments for every permit and ARS 49-208 requires public participation procedures meet the requirements of the CWA for permits issued under that act. The latter includes prescribing public notice requirements and providing an opportunity for public hearing. This would cover the Section 404 program but specifics to Section 404 are not included in AAC Title 18.	Amend the AAC Title 18 to include public notice and hearing provisions to meet the requirements of 40 CFR §§ 233.32 – 233.33. The general permit program should have public notice but specific general permit authorizations under the program do not require public notice.

7. Federal Nexus Projects

A federal nexus on a project occurs whenever the federal government is in some way involved in a project. Common instances of a federal nexus include use of federal funding, involvement of federal land, federal approval needed (e.g., federal approval for changes to an airport layout plan), or a requirement for a federal permit. Under the USACE program, a requirement for a Section 404 permit constitutes a federal nexus. This section lays out, in brief, the current state of a federal nexus in the context of Section 404 and then transitions to a discussion of considerations and recommendations specific to projects with a federal nexus under an ADEQ Section 404 program.

7.1 Current State of Regulations and Program

Under the USACE program, any activity in Waters that requires a Section 404 permit automatically has a federal nexus because the permit itself is the federal nexus. Some projects may have additional federal nexuses (such as federal funding or federal land ownership). Because prior sections discuss the current state of the federal (USACE) Section 404 permitting process, this section mainly focuses on the Section 404 and NEPA processes through the lens of other federal entities and federally-related requirements.

One of the key differences between a project with a federal nexus and a project without a federal nexus is the requirement for federal actions to comply with NEPA. Federal agencies must conform to the generic, binding Council on Environmental Quality (CEQ) regulations on NEPA (40 CFR §§ 1500-1508). However, each federal agency has authority and flexibility to define its own implementing regulations under NEPA, which makes it difficult to present in detail. The USACE NEPA implementation regulations and guidance associated with issuance of a Section 404 permit, including 33 CFR Part 230 and 33 CFR Part 325, Appendix B, differ from the NEPA implementation regulations and guidance adopted by other federal agencies associated with their decision-making. Under the existing USACE program, a separate NEPA document is often prepared for the USACE in addition to the NEPA document required by the other federal agency/ies. Conversely, other agencies may sometimes use a USACE NEPA document (e.g., a USACE-led EIS) as their primary NEPA document (if it captures the scope of analysis and considerations of the other agency/ies).

There are some exceptions to this, such as the ADOT/FHWA NEPA process, which includes the Section 404 process with the USACE into ADOT/FHWA's NEPA documentation. The experience of TWG members indicates this combined process can actually extend and complicate the Section 404 permitting process by mingling it with other federal agency reviews and requirements outside of those required for USACE. This is particularly true compared to obtaining a Section 404 permit separately and directly through the local USACE office.

In Arizona, two agencies (ADOT and Pima County) pay for staff positions in the local USACE offices to address their respective Section 404 requirements, which helps streamline the reviews once an

application is submitted to the USACE. Other applicants in Arizona submit to the local USACE office in Phoenix but permit applications are assigned based on USACE project manager geographic assignment and workload.

Generally, most NEPA evaluations prepared by federal agencies other than the USACE do analyze and summarize CWA Section 401 and Section 404 considerations, but the USACE NEPA process also has a combined decision document template that includes the various analyses required for a Section 404 permit (404(b)(1) guidelines, NEPA, public comment, and public interest review). This is discussed in more detail in [Section 5/Forms and Online Tools](#). Many times, cultural resources and biology-related documentation prepared for another federal agency’s NEPA process will be accepted by the USACE.

7.1.1 Benefits and Drawbacks Summary

Table 11 summarizes the benefits and drawbacks of the federal nexus projects current state identified by the TWG.

Table 11. Federal Nexus Projects Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
<p>The Section 404 permit as a federal nexus results in a broad review of environmental considerations under NEPA. Although the public interest review could be perceived as broad enough to encompass a review of environmental and social considerations, the USACE typically undertakes this review under NEPA.</p>	<p>Often, the USACE NEPA requirements are different enough from another federal agency’s NEPA requirements to require two separate NEPA documents for one project.</p>
<p>Technical documentation, such as cultural surveys or biological evaluations, for another federal agency will often be accepted by the USACE for the same project.</p>	<p>Although the CEQ has common, overarching guidelines for NEPA that apply across federal agencies (40 CFR §§ 1500-1508), each federal agency develops its own implementing regulations for NEPA, making consistency in analysis and a comparison of different processes difficult. It is also more difficult for the non-federal project proponent to know what is needed to comply with NEPA.</p>

7.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

The following are recommendations of the TWG for activities with a federal nexus under an ADEQ-assumed Section 404 program.

7.2.1 Projects with NEPA should follow the state Section 404 procedure

- A. ADEQ should not assume responsibility for trying to mimic or be inclusive of the varying NEPA programs of the multiple federal agencies that could represent a federal nexus in Arizona.
- B. Any MOAs between ADEQ and other federal entities should describe steps to address state Section 404 permitting requirements for their federal projects.

7.2.2 Provide allowance to adopt applicable NEPA documentation/consultation in the permit process

- A. ADEQ should consider ways to streamline duplicative requirements in the general and individual permit processes and a federal agency's NEPA process (e.g., ADEQ can accept NEPA technical documents covering the Section 404 permitting analysis area such as cultural surveys and biological evaluations).
- B. The lead federal agency would be required to conduct appropriate analyses and provide technical documentation and associated consultations required under NEPA (e.g., under Section 7 [ESA] or Section 106 [NHPA]). If more than one federal agency is involved, the lead federal agency will be determined among them.
- C. ADEQ should work with the lead federal agency to determine if the agency's scope of analysis under NEPA is sufficient to provide the information necessary for ADEQ to determine compliance with 404(b)(1) guidelines and any other Section 404 permitting requirements. If the NEPA scope of analysis sufficiently addresses ADEQ's analysis area, ADEQ should review and, where appropriate, adopt the federal agency's technical documents to avoid duplication of effort for the applicant and authorizing agencies (this would apply to both individual permits and general permit authorizations).
 - 1. Such adoptions should occur only if it is unlikely to result in greatly extended licensing time frames.
 - 2. ADEQ remains responsible for analysis under 404(b)(1) guidelines, but can utilize relevant information or analysis provided by federal NEPA documents.
- D. If the NEPA scope of analysis is insufficient (e.g., doesn't cover ADEQ's analysis area or doesn't cover resource categories necessary for a Section 404 permitting decision), ADEQ must have the

capacity, expertise, and ability to undertake that technical documentation, review, and coordination internally.

7.2.3 Address permitting needs for different federal nexus scenarios

There are several Section 404 permitting scenarios that could result in some level of federal involvement. Some of the most common in Arizona are: 1) tribal lands (where the USACE would retain Section 404 permitting jurisdiction minus tribal assumption of that authority); 2) federal lands/funding/approval/etc.; 3) a combination of land ownership (e.g., federal, tribal and/or private lands); and, 4) Section 10 Waters and adjacent wetlands (not assumable by ADEQ).

The NWP general conditions identify other potential federal triggers that could occur for activities requiring Section 404 permitting, such as the Migratory Bird Treaty Act, Wild and Scenic Rivers Act, tribal rights, ESA, Bald and Golden Eagle Protection Act, historic properties, and Section 408. Two other potential federal triggers in the NWP general conditions do not currently apply to Arizona – the state does not contain any designated critical resource Waters or essential fish habitat. Other sources of federal involvement include Section 6(f) of the Land and Water Conservation Fund Act and the Nationwide Rivers Inventory (both of which involve the National Park Service).

- A. For impacts in Waters on tribal lands or involving Section 10 Waters (including adjacent wetlands), the USACE would retain responsibility for Section 404 permitting, including all associated federal permitting requirements such as NEPA.
- B. For impacts in Waters on federal lands or with some other federal nexus – such as funding, other permitting, or approvals – affecting Waters for which the state has assumed jurisdiction, ADEQ would issue the Section 404 permit.
 - 1. The federal agency would be required to comply with NEPA (this includes actions on USACE Civil Works projects requiring a Section 408 permit) and should include an analysis of impacts on Waters and applicable uplands in its NEPA document.
 - 2. ADEQ should use the NEPA technical documentation in their Section 404 permitting process, as appropriate to comply with 404(b)(1) guidelines and other permitting requirements, rather than undertaking a separate documentation and coordination process.
 - a) Such adoptions should occur only if it is unlikely to result in greatly extended licensing time frames.
 - b) ADEQ remains responsible for analysis under 404(b)(1) guidelines, but can utilize relevant information or analysis provided by federal NEPA documents.

3. ADEQ should consider being a cooperating agency for the federal process in the case of individual or complex permits.
- C. For impacts in Waters on a combination of Section 10/tribal and other federal/private lands, both the USACE and ADEQ would have permitting authority, assuming impacts to Waters would occur in both jurisdictions.
1. ADEQ and the USACE should develop a joint permitting process to reduce duplication of effort by the applicant and the permitting entities. Michigan has a joint permitting application package that includes permit requirements for both state and federal rules and regulations regarding activities in Waters (including wetlands). An applicant can fill out one application and submit it to both Michigan's DEQ and the USACE district office for processing. A similar process is recommended for ADEQ.
 - a) It is preferred that one joint permit be co-provided by ADEQ and the USACE. Some circumstances may legally require two permits (one from the USACE and one from ADEQ) due to authority limitations. In these circumstances, the USACE and ADEQ should work together to have identical conditions to reduce permittee confusion and accidental violations, unless unique conditions in an area necessitate differences. In that case, the differences in conditions between ADEQ and USACE should be kept to the minimum necessary.
 2. The lead federal agency (whether the USACE or another federal entity) would be required to conduct appropriate analyses and provide technical documentation and associated consultations required under NEPA. If more than one federal agency is involved, the lead federal agency will be determined among them.
 3. ADEQ should use federal NEPA documentation associated with the project, where appropriate, rather than undertaking separate technical documentation and coordination.
 - a) Such adoptions should occur only if it is unlikely to result in greatly extended licensing time frames.
 - b) ADEQ remains responsible for analysis under 404(b)(1) guidelines, but can utilize relevant information or analysis provided by federal NEPA documents.
 4. ADEQ should consider being a cooperating agency for the federal process in the case of individual or complex permits.
- D. If impacts in Waters would be conducted under an NWP or other general permit requiring notification (such as a PCN), the respective authority, USACE or ADEQ, would be responsible for reviewing, approving, and authorizing those impacts under that general permit. If activities in

Waters would be conducted under a non-notifying general permit, the permittee would be responsible for any documentation required to support use of that permit.

1. Joint permitting and review and adoption of federal agency efforts should be utilized as discussed previously, where appropriate, for general permit authorization or for documentation of general permit conditions.

7.2.4 Licensing time frames are only applicable to ADEQ

- A. Licensing time frames defined by ADEQ for Section 404 permitting may need to be modified when the state is issuing a permit with a federal nexus. Any time a federal nexus is present, it involves NEPA and other federal consultation processes, which ADEQ would incorporate as part of their Section 404 permit review whenever possible. Federal agencies cannot be held to ADEQ licensing time frames.
- B. ADEQ is responsible for meeting time frames within its control. For time frames outside of its control (e.g., because of NEPA or other coordination efforts) and to the extent allowed by law, ADEQ should have the ability to “stop the clock” to allow time for these external processes to occur.
- C. ADEQ should coordinate with other federal and state agencies to discuss procedures, policies, and time frames when coordination is necessary for Section 404 permitting. Some of this may be appropriately captured in MOAs (e.g., USFWS and USACE), but other discussions may be more informal.

7.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 7.2](#). Since this is a new program, a new rule will be needed and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 12. Gaps and Options Summary Table – Federal Nexus Projects

<p>Summary of Recommendation</p>	<p>Gap in ADEQ authority, process, or existing capability</p>	<p>Option to Resolve</p>
<p>For projects with a federal nexus, work with the federal agency to coordinate analysis of impacts to Waters (Section 7.2.2).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.</p>	<p>Develop working relationships with the environmental branches of relevant federal agencies. No statute or code changes anticipated but this may in some cases require formal agreements with federal agencies.</p>
<p>Adopt the technical documentation and consultation of the federal agency conducting NEPA where possible (e.g., unless resulting in excessive time frames) and appropriate (Section 7.2.2(C)).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.</p>	<p>Include this intent in the assumption submittal to the EPA. No statute or code changes anticipated.</p>
<p>Develop a joint permitting process with the USACE for projects where Section 404 permits would be needed from both ADEQ and USACE (Section 7.2.3(C)).</p>	<p>This is specific to an assumed Section 404 program and is therefore not currently addressed in ADEQ regulations or policies.</p>	<p>Include in the ADEQ/USACE MOA, including the intent to provide similar permit conditions (unless unique conditions in one area require otherwise) to reduce permittee confusion.</p> <p>Jointly with the USACE, develop clear guidance for applicants.</p>

8. EPA Role

EPA's role and level of authority in Section 404 permitting is somewhat different depending on whether USACE or a state that has assumed the Section 404 program is the permitting authority. This section describes EPA's role in Section 404 permitting, starting with the role of EPA with the USACE program, as the current regulatory authority for Section 404 permitting in Arizona. The Current State sub-section also describes current regulations governing EPA interactions with state-assumed Section 404 programs. The section then transitions to a discussion of considerations and recommendations regarding the EPA role specific to ADEQ's effort to assume the Section 404 program.

8.1 Current State of Regulations and Program

The EPA interacts with the USACE on Section 404 permits by reviewing and commenting on individual permits and exercising veto authority under Section 404(c). The EPA has the authority to approve a state's request to assume the Section 404 permit program from the USACE, and when they do so, they possess veto and objection authority for permit applications (both individual permits and any general permits issued by a state under the Section 404 program). These interactions are guided by the following regulations, each of which is discussed in greater detail later in this section:

- A. 40 CFR Part 231/33 USC § 1344(c) (Section 404(c)), which provides for EPA to prohibit ("veto") discharge that will have an "unacceptable adverse effect" on specific resource categories;
- B. 33 USC § 1344(q) (Section 404(q)), which outlines EPA and USACE coordination to minimize duplication and delay in permit issuance and allows EPA to request elevation of permit decision-making in certain circumstances; and,
- C. 40 CFR § 233.50/33 USC § 1344(j) (Section 404(j)), which provides for EPA review, oversight, and ability to prevent issuance of state-issued permits.

This section summarizes the current process for EPA interactions with the USACE and state-assumed programs.

8.1.1 Section 404(c) Veto Procedures—40 CFR Part 231

The EPA review and veto authority under Section 404(c) applies to permit programs administered by the USACE and by states who have assumed the Section 404 program. Under this authority, the EPA may prohibit the use of a site for the discharge of dredged or fill material if they determine the activity will have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fisheries, wildlife, or recreational areas. This authority can be exercised prior to a permit application being submitted to, or approved by, the USACE or a state or after a permit has been issued. The USACE or state cannot issue a permit that is inconsistent with a final EPA Section 404(c) determination.

The EPA must reference permit documentation (including 404(b)(1) analysis) and coordinate with the USACE or state prior to exercising this authority. If a permit has already been issued but the EPA determines it presents an imminent threat, the EPA may request the USACE or state to suspend the permit. It appears this suspension is optional, but the EPA may elect to use CWA Section 504, which gives EPA emergency authority to request the courts constrain an immediate stop to the discharge of pollutants. If the permit is suspended, the EPA may agree to shorten the times for the Section 404(c) process.

The specific steps of the entire Section 404(c) process are included in Figure 1 and will not be discussed in detail in the text. The EPA exercises this authority rarely, with only 13 Final Determinations under Section 404(c) issued between 1972 and 2016. Of these 13, none have been associated with a state-assumed Section 404 program or the USACE Los Angeles District. However, it's unlikely the EPA would need to use Section 404(c) authority for a state-assumed program because of their objection authority under Section 404(j).

On June 26, 2018, the Administrator of the EPA issued a memo directing the development of a proposed rule to change the Section 404(c) regulations (EPA 2018). Specifically, the memo directs that the proposed rule:

- A.** eliminate EPA authority to initiate Section 404(c) procedures before a permit application has been filed or after a permit has been issued,
- B.** require the Regional EPA to get authority from EPA Headquarters to start Section 404(c) procedures,
- C.** require EPA to review a final EA or EIS before preparing a proposed determination (for a state permit with no federal nexus, it doesn't specify document review but presumably would involve review of the final 404(b)(1) analysis),
- D.** require EPA to publish and seek public comment on a final determination before it takes effect.

At the date of this white paper, no proposed rule on this topic has been published in the Federal Register. If a rule on this topic is finalized, the information in this section will no longer reflect the current state of the regulation

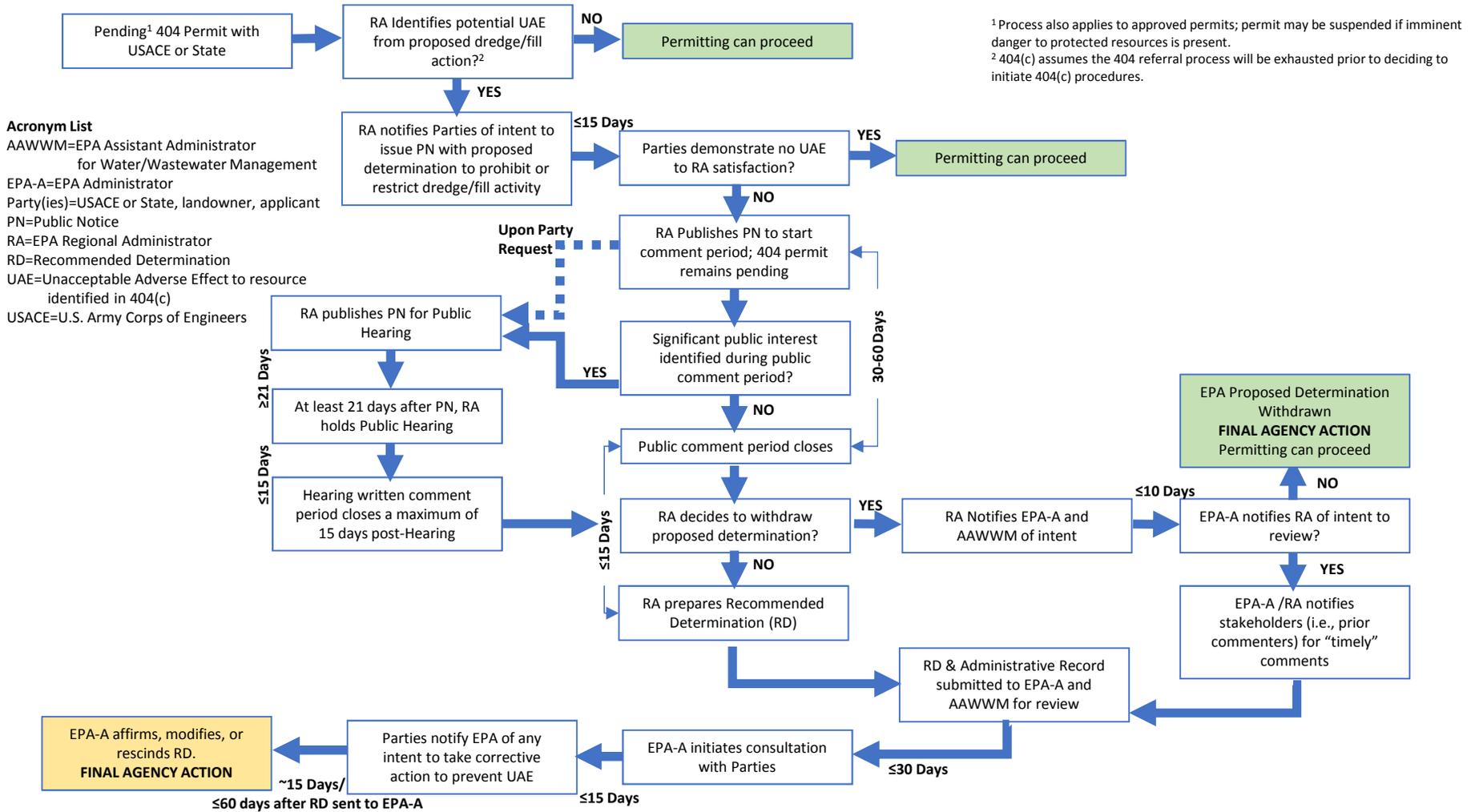


Figure 1. CWA Section 404(c) – EPA veto authority for discharges having an “unacceptable adverse effect”, 40 CFR Part 231

8.1.2 EPA/USACE Memorandum of Agreement on Permit Elevation under 33 U.S.C. 1344(q) (Section 404(q))

Section 404(q) requires that the USACE enter into agreements with other federal agencies to minimize duplication, needless paperwork, and delays in the issuance of Section 404 permits, with the goal of issuing a permit decision within 90 days after public notice or hearing. In accordance with this section, the USACE entered into an MOA with the EPA, the latest in 1992 (EPA and USACE 1992). This MOA outlines coordination between the USACE and EPA for Section 404 permitting, including:

- A.** The USACE will fully consider EPA comments and views on permits and mitigation and EPA will only submit substantive comments on project impacts, mitigation actions, and 404(b)(1) compliance (this is separate from EPA’s engagement on the Interagency Review Team associated with compensatory mitigation that is discussed in that TWG’s white paper).
- B.** The USACE will ensure EPA receives a copy of a public notice and EPA will provide comments within the public notice comment period, unless an extension is requested.
- C.** If USACE decides to issue permit over EPA objection or without EPA-recommended conditions, a copy of the final decision document will be sent to the EPA.
- D.** Individual permits impacting Aquatic Resources of National Importance (ARNI) where unacceptable adverse effects will occur, even with mitigation, can be elevated to USACE headquarters level for decision under this agreement at the request of EPA, if certain procedures are followed. Such adverse impacts are defined as “resource damages similar in magnitude to cases evaluated under Section 404(c) of the CWA.” The decision whether to elevate a permit is made by USACE Headquarters. The MOA notes that elevation can result in costly delays, so should be undertaken only when absolutely necessary.
 - 1. USACE can decide to issue permit after this coordination but EPA retains the right to proceed with Section 404(c) veto procedures at this point. USACE must give EPA 10 days after notification to decide if they want to initiate Section 404(c).

While this MOA makes it clear that the USACE can issue a permit over an EPA objection – which a state does not have the authority to do (refer to additional state interaction with EPA in Section 8.1.4) – it can only do so if the EPA does not exercise their veto authority under Section 404(c).

The provisions in this section on permit elevation procedures do not apply to a state-assumed program. Instead, EPA has the authority to object to issuance of state-issued Section 404 permits and prevent issuance of the state permit until outstanding issues are resolved to EPA’s satisfaction.

8.1.3 Permit and enforcement appeals

The USACE has a process for applicants to administratively appeal permit decisions in 33 CFR Part 331. A flow chart of this process can be found in Appendix A of this regulation found here: <https://www.gpo.gov/fdsys/granule/CFR-2012-title33-vol3/CFR-2012-title33-vol3-part331>. In a nutshell, the applicant has 60 days to decide whether to appeal the decision with a timeline of 90 days maximum for the rest of the appeal process to occur thereafter. This is primarily a USACE process, but does have a caveat that it doesn't apply if, for an unauthorized activity or "after the fact" permit, the EPA has the lead enforcement authority or has requested lead enforcement authority for a permit. Final USACE permit decisions may be appealed to federal district court, but only after exhausting administrative remedies (33 CFR § 331.12).

Appeal of an enforcement action by the EPA is addressed in 33 USC § 1319 (CWA Section 309) and a request for judicial review must be filed within 30 days of the civil enforcement notice in either a district or circuit court, depending on the type of violation and applies to violations whereon EPA takes lead enforcement authority regardless of whether in a USACE program area or state-assumed program area.

8.1.4 EPA Role in State-Assumed Program—40 CFR § 233.50/33 USC § 1344(j) (Section 404(j))

These regulations detail EPA's oversight authority over a state-assumed Section 404 program and do not apply to the USACE program. Since 40 CFR § 233.50⁶ describes this process in more detail, it has been used as the main source for this section.

Any state that assumes the Section 404 program is required to promptly transmit to the regional administrator of the EPA the following documents:

- A.** the public notice for any complete permit application, except as waived (note: the state must provide EPA with a copy of the public notice if requested, even if it falls under a waived category)
- B.** a notice of significant actions taken by the state related to any permit application (again, except as waived)
- C.** a copy of any draft general permit the state intends to issue
- D.** a copy of the state's response to another affected state's comments or recommendations, if the permitting state doesn't accept those recommendations
- E.** a copy of every issued permit (no waivers identified)

Unless waived, a formal review process by EPA is triggered when the regional administrator receives a public notice for an application, a draft general permit, or the state's response to an affected state's recommendations. This review process is shown in Figure 2 and therefore will not be discussed in detail

⁶ Although not covered in this section, 40 CFR § 233.52 also details state annual reporting requirements. ADEQ should ensure they have the programs/resources available to appropriately track reportable permits/actions/notices/etc.

here except to state that the reasons the EPA can object to a permit under this regulation are limited to the following:

- A. the permit is the subject of an interstate dispute (40 CFR § 233.31(a))
- B. the permit is outside the requirements of the CWA, “these regulations” (meaning 40 CFR Part 233), or the 404(b)(1) guidelines

If EPA objects, a permit cannot be issued unless and until its objections are resolved; if they are not, the permit gets transferred to the USACE for processing and final decision.

As a state pursues Section 404 assumption, an MOA must be developed with the EPA that specifies categories of discharge for which EPA review is waived. This can be modified over time and the EPA can terminate a waiver at any time by notifying the state program. While this regulation is not specific in the categories that can be waived, it does identify six categories for which federal review cannot be waived:

- A. draft general permits
- B. discharges with reasonable potential to affect threatened or endangered species (USFWS input)
- C. discharges with reasonable potential to adversely affect another state’s Waters
- D. discharges known or suspected to contain toxic pollutants in toxic amounts or reportable quantities of hazardous substances
- E. discharges in proximity to a local public water supply intake
- F. discharges in “critical areas” under state or federal law (including but not limited to, national or state parks, fish and wildlife refuges, national and historic monuments, wilderness areas and preserves, sites identified or proposed under the NHPA, and components of the National Wild and Scenic Rivers System)

The EPA can withdraw an assumed Section 404 program from the state⁷ if the state’s program is no longer in compliance and the state fails to correct the deficiencies. The reasons are wide-ranging. Key considerations for the state are to ensure all state legislation is kept up to date to ensure ongoing authority and that state government or courts don’t limit the authority to enact this program; to ensure the state program is in compliance with regards to regulating activities that require such; providing permits that comply with regulatory requirements; engaging the public; acting on violations and enforcement; adequately inspecting regulated activities; and complying with the MOA.

The proposal to withdraw the Section 404 program from a state may be brought by the EPA or in response to an “interested person” petition. The process to remove the program is spelled in detail in 40 CFR § 233.53 and includes the requirement that EPA provide to the state a description of deficiencies and an opportunity to correct but the time frame for correction is short, only up to 90 days. Michigan, which has

⁷ The state can also voluntarily return the Section 404 program to the USACE with proper notification and transition plan, as detailed in this regulation.

had a state-assumed Section 404 program since 1984, received such a notice to correct deficiencies, among others requiring changes to permit exemptions Michigan had added (Newlon, 2014). While no new actions may be approved under any state general permits if the state program is withdrawn, this regulation makes it clear that that actions taken while the state program was active remain valid.

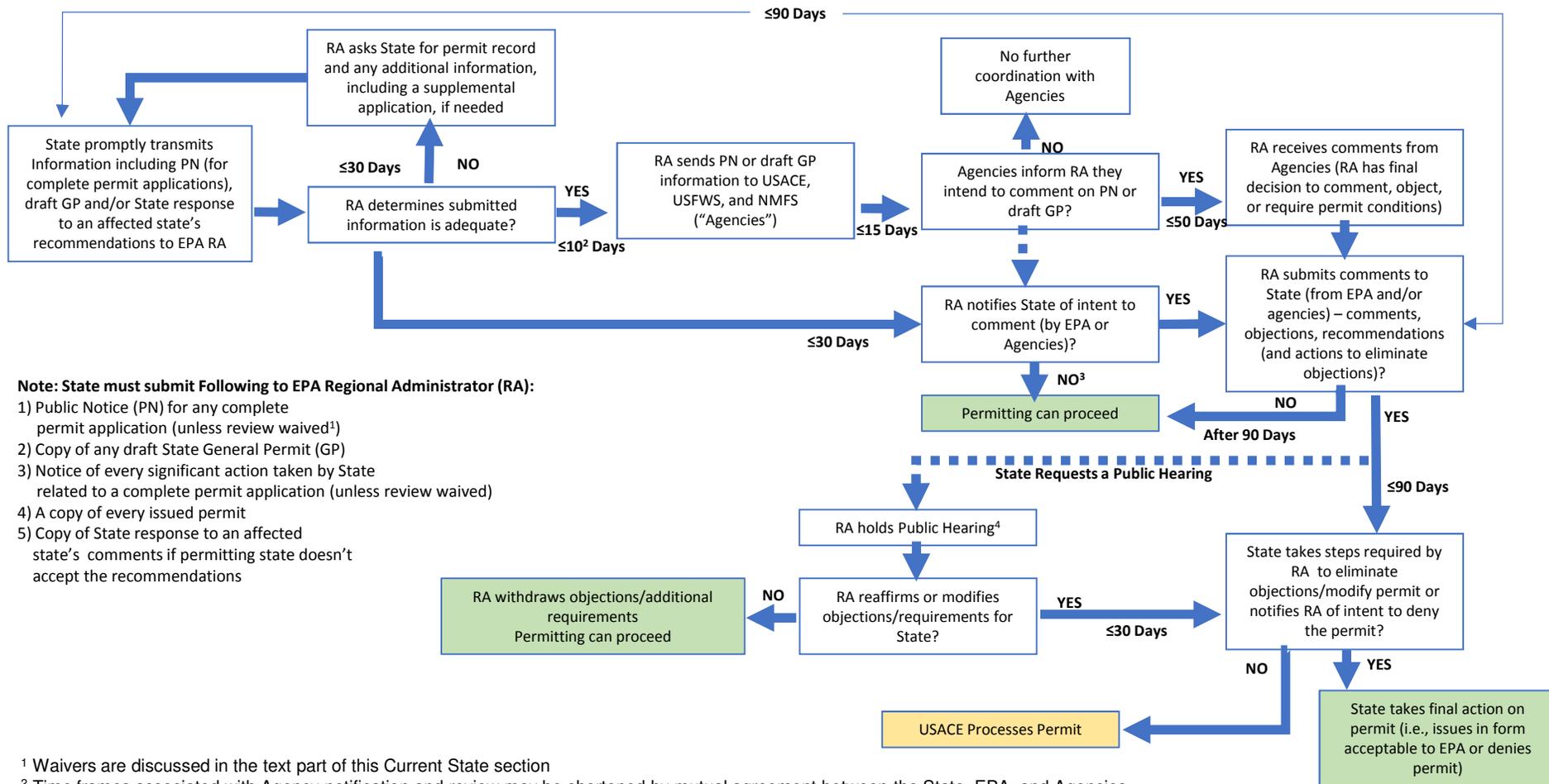


Figure 2. Federal review process for permit applications, draft general permits and affected state recommendations that aren't accepted by permitting state (40 CFR § 233.50)

8.1.5 Benefits and drawbacks summary

Table 13 summarizes the benefits and drawbacks of the EPA role current state identified by the TWG.

Table 13. EPA Role Current State Summary Table

Top Benefits of Current State	Top Drawbacks of Current State
Allows negotiation of which individual permits EPA will review.	Very little overall flexibility in EPA role in a state-assumed Section 404 program as defined in federal regulations.
The possibility for negotiating shorter review time frames at certain federal agencies (USACE and USFWS) is included.	Although not current practice, under the federal assumption regulations, EPA has significantly greater authority to stop issuance of state-issued permits (as compared to USACE-issued permits).

8.2 Recommendations for an ADEQ-Assumed Section 404 Program Which Maintains Equivalent Protection of Waters

The EPA role is well-defined in federal regulation. This effort does not include recommending changes to federal regulations. The flow charts describing the Section 404(c) and Section 404(j) processes would remain consistent under an ADEQ program. However, there are a few key aspects of EPA's role that allow room for negotiation, generally within the confines of the MOA between the state and EPA. There are also general, practical steps ADEQ could take to ensure smooth coordination with the EPA. This vision of the future state for an ADEQ Section 404 program will focus on those aspects.

8.2.1 Negotiate shorter federal agency review times

40 CFR § 233.50 allows for negotiation of the concurrent USACE, USFWS, and NMFS reviews of those documents not waived for EPA review. Currently, the agencies have 15 days to notify the EPA if they intend to comment and then 50 days to provide such comments. If agreed between the federal agencies and the state, this time frame can be reduced. Because Arizona has no coastlines, NMFS review of Section 404 permits is not anticipated to be necessary, but ADEQ's program should negotiate shorter review times with the USACE and USFWS for this step, while maintaining an adequate length for a full and proper review by these federal agencies. Any such agreement for shorter review times would need to be included in MOAs between ADEQ and the appropriate agency.

8.2.2 Include categories of permits for which EPA review will occur (per 40 CFR § 233.51)

The Michigan and New Jersey MOAs describe the waiver of EPA review by categories of what EPA *will* review, and this paper will copy that format. The future ADEQ program should require EPA review of:

- A. All mandatory review items as outlined in 40 CFR § 233.51/33 USC §1344(k).
- B. Major discharges (this is subject to negotiation with the EPA), including:
 - 1. discharge impacting a certain area of wetland, to be negotiated with the EPA during the MOA process,
 - 2. enclosure or filling a certain linear length (or acreage) of Waters, contiguous or segmented; length should be differentiated based on the size of impacts in Waters and class of water (i.e., ephemeral, perennial) and will need to be negotiated with the EPA during the MOA process, and
 - 3. relocating or channelizing a certain linear length of Waters; length should be differentiated based on the size of a project and class of Water (i.e., ephemeral, perennial) and will need to be negotiated with the EPA during the MOA process.

8.2.3 Provide opportunities for close coordination and clear guidance to streamline EPA review

The time frames for official EPA review are identified in federal regulation. Recommendation to change federal regulation is outside the purview of this paper; however, any future ADEQ program should include the following to smooth the EPA review process and thereby work toward meeting defined or even shorter review times:

- A. easily accessible and thorough application guidance documents and clear forms for permittees to use in completing an application for a Section 404 permit; ensure such guidance and forms comply with requirements under the CWA, including 404(b)(1) guidance (addressed in greater detail in [Section 5/Forms and Online Tools](#)),
- B. a sufficient tracking system developed to handle the program reporting required under 40 CFR § 233.52 and the MOA,
- C. thorough ADEQ reviews for application completeness and public notice readiness before issuance of the public notice and submittal of permit documentation to the EPA for review,
- D. close ADEQ coordination with states whose Waters might reasonably expect to be impacted by permitted activities to ensure concerns are adequately addressed by the permittee, whenever possible,
- E. regular ADEQ contact with the EPA Regional authority to stay engaged and up-to-date and update ADEQ guidance expeditiously, as needed, to reflect any changes,

- F. maintenance (in practice and in legislative authority) of equivalent protection of Waters as provided in the USACE Section 404 program,
- G. maintaining a state program that meets the legislative requirements of the CWA and adhere to the requirements in 40 CFR § 233.16(b) regarding timelines for revisions to a state program in response to federal statutory or regulatory changes.

The EPA would also be involved in the state equivalent of the Interagency Review Team for compensatory mitigation. Refer to the Compensatory Mitigation TWG white paper for more information on the EPA’s role with respect to state-assumed mitigation practices for Section 404 permitting.

8.3 Program Comparison and Identification of Gaps and Gap Closure Options

The Gaps and Options Summary Table provides information on key gaps identified between ADEQ’s current capabilities (e.g., rules, statutes, processes, etc.) and the recommendations for an ADEQ-assumed Section 404 program included in [Section 8.2](#). Since this is a new program, a new rule will be needed and each recommendation will require action by ADEQ to implement. This table only offers options to close gaps that are more substantive than those requiring new draft templates (e.g., applications, checklists, etc.).

Table 14. Gaps and Options Summary Table – EPA Role

Summary of Recommendation	Gap in ADEQ authority, process, or existing capability	Option to Resolve
Negotiate time frames for concurrent reviews by USACE and USFWS for documents not waived for EPA review (Section 8.2.1).	MOAs with USACE and EPA are required as part of the assumption process, but a written agreement with USFWS is not.	ADEQ may need to enter into an MOA with USFWS to create a written agreement with negotiated time frames for USFWS review of documents as part of Section 404(j) reviews.
Track information for program reporting as required under 40 CFR § 233.52(b) (Section 8.2.3(B)).	ADEQ has a tracking system for tracking touch time and other related metrics but there may be a gap in what the existing tracking program captures vs. what is required to be reported to EPA on an annual basis.	Modify the existing tracking system, if practicable, to capture the metrics required in 40 CFR § 233.52(b). If not practicable, a new system may be needed to meet this requirement.

9. Conclusion

This paper is the result of group discussion and research into existing regulations, documents, information from other states with assumed Section 404 authority or who are pursuing such authority, and data received from the USACE Phoenix Regulatory Office.

While the TWG attempted to capture as many recommendations pertinent to these topics as possible, the time frame for analysis and completion of the white paper did not allow for great specificity, the creation of detailed process flow charts, or independent research outside of existing documentation. This white paper therefore provides broad brush recommendations intended to assist an ADEQ Section 404 program in streamlining process while providing equal and appropriately robust protection of Waters. Additional detail will be needed to fill in program details before the program is submitted to the EPA. Many of the recommendations had TWG consensus. For those that did not, a short description of the options with the TWG split identified was provided. For ease of reference, a summary of the main recommendations provided in the topic sections, with the applicable section hyperlinked for access to greater detail, is provided in the Executive Summary ([Table ES-1](#)).

This paper did not evaluate the overall proposal for ADEQ to assume the Section 404 program, but provided recommendations based on ADEQ direction to *presume* such assumption. This paper should therefore not be read as an analysis of the practicality or feasibility of assuming the Section 404 program. A separate feasibility study, including an economic study, would be required to address this larger question.

10. Minority Opinion

10.1 Public Interest Review Considerations (Option 3) - Scott Thomas, Fennemore Craig

In deciding whether and to what extent to adopt some variant of the USACE public interest review regulation (33 CFR § 320.4(a)) as part of a possible state-assumed program, some considerations should be kept in mind:

- Neither the CWA assumption statute (33 USC § 1344(g)-(k)) nor EPA's state assumption regulations (40 CFR Part 233) require a public interest review analysis.
- In fact, the public interest review requirement is found nowhere in the text of the CWA. The USACE first adopted it in 1967⁸ to help govern its review of Rivers and Harbors Act (RHA) permits issued for certain activities occurring in waters regulated by the RHA. See 32 Fed. Reg. 17522, 17539 (December 7, 1967) (former 33 CFR § 209.330(a), stating that the decision as to whether to issue a permit would be predicated upon the "effects of permitted activities on the public interest," including effects upon water quality, recreation, fish and wildlife, pollution, natural resources, and navigation.⁹
- Because a public interest review analysis is not required under CWA Section 404 or EPA's state assumption regulations (40 CFR Part 233), state adoption of a public interest review is not required "for purposes of implementing the permit program established by 33 United States Code Section 1344," which is the extent of the discretionary authority granted to ADEQ pursuant to ARS § 49-203(B)(9).
- From the standpoint of many applicants, especially private sector applicants, a concern with the public interest review analysis is that some of the factors listed are extremely subjective (e.g., "aesthetics"), and others are identified in such a manner that it is unclear how they will be interpreted (e.g., "land use").

⁸ The public interest requirement was revised and relocated in 1968. See 33 Fed. Reg. 18670, 18671 (December 18, 1968). A revised version of the public interest review test that reads in a fashion substantially similar to the current version of the text, and that contained a majority of the currently listed evaluation factors, was adopted in 1974. See 39 Fed. Reg. 12115, 12120 (April 3, 1974) (former 33 CFR § 209.120(f)(1)). At that time: (1) the USACE believed that its regulatory authority under the CWA extended only to waters also regulated under the RHA (see id. at 12115); and (2) the interim 404(b)(1) Guidelines had not yet been adopted (that occurred in 1975, see 40 Fed. Reg. 41292 (September 5, 1975)).

⁹ Because the 404(b)(1) Guidelines do not apply to the issuance of RHA permits (see 33 CFR § 230.2), the USACE public interest review regulations remain the only substantive decision criteria that apply equally to all types of RHA permits, and represent the primary vehicle for the USACE to analyze the potential effects (including the environmental effects) of those permits.

- the open-ended nature of the USACE’s public interest review regulation led a respected commentator to conclude that it “reads like a parody of standardless administrative choice.” See Rodgers, *Environmental Law: Air and Water*, at 205 (1986).
- As noted in the body of the white paper, some of the USACE’s 21 public interest factors are thoroughly addressed in the Guidelines (e.g., wetlands, water quality) or are unlikely to be relevant in Arizona. Other factors are addressed by non-USACE programs (e.g., flood hazards, which are addressed by county flood control districts).
- If ADEQ nevertheless believes it is authorized to, and that it should, adopt a public interest review component as part of state Section 404 program regulations despite the foregoing concerns, then it should:
 - adopt only review factors that are pertinent to Arizona and that are not addressed under the Guidelines (this is recommended in the body of the white paper), and that are not considered by other agencies with regulatory authority;
 - avoid use of overly subjective criteria (such as “aesthetics”);
 - clarify in the state Section 404 regulations that the scope of review for assessing compliance with the public interest requirement is limited to the effects of the discharge of dredged or fill material into waters of the U.S., and not the effects of a project as a whole. That is how the USACE typically interprets its public interest review authority (similar to how it evaluates compliance with the Guidelines, as discussed in the white paper prepared by the Significant Degradation/Alternatives Analysis/Minimization TWG), and courts have approved this interpretation. See, e.g., *Ohio Valley Environmental Coalition v. Corps of Engineers*, 828 F.3d 316, 324 (4th Cir. 2016) (under its public interest review regulations, USACE is not required to analyze impacts outside of those caused by the proposed discharge of dredged or fill material);
 - frame the test in the same fashion that the USACE does in 33 CFR § 320.4(a)(1): if a proposed discharge complies with the Guidelines, then a permit will be issued “unless . . . it would be contrary to the public interest” (rather than placing a burden on applicants to prove that a proposed discharge would be “in the public interest”). This would be consistent with USACE practice; the USACE has clarified that in the context of its public interest review, “an applicant’s proposal is presumed to be acceptable unless demonstrated by the government not to be.” See 48 Fed. Reg. 21466 (May 12, 1983) (This is recommended in the body of the white paper); and
 - clarify (preferably in the ADEQ/EPA MOA) that an EPA belief that a proposed permit is contrary to the public interest, where the state has reached a different conclusion, does

not provide EPA with a basis for formally objecting to (and thereby stopping state issuance of) that permit. Because a public interest review is not mandated by the text of CWA Section 404, the Guidelines or EPA's assumption regulations, EPA disagreeing with a state's decision regarding public interest does not provide a valid basis for EPA objection under CWA § 1344(j) or 40 CFR § 233.50(e) (This is recommended in the body of the white paper).

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Appendix A - USACE General Permit Applicability to Arizona

Table A-1. Current (2017-2022) USACE Nationwide Permits: Potential Relevance to an ADEQ-assumed Section 404 Program in Arizona

Nationwide Permit (NWP) Number	Covered Activity	Relevant in AZ?	Rationale for NWPs not considered potentially relevant
1	Aids to Navigation	No	Listed authority is only Section 10 of the Rivers and Harbors Act (RHA); USACE will retain permitting over Section 10 Waters.
2	Structures in Artificial Canals	No	Listed authority is only Section 10 of the RHA; USACE will retain permitting over Section 10 Waters.
3	Maintenance	Yes	
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Yes	
5	Scientific Measurement Devices	Yes	
6	Survey Activities	Yes	
7	Outfall Structures and Associated Intake Structures	Yes	
8	Oil and Gas Structures on the Outer Continental Shelf	No	Arizona has no jurisdiction over activities on the Outer Continental Shelf.
9	Structures in Fleeting and Anchorage Areas	No	Listed authority is only Section 10 of the RHA; USACE will retain permitting over Section 10 Waters.

Nationwide Permit (NWP) Number	Covered Activity	Relevant in AZ?	Rationale for NWPs not considered potentially relevant
10	Mooring Buoys	No	Listed authority is only Section 10 of the RHA; USACE will retain permitting over Section 10 Waters.
11	Temporary Recreational Structures	No	Listed authority is only Section 10 of the RHA; USACE will retain permitting over Section 10 Waters.
12	Utility Line Activities	Yes	
13	Bank Stabilization Activities	Yes	
14	Linear Transportation Projects	Yes	
15	U.S. Coast Guard Approved Bridges	No	Applies only to discharges associated with construction of bridges over Section 10 Waters; USACE will presumably have jurisdiction in these areas.
16	Return Water from Upland Contained Disposal Areas	Yes	
17	Hydropower Projects	Yes	
18	Minor Discharges	Yes	
19	Minor Dredging	Yes	
20	Response Operations for Oil or Hazardous Substances	Yes	
21	Surface Coal Mining Activities	No	Coal currently produced only on tribal lands, where USACE will retain permitting authority. Note: if coal likely to be produced off tribal lands, this permit may be relevant.

Nationwide Permit (NWP) Number	Covered Activity	Relevant in AZ?	Rationale for NWPs not considered potentially relevant
22	Removal of Vessels	Yes	
23	Approved Categorical Exclusions	Yes	
24	Indian Tribe or State Administered Section 404 Programs	No	This is an RHA Section 10 authorization and thus not pertinent to a state program
25	Structural Discharges	Yes	
26	[Reserved]	--	--
27	Aquatic Habitat Restoration, Establishment and Enhancement Activities	Yes	
28	Modifications of Existing Marinas	No	Listed authority is only Section 10 of the RHA; USACE will retain permitting over Section 10 Waters.
29	Residential Developments	Yes	
30	Moist Soil Management for Wildlife	Yes	
31	Maintenance of Existing Flood Control Structures	Yes	
32	Completed Enforcement Actions	Yes	
33	Temporary Construction, Access and Dewatering	Yes	
34	Cranberry Production Activities	No	No such activities currently occur, or are likely to occur, in Arizona.
35	Maintenance Dredging of Existing Basins	No	Listed authority is only Section 10 of the RHA; USACE will retain

Nationwide Permit (NWP) Number	Covered Activity	Relevant in AZ?	Rationale for NWPs not considered potentially relevant
			permitting over Section 10 Waters.
36	Boat Ramps	Yes	
37	Emergency Watershed Protection and Rehabilitation	Yes	
38	Cleanup of Hazardous and Toxic Waste	Yes	
39	Commercial and Industrial Development	Yes	
40	Agricultural Activities	Yes	
41	Reshaping Existing Drainage Ditches	Yes	
42	Recreational Facilities	Yes	
43	Stormwater Management Facilities	Yes	
44	Mining Activities	Yes	
45	Repair of Uplands Damaged by Discrete Events	Yes	
46	Discharges in Ditches	Yes	
47	[Reserved]	--	--
48	Commercial Shellfish Aquaculture Activities	No	No such activities likely in Arizona.
49	Coal Remining Activities	No	Coal currently produced only on tribal lands, where USACE will retain permitting authority.

Nationwide Permit (NWP) Number	Covered Activity	Relevant in AZ?	Rationale for NWPs not considered potentially relevant
50	Underground Coal Mining Activities	No	Coal currently produced only on tribal lands, where USACE will retain permitting authority. Note: if coal likely to be produced off tribal lands, this permit may be relevant.
51	Land-Based Renewable Energy Generation Activities	Yes	
52	Water-Based Renewable Energy Generation Pilot Projects	Yes	
53	Removal of Low-Head Dams	Yes	
54	Living Shorelines	No	Applies only to coastal Waters and the Great Lakes.

Table A.2. Current USACE Los Angeles District Regional General Permits Considered Potentially Relevant to State-Run Section 404 Program in Arizona

RGP Number	Covered Activity	Rationale for Applicability
63	Emergency authorizations	Useful, though currently subject to strict criteria before it can be used.
70	Bioengineered bank stabilization activities	Potentially relevant, though apparently not used to date in Arizona.
81	Pima County maintenance and bank stabilization activities	Widely used in Pima County.
96	ADOT routine transportation activities	Widely used by ADOT statewide.

Appendix B - Summary of Enforcement Gap Investigation

Table B.1. Comparison of Existing ADEQ Enforcement Authority to Assumption Regulation Requirements for Enforcement Authority (40 C.F.R. § 233.41)

Note: Section 404 statutes are contained in Article 3.2 of Title 49, Chapter 2. Enforcement of Article 3.2 is via the existing provisions of Title 49, Chapter 2, Article 5 (A.R.S. § 49-261 et seq.)

EPA Requirement	Current ADEQ Authority	Comment
State must have the ability to restrain persons from engaging in unauthorized activity 40 C.F.R. § 233.41(a)(1).	ADEQ may issue compliance orders (A.R.S. § 49-261) or request a restraining order or injunction (A.R.S. § 49-262).	Existing authority adequate.
State must have the ability to sue to enjoin any threatened or continuing violation of any program requirement 40 C.F.R. § 233.41(a)(2).	ADEQ may seek a restraining order or injunction for (<i>inter alia</i>) violations of any provision of Article 3.2, any rule issued under Article 3.2, or the condition of a permit issued pursuant to Article 3.2 (A.R.S. § 49-262(A)).	Existing authority adequate.
State must have the ability to assess or sue to recover civil penalties in an amount of at least \$5000 per day for unpermitted discharges or discharges in violation of a permit 40 C.F.R. § 233.41(a)(3)(i).	ADEQ may seek civil penalties of up to \$25,000 per day per violation for violations of Article 3.2 or a rule or permit issued under Article 3.2.	Existing authority adequate.
State must have the ability to seek criminal fines of at least \$10,000 per day for willful or criminally negligent discharges that occur without a permit or in violation of a permit condition	a. Knowing or reckless (which presumably encompass “willful”) discharges without a permit or in violation of a discharge limitation contained in a permit are subject to criminal enforcement. A.R.S. § 49-	Existing authority adequate except possibly for criminally negligent violations committed by individuals (not enterprises). Such violations appear to be subject to fines under state law of only \$2,500 per day,

EPA Requirement	Current ADEQ Authority	Comment
<p>40 C.F.R. § 233.41(a)(3)(ii).</p>	<p>263.01(A). A knowing violation is a Class 5 felony, and a reckless violation is a Class 6 felony. A.R.S. § 49-263.01(B)-(C).</p> <p>For individuals, both classes of felonies are subject to fines of up to \$150,000. A.R.S. § 13-801. For enterprises (corporations or other legal entities), fines for felonies may be up to \$1,000,000. A.R.S. § 13-803</p> <p>b. Each day of violation may be charged as a separate offense. A.R.S. § 49-263.01(H)</p> <p>b. Criminally negligent violations of permit conditions or limitations imposed under Article 3.2 are also subject to criminal enforcement. Such a violation is classified as a Class 1 misdemeanor. A.R.S. § 49-263.01(D).</p> <p>For individuals, the fine for a Class 1 misdemeanor is up to \$2,500. A.R.S. § 13-802(A). For enterprises (corporations or other legal entities), the fine for a Class 1 misdemeanor is up to \$20,000. A.R.S. § 13-803(2). Each day of violation may be charged as a separate offense. A.R.S. § 49-263.01(H).</p>	<p>which is less than the \$10,000 per day called for in the assumption regulations.</p> <p>Note: this same apparent shortfall did not stop the State from assuming the AZPDES program, despite a similar requirement in the NPDES assumption regulations requiring a minimum of \$10,000 per day criminal negligence fine authority (40 CFR § 123.27(a)(3)(ii)).</p> <p>Also of note: the Section 404 assumption regulations allow EPA to approve a program with less than the requisite penalty amounts if EPA determines that the State has an alternative, demonstrably effective method of ensuring compliance. 40 C.F.R. § 230.41(d).</p>

EPA Requirement	Current ADEQ Authority	Comment
<p>State must have the ability to seek criminal fines of at least \$5,000 per violation for (1) knowingly making false statements, representations or certifications in an application or other required document, or (2) falsifying, tampering with or knowingly rendering inaccurate a monitoring device or method required under a permit 40 C.F.R. § 233.41(a)(3)(iii).</p>	<p>In any matter related to the business conducted by any state agency, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony. A.R.S. § 13-2311(A).</p> <p>A.R.S. § 49-263.01(A)(4) specifically authorizes criminal enforcement for altering, modifying or destroying any monitoring device, sampling method, analytical method or test result required in a permit issued under (inter alia) Article 3.2 in order to render the device or method inaccurate. A knowing violation is classified as a Class 6 felony (A.R.S. § 49-263.01(C).</p> <p>As noted above, a felony carries a potential criminal fine of up to \$150,000 for individuals or \$1,000,000 for enterprises. A.R.S. § 13-803.</p>	<p>Existing authority adequate.</p>
<p>State must have the ability to impose maximum civil and criminal fines for each</p>	<p>As noted above, civil and criminal penalties may be imposed up to the maximum</p>	<p>Existing authority adequate.</p>

EPA Requirement	Current ADEQ Authority	Comment
<p>violation, and to seek the maximum per each day of violation for continuous violations 40 C.F.R. § 233.41(b)(1).</p>	<p>amount, and can be imposed on a per day basis. A.R.S. §§ 49-262(C) (civil penalty may be imposed up to \$25,000 “per day per violation”) & 49-263.01(H) (each day of criminal violation constitutes a separate offense).</p>	
<p>The burden of proof and degree of knowledge and intent required for the State to prove violations under state law must be no greater than that required of EPA when pursuing violations under the Clean Water Act 40 C.F.R. § 233.41(b)(2).</p>	<p>Noting in the Title 49, Chapter 2, Article 5, or in the state criminal statutes, appears to make it more difficult for the state to prove violations than it is for EPA to do so.</p>	<p>Existing authority adequate. The NPDES assumption regulations contain a similar requirement (40 C.F.R. § 123.27(b)(2)), and the same state enforcement provisions that will apply to the Section 404 program were deemed consistent with this requirement.</p>
<p>Civil penalties assessed shall be “appropriate to the violation” 40 C.F.R. § 233.41(b)(3).</p>	<p>Civil penalty statute sets out equitable factors for court to consider in assessing civil penalties. A.R.S. § 49-262(H).</p>	<p>Existing authority adequate. The same statute that will apply to Section 404 violations (A.R.S. § 49-262(H)) also applies to determination of civil penalties under the AZPDES program, and was deemed adequate to satisfy a similar requirement in the NPDES assumption regulations (40 C.F.R. § 123.27(c)).</p>
<p>States must allow public participation in enforcement by providing either:</p>	<p>Rule 24(a)-(b) of the Arizona Rules of Civil Procedure allows for intervention of right or permissive intervention by third parties in civil actions, including actions by ADEQ</p>	<p>Existing authority adequate. The same criteria found in 40 C.F.R. § 233.41(e) regarding public participation in</p>

EPA Requirement	Current ADEQ Authority	Comment
<p>a. intervention of right in any administrative or civil action by a citizen having an interest that is or may be adversely affected; or</p> <p>b. assurance that the state will: 1. provide written responses to citizen complaints; 2. not oppose intervention when permissive intervention is allowed; and 3. publish notice and allow comment for at least 30 days on proposed settlements of state enforcement actions 40 C.F.R. § 233.41(e).</p>	<p>seeking civil penalties under A.R.S. § 49-262(C).</p>	<p>civil enforcement actions are also part of the NPDES assumption rules (40 C.F.R. § 123.27(d)). At the time of state assumption of the NPDES program, EPA agreed that the Arizona Rules of Civil Procedure provided for public participation sufficient to meet public participation criterion 1 (intervention).</p> <p>Note: when assuming the NPDES program, ADEQ assured EPA that it would not oppose citizen intervention on the grounds that the citizen's interest was adequately represented by the state. A similar assurance may be required if the state assumes the Section 404 program.</p>

Appendix C - USACE Combined 404(b)(1) Evaluation/EA/Public Interest Review/Statement of Findings Template

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application

This document constitutes the Environmental Assessment, 404(b)(1) Guidelines Evaluation, as applicable, Public Interest Review, and Statement of Findings for the subject application.

1.0 Introduction and Overview: Information about the proposal subject to one or more of the Corps' regulatory authorities is provided in Section 1, detailed evaluation of the activity is found in Sections 2 through 11 and findings are documented in Section 12 of this memorandum. Further, summary information about the activity including administrative history of actions taken during project evaluation is attached (ORM2 Summary) and incorporated in this memorandum.

1.1 Applicant: *Describe here*

1.2 Activity location: *Describe here*

1.3 Description of activity requiring permit: *Describe here*

1.3.1 Proposed avoidance and minimization measures: *Describe here*

1.3.2 Proposed compensatory mitigation: *Describe here*

1.4 Existing conditions and any applicable project history: *Describe here*

1.5 Permit Authority: *Select permitting authority.*

2.0 Scope of review for National Environmental Policy Act (i.e. scope of analysis), Section 7 of the Endangered Species Act (i.e. action area), and Section 106 of the National Historic Preservation Act (i.e. permit area)

2.1 Determination of scope of analysis for National Environmental Policy Act (NEPA):

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

The scope of analysis includes the specific activity requiring a Department of the Army permit. Other portions of the entire project: *Select appropriate choice* included because the Corps *Select appropriate choice* have sufficient control and responsibility to warrant federal review.

Final description of scope of analysis: *Describe here*

- 2.2 Determination of the “action area” for Section 7 of the Endangered Species Act (ESA):

Description of ESA scope with rationale here.

- 2.3 Determination of permit area for Section 106 of the National Historic Preservation Act (NHPA):

The permit area includes *Select first option if the permit area includes uplands in addition to waters, and the second option if the permit area includes only waters* those areas comprising waters of the United States that will be directly affected by the proposed work or structures *Select first option if the permit area includes uplands, and the second option if the permit area includes only waters*

Final description of the permit area: *Final description of permit area with rationale here. Include in the rationale the specific upland areas that are determined to be included or excluded from the permit area.*

3.0 Purpose and Need

- 3.1 Purpose and need for the project as provided by the applicant and reviewed by the Corps: *Describe here.*

- 3.2 Basic project purpose, as determined by the Corps: *Select N/A or basic purpose here.*

- 3.3 Water dependency determination: *Select correct choice. If choice is either, not water dependent or water dependent please explain in further detail.*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

3.4 Overall project purpose, as determined by the Corps: *Describe here.*

4.0 Coordination

4.1 The results of coordinating the proposal on Public Notice (PN) are identified below, including a summary of issues raised, any applicant response and the Corps' evaluation of concerns.

Were comments received in response to the PN? *Select Yes or No*

Were comments forwarded to the applicant for response? *Select Yes, No or N/A*

Was a public meeting and/or hearing requested and, if so, was one conducted? *Select appropriate response Provide additional description/rationale here as needed.*

Comments received in response to public notice:

Comment 1:

Agency/Person providing comment Summarize comment here.

Applicant's Response: *Select N/A or provide applicant's response as appropriate.*

Corps Evaluation: *Summarize Corps evaluation here.*

Comment 2: *Agency/Person providing comment Summarize comment here.*

Applicant's Response: *Select N/A or provide applicant's response as appropriate.*

Corps Evaluation: *Summarize Corps evaluation here.*

Additional discussion of submitted comments, applicant response and/or Corps' evaluation: *Select N/A or provide discussion as appropriate.*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

4.2 Were additional issues raised by the Corps including any as a result of coordination with other Corps offices? *Select Yes or No*

If yes, provide discussion including coordination of concerns with the applicant, applicant's response and Corps' evaluation of the response: *Select N/A or provide discussion as appropriate.*

4.3 Were comments raised that do not require further discussion because they address activities and/or effects outside of the Corps' purview? *Select Yes or No*

If yes, provide discussion: *Select N/A or provide discussion as appropriate.*

5.0 Alternatives Analysis (33 CFR Part 325 Appendix B(7), 40 CFR 230.5(c) and 40 CFR 1502.14). An evaluation of alternatives is required under NEPA for all jurisdictional activities. An evaluation of alternatives is required under the Section 404(b) (1) Guidelines for projects that include the discharge of dredged or fill material. NEPA requires discussion of a reasonable range of alternatives, including the no action alternative, and the effects of those alternatives; under the Guidelines, practicability of alternatives is taken into consideration and no alternative may be permitted if there is a less environmentally damaging practicable alternative.

5.1 Site selection/screening criteria: In order to be practicable, an alternative must be available, achieve the overall project purpose (as defined by the Corps), and be feasible when considering cost, logistics and existing technology.

Criteria for evaluating alternatives as evaluated and determined by the Corps: *Describe evaluation criteria here.*

5.2 Description of alternatives

5.2.1 No action alternative: *Description of No Action alternative*

5.2.2 Off-site alternatives

Off-site alternative 1: *Description of off-site alternative 1*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

Off-site alternative 2: *Description of off-site alternative 2*

5.2.3 On-site alternatives

On-site alternative 1 (applicant's preferred alternative): *Description of on-site alternative 1*

On-site alternative 2: *Description of on-site alternative 2*

5.3 Evaluate alternatives and whether or not each is practicable under the Guidelines or reasonable under NEPA *Provide appropriate discussion here.*

5.4 Least environmentally damaging practicable alternative under the 404(b)(1) Guidelines (if applicable) and the environmentally preferable alternative under NEPA:

Identify the least damaging/environmentally preferred alternative. If more than one alternative is practicable based on the analysis above, include discussion of environmental effects of each and rationale for selecting the least damaging one.

6.0 Evaluation for Compliance with the Section 404(b)(1) Guidelines. *Select appropriate choice.*

6.1 Practicable alternatives to the proposed discharge consistent with 40 CFR 230.5(c) are evaluated in Section 5. The statements below summarize the analysis of alternatives.

In summary, based on the analysis in Section 5.0 above, the no-action alternative, which would not involve discharge into waters, is not practicable.

For those projects that would discharge into a special aquatic site and are not water dependent, the applicant has demonstrated there are no practicable alternatives that do not involve special aquatic sites.

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

It has been determined that there are no alternatives to the proposed discharge that would be less environmentally damaging. (Subpart B, 40 CFR 230.10(a)). *Select appropriate response.*

6.2 Candidate disposal site delineation (Subpart B, 40 CFR 230.11(f)). Each disposal site shall be specified through the application of these Guidelines:

Discussion: *Provide appropriate discussion here.*

6.3 Potential impacts on physical and chemical characteristics of the aquatic ecosystem (Subpart C 40 CFR 230.20). See Table 1:

Table 1 – Potential Impacts on Physical and Chemical Characteristics						
Physical and Chemical Characteristics	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Substrate						
Suspended particulates/ turbidity						
Water						
Current patterns and water circulation						
Normal water fluctuations						
Salinity gradients						

Discussion: *Provide discussion of the above factors as appropriate.*

6.4 Potential impacts on the living communities or human uses (Subparts D, E and F):

6.4.1 Potential impacts on the biological characteristics of the aquatic ecosystem (Subpart D 40 CFR 230.30). See Table 2:

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

Table 2 – Potential Impacts on Biological Characteristics						
Biological characteristics	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Threatened and endangered species						
Fish, crustaceans, mollusk, and other aquatic organisms						
Other wildlife						

Discussion: *Provide discussion of the above factors as appropriate.*

6.4.2 Potential impacts on special aquatic sites (Subpart E 40 CFR 230.40). See Table 3:

Table 3 – Potential Impacts on Special Aquatic Sites						
Special Aquatic Sites	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Sanctuaries and refuges						
Wetlands						
Mud flats						
Vegetated shallows						
Coral reefs						

Discussion: *Provide discussion of the above factors as appropriate*

6.4.3 Potential impacts on human use characteristics (Subpart F 40 CFR 230.50). See Table 4:

Table 4 – Potential Impacts on Human Use Characteristics						
Human Use Characteristics	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Municipal and private water supplies						
Recreational and commercial fisheries						
Water-related recreation						
Aesthetics						
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar preserves						

Discussion: *Provide discussion of the above factors as appropriate*

6.5 Pre-testing evaluation (Subpart G, 40 CFR 230.60):

The following has been considered in evaluating the biological availability of possible contaminants in dredged or fill material. See Table 5:

Table 5 – Possible Contaminants in Dredged/Fill Material	
Physical characteristics	
Hydrography in relation to known or anticipated sources of contaminants	
Results from previous testing of the material or similar material in the vicinity of the project	
Known, significant sources of persistent pesticides from land runoff or percolation	
Spill records for petroleum products or designated (Section 331 of CWA) hazardous substances	
Other public records or significant introduction of contaminants from industries, municipalities, or other sources	
Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities	

Discussion: *Provide discussion of the above factors as appropriate*

It has been determined that testing *Select* required because *Select*

6.6 Evaluation and testing (Subpart G, 40 CFR 230-61):

Discussion: *Provide discussion of the above factors in Table 5 as appropriate*

6.7 Actions to minimize adverse impacts (Subpart H). The following actions, as appropriate, have been taken through application of 40 CFR 230.70-230.77 to ensure minimal adverse effects of the proposed discharge. See Table 6:

Table 6 – Actions to Ensure Adverse Effects are Minimized	
Actions concerning the location of the discharge	
Actions concerning the material to be discharged	
Actions controlling the material after discharge	
Actions affecting the method of dispersion	
Actions affecting plant and animal populations	
Actions affecting human use	

Discussion: *Provide discussion of the above factors as appropriate.*

6.8 Factual Determinations (Subpart B, 40 CFR 230.11). The following determinations are made based on the applicable information above, including actions to minimize effects and consideration for contaminants. See Table 7:

Table 7 – Factual Determinations of Potential Impacts						
Site	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Physical substrate						
Water circulation, fluctuation and salinity						
Suspended particulates/turbidity						

Table 7 – Factual Determinations of Potential Impacts						
Site	N/A	No Effect	Negligible Effect	Minor Effect (Short Term)	Minor Effect (Long Term)	Major Effect
Contaminants						
Aquatic ecosystem and organisms						
Proposed disposal site						
Cumulative effects on the aquatic ecosystem						
Secondary effects on the aquatic ecosystem						

Discussion: *Provide discussion of the above factors as appropriate*

6.9 Findings of compliance or non-compliance with the restrictions on discharges (40 CFR 230.10(a-d) and 230.12). Based on the information above, including the factual determinations, the proposed discharge has been evaluated to determine whether any of the restrictions on discharge would occur. See Table 8:

Table 8 – Compliance with Restrictions on Discharge		
Subject	Yes	No
1. Is there a practicable alternative to the proposed discharge that would be less damaging to the environment (any alternative with less aquatic resource effects, or an alternative with more aquatic resource effects that avoids other significant adverse environmental consequences?)		
2. Will the discharge cause or contribute to violations of any applicable water quality standards?		
3. Will the discharge violate any toxic effluent standards (under Section 307 of the Act)?		
4. Will the discharge jeopardize the continued existence of endangered or threatened species or their critical habitat?		
5. Will the discharge violate standards set by the Department of Commerce to protect marine sanctuaries?		
6. Will the discharge cause or contribute to significant degradation of waters of the U.S.?		

Table 8 – Compliance with Restrictions on Discharge		
Subject	Yes	No
7. Have all appropriate and practicable steps (Subpart H, 40 CFR 230.70) been taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem?		

Discussion: *Provide discussion of the above factors as appropriate*

7.0 General Public Interest Review (33 CFR 320.4 and RGL 84-09)

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest as stated at 33 CFR 320.4(a). To the extent appropriate, the public interest review below also includes consideration of additional policies as described in 33 CFR 320.4(b) through (r). The benefits which reasonably may be expected to accrue from the proposal are balanced against its reasonably foreseeable detriments.

7.1 All public interest factors have been reviewed and those that are relevant to the proposal are considered and discussed in additional detail. See Table 9 and any discussion that follows.

Table 9: Public Interest Factors	Effects					
	None	Detrimental	Neutral (mitigated)	Negligible	Beneficial	Not Applicable
1. Conservation: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
2. Economics: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
3. Aesthetics: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
4. General Environmental Concerns: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
5. Wetlands: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						

Table 9: Public Interest Factors	Effects					
	None	Detrimental	Neutral (mitigated)	Negligible	Beneficial	Not Applicable
6. Historic Properties: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
7. Fish and Wildlife Values: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
8. Flood Hazards: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
9. Floodplain Values: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
10. Land Use: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
11. Navigation: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
12. Shoreline Erosion and Accretion: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
13. Recreation: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
14. Water Supply and Conservation: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
15. Water Quality: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
16. Energy Needs: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
17. Safety: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
18. Food and Fiber Production: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
19. Mineral Needs: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						
20. Consideration of Property Ownership: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						

Table 9: Public Interest Factors	Effects					
	None	Detrimental	Neutral (mitigated)	Negligible	Beneficial	Not Applicable
21. Needs and Welfare of the People: <i>Select option, enter discussion here or delete if explanation is not warranted.</i>						

Additional discussion of effects on factors above: *Select N/A or describe the above factors as appropriate.*

7.1.1 Climate Change. The proposed activities within the Corps federal control and responsibility likely will result in a negligible release of greenhouse gases into the atmosphere when compared to global greenhouse gas emissions. Greenhouse gas emissions have been shown to contribute to climate change. Aquatic resources can be sources and/or sinks of greenhouse gases. For instance, some aquatic resources sequester carbon dioxide whereas others release methane; therefore, authorized impacts to aquatic resources can result in either an increase or decrease in atmospheric greenhouse gas. These impacts are considered de minimis [If Compensatory Mitigation is Required ADD “and are negated through compensatory mitigation” otherwise delete]. Greenhouse gas emissions associated with the Corps’ federal action may also occur from the combustion of fossil fuels associated with the operation of construction equipment, increases in traffic, etc. The Corps has no authority to regulate emissions that result from the combustion of fossil fuels. These are subject to federal regulations under the Clean Air Act and/or the Corporate Average Fuel Economy (CAFE) Program. Greenhouse gas emissions from the Corps action have been weighed against national goals of energy independence, national security, and economic development and determined not contrary to the public interest. [ADD, if determined appropriate, otherwise delete: *The applicant voluntarily provided the Corps with an analysis of greenhouse gas emissions that they produced for other local, state, and/or federal requirements, entitled [INSERT NAME], dated [Insert DATE]. The portions of that document pertaining to the actions within the Corps federal control and responsibility are incorporated by reference.*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

7.2 The relative extent of the public and private need for the proposed structure or work:

Describe here

7.3 If there are unresolved conflicts as to resource use, explain how the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work was considered.

Discussion: *Select option or provide discussion as appropriate.*

7.4 The extent and permanence of the beneficial and/or detrimental effects that the proposed work is likely to have on the public and private use to which the area is suited:

Detrimental effects are expected to be *Select the appropriate determination.*

Beneficial effects are expected to be *Select the appropriate determination.*

Provide rationale here as needed to support the determinations above.

8.0 Mitigation(33 CFR 320.4(r), 33 CFR Part 332, 40 CFR 230.70-77, 40 CFR 1508.20 and 40 CFR 1502.14)

8.1 Avoidance and Minimization: When evaluating a proposal including regulated activities in waters of the United States, consideration must be given to avoiding and minimizing effects to those waters. Avoidance and minimization measures are described above in Sections 1 and 3.

Were any other mitigative actions including project modifications discussed with the applicant implemented to minimize adverse project impacts? (see 33 CFR 320.4(r)(1)(i)) *Select Yes or No*

Describe here.

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

8.2 Is compensatory mitigation required to offset environmental losses resulting from proposed unavoidable impacts to waters of the United States? *Select Yes or No*

Provide rationale: *Describe here*

8.3 Type and location of compensatory mitigation

8.3.1 Is the impact in the service area of an approved mitigation bank? *Select Yes or No*

If yes, does the mitigation bank have appropriate number and resource type of credits available? *Select Yes, No, or N/A*

8.3.2 Is the impact in the service area of an approved in-lieu fee program? *Select Yes or No*

If yes, does the in-lieu fee program have the appropriate number and resource type of credits available? *Select Yes, No, or N/A*

8.3.3 Selected compensatory mitigation type/location(s). See Table 10:

Mitigation bank credits	
In-lieu fee program credits	
Permittee-responsible mitigation under a watershed approach	
Permittee-responsible mitigation, on-site and in-kind	
Permittee-responsible mitigation, off-site and/or out of kind	

8.3.4 Does the selected compensatory mitigation option deviate from the order of the options presented in §332.3(b)(2)-(6)? *Select Yes, No, or N/A*

If yes, provide rationale for the deviation, including the likelihood for ecological success and sustainability, location of the compensation site relative to the impact site and their significance within the watershed, and/or the costs of the compensatory mitigation project (see 33 CFR §332.3(a)(1)): *Select N/A or provide rationale here*

8.4 Amount of compensatory mitigation: *Enter amount here*

Rationale for required compensatory mitigation amount: *Provide discussion here*

- 8.5 For permittee responsible mitigation identified in 9.3.3 above, the final mitigation plan must include the items described in 33 CFR 332.4(c)(2) through (c)(14) at a level of detail commensurate with the scale and scope of the impacts. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in (c)(2) through (c)(14) as permit conditions, instead of components of a compensatory mitigation plan. Presence of sufficient information related to each of these requirements in the applicant’s mitigation plan is indicated by “Yes” in Table 11. “No” indicates absence or insufficient information in the plan, in which case, additional rationale must be provided below on how these requirements will be addressed through special conditions or why a special condition is not required:

Table 11 – Permittee-Responsible Mitigation Plan Requirements		
Requirement	Yes	No
Objectives		
Site selection		
Site protection instrument		
Baseline information		
Determination of credits		
Mitigation work plan		
Maintenance plan		
Performance standards		
Monitoring requirements		
Long-term management plan		
Adaptive management plan		
Financial assurances		
Other		

For any “No”, provide rationale on how the subject component(s) of the compensatory mitigation plan will be addressed as special conditions or why no special conditions are required: *Provide discussion here*

9.0 Consideration of Cumulative Impacts

(40 CFR 230.11(g) and 40 CFR 1508.7, RGL 84-9) Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor direct and indirect but collectively significant actions taking place over a period of time. A

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

cumulative effects assessment should consider how the direct and indirect environmental effects caused by the proposed activity requiring DA authorization (i.e., the incremental impact of the action) contribute to cumulative effects, and whether that incremental contribution is significant or not. .

9.1 Identify/describe the direct and indirect effects caused by the proposed activity:

Describe here.

9.2 The geographic scope for the cumulative effects assessment is:

Describe here.

9.3 The temporal scope of this assessment covers: *Describe here.*

9.4 Describe the affected environment: *Describe here.*

9.5 Determine the environmental consequences: *Describe here.*

9.6 Discuss any mitigation to avoid, minimize or compensate for cumulative effects:

Provide discussion here.

9.7 Conclusions regarding cumulative impacts:

When considering the overall impacts that will result from the proposed activity, in relation to the overall impacts from past, present, and reasonably foreseeable future activities, the incremental contribution of the proposed activity to cumulative impacts in the area described in section 9.2, are not considered to be significant . Compensatory mitigation *Select will or will not* be required to help offset the impacts to eliminate or minimize the proposed activity's incremental contribution to cumulative effects within the geographic area described in Section 9.2. Mitigation required for the proposed activity is discussed in Section 8.0.

10.0 Compliance with Other Laws, Policies, and Requirements

10.1 **Section 7(a)(2) of the Endangered Species Act (ESA):** Refer to Section 2.2 for description of the Corps action area for Section 7.

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

10.1.1 Are there listed species or designated critical habitat present or in the vicinity of the Corps' action area? *Select appropriate option.*

Effect determination(s), including no effect, for all known species/habitat, and basis for determination(s): *Provide determination(s) and rationale.*

10.1.2 Has another federal agency been identified as the lead agency for complying with Section 7 of the ESA with the Corps designated as a cooperating agency and has that consultation been completed? *Select Yes or No.*

If yes, identify that agency, the actions taken to document compliance with Section 7 and whether those actions are sufficient to ensure the activity(s) requiring DA authorization is in compliance with Section 7 of the ESA:

If yes, identify agency and provide description here. Select appropriate conclusion.

10.1.3 Consultation with either the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service was initiated and completed as required, for any determinations other than "no effect" (see the attached ORM2 Summary sheet for begin date, end date and closure method of the consultation). *Provide additional discussion here as needed to describe consultation(s) with the Service(s)* Based on a review of the above information, the Corps has determined that it has fulfilled its responsibilities under Section 7(a)(2) of the ESA. The documentation of the consultation is incorporated by reference.

10.2 **Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Essential Fish Habitat (EFH).** *Select N/A if appropriate*

10.2.1 Did the proposed project require review under the Magnuson-Stevens Act? *Enter Yes or No, with discussion as needed*

10.2.2 If yes, EFH species or complexes considered: *Enter EFH species or complexes considered here*

Effect(s) determination and basis for that determination(s): *Provide determination(s) and rationale here.*

10.2.3 Has another federal agency been identified as the lead agency for complying with the EFH provisions of the Magnuson-Stevens Act with the Corps designated as a cooperating agency and has that consultation been completed? *Select Yes or No.*

If yes, identify the agency, the actions taken to document compliance with the Magnuson Stevens Act and whether those actions are sufficient to ensure the activity(s) requiring DA authorization is in compliance the EFH provisions.

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

Identify agency and provide description here Select appropriate conclusion.

10.2.4 Consultation with the National Marine Fisheries Service was initiated and completed as required (see the attached ORM2 Summary sheet for consultation type, begin date, end date and closure method of the consultation). *Enter additional discussion here as needed.* Based on a review of the above information, the Corps has determined that it has fulfilled its responsibilities under EFH provisions of the Magnuson-Stevens Act.

10.3 **Section 106 of the National Historic Preservation Act (Section 106):** Refer to Section 2.3 for permit area determination.

10.3.1 Known historic properties present? *Enter Yes or No and provide discussion as appropriate Select appropriate conclusion.*

Effect determination and basis for that determination: *Provide determination and rationale here.*

10.3.2 Has another federal agency been identified as the lead federal agency for complying with Section 106 of the National Historic Preservation Act with the Corps designated as a cooperating agency and has that consultation been completed? *Select Yes or No.*

If yes, identify that agency, and whether the undertaking they consulted on included the Corps undertaking(s). Briefly summarize actions taken by the lead federal agency.

Identify agency and provide description here . Select appropriate conclusion.

10.3.3 Consultation was initiated and completed with the appropriate agencies, tribes and/or other parties for any determinations other than “no potential to cause effects” (see the attached ORM2 Summary sheet for consultation type, begin date, end date and closure method of the consultation). *Provide additional discussion here as needed or delete if not needed.* Based on a review of the information above, the Corps has determined that it has fulfilled its responsibilities under Section 106 of the NHPA. Compliance documentation incorporated by reference.

10.4 **Tribal Trust Responsibilities**

10.4.1 Was government-to-government consultation conducted with Federally-recognized Tribe(s)? *Select Yes or No*

Provide a description of any consultation (s) conducted including results and how concerns were addressed. *Provide additional discussion here as needed or delete*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

if not needed The Corps has determined that it has fulfilled its tribal trust responsibilities.

10.4.2 Other Tribal including any discussion of Tribal Treaty rights? *Select N/A or provide discussion.*

10.5 **Section 401 of the Clean Water Act – Water Quality Certification (WQC)**

10.5.1 Is a Section 401 WQC required, and if so, has the certification been issued, waived or presumed? *Select appropriate option*

10.6 **Coastal Zone Management Act (CZMA)**

10.6.1 Is a CZMA consistency concurrence required, and if so, has the concurrence been issued, waived or presumed? *Select appropriate option*

10.7 **Wild and Scenic Rivers Act**

10.7.1 Is the project located in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system? *Select Yes or No.*

If yes, summarize coordination and the determination on whether activity will adversely affect the Wild and Scenic River designation or study status. *Enter additional discussion here as needed.* The Corps has determined that it has fulfilled its responsibilities under the Wild and Scenic Rivers Act.

10.8 **Effects on Corps Civil Works Projects (33 USC 408)**

10.8.1 Does the applicant also require permission under Section 14 of the Rivers and Harbors Act (33 USC 408) because the activity, in whole or in part, would alter, occupy or use a Corps Civil Works project? *Select appropriate option*

If yes, provide date that decision was made and whether permission was granted or denied : *Enter date received or delete this box if no 408 is required.*

Provide additional discussion here as needed or delete.

10.9 **Corps Wetland Policy (33 CFR 320.4(b))**

10.9.1 Does the project propose to impact wetlands? *Select Yes or No*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

10.9.2 Based on the public interest review herein, the beneficial effects of the project outweigh the detrimental impacts of the project.

10.10 **Other (as needed):** *Provide discussion here as needed.*

11.0 Special Conditions

11.1 Are special conditions required to protect the public interest, ensure effects are not significant and/or ensure compliance of the activity with any of the laws above?
Select Yes or No

If no, provide rationale: *Describe rationale*

11.2 Required special condition(s)

Special condition(s): *Enter specific condition(s)*

Rationale: *Enter rationale here*

12.0 Findings and Determinations

12.1 Section 176(c) of the Clean Air Act General Conformity Rule Review: The proposed permit action has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed de minimis levels of direct or indirect emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps' continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this permit action.

12.2 Presidential Executive Orders (EO):

12.2.1 EO 13175, Consultation with Indian Tribes, Alaska Natives, and Native Hawaiians:
Select response or provide discussion here

12.2.2 EO 11988, Floodplain Management: *Select response or provide discussion here*

12.2.3 EO 12898, Environmental Justice: *Select response or provide discussion here*

12.2.4 EO 13112, Invasive Species: *Select response or provide discussion here*

CE *Select District-District abbreviation (e.g. RD, O-R)* (File Number, *Select District ORM File Number*)

12.2.5 EO 13212 and EO 13302, Energy Supply and Availability: *Select response or provide discussion here*

12.3 Findings of No Significant Impact: Having reviewed the information provided by the applicant and all interested parties and an assessment of the environmental impacts, I find that this permit action will not have a significant impact on the quality of the human environment. Therefore, an environmental impact statement will not be required.

12.4 Compliance with the Section 404(b)(1) Guidelines: Having completed the evaluation above, I have determined that *Choose one of the following*

12.5 Public interest determination: Having reviewed and considered the information above, I find that the proposed project is not contrary to the public interest.

PREPARED BY:

Project Manager

Date: _____

REVIEWED BY:

Enter name of appropriate level reviewer

Date: _____

APPROVED BY:

Enter name of appropriate level approver

Date: _____

Appendix D - RGP 81 and RGP 96 Notification Forms

REGIONAL GENERAL PERMIT 81 NOTIFICATION

Routine Flood Control Maintenance

U. S. Army Corps of Engineers
 3636 N. Central Ave, Suite 900
 Phoenix, AZ 85012
 Ph. (602) 230-6950
 Fax (602) 640-2020
 Sallie.McGuire@usace.army.mil

Notification Type: Non-Notification Concurrence Notification Full Pre-Construction Notification

Permittee	Corps File Number <input style="width: 90%;" type="text"/>	Internal Agency Activity # (optional)	<input style="width: 90%;" type="text"/>
Agency	<input style="width: 90%;" type="text"/>	Contact Person	<input style="width: 90%;" type="text"/>
Address	<input style="width: 90%;" type="text"/>	Phone Number	<input style="width: 90%;" type="text"/>
Authorized Representative	<input style="width: 90%;" type="text"/>	Submittal Date	<input style="width: 90%;" type="text"/>
		End Review Date	<input style="width: 90%;" type="text"/>

Project Location Lat: Long: Township: Range: Section:

Primary Street: <input style="width: 90%;" type="text"/>	Channel/Facility Name <input style="width: 90%;" type="text"/>	ID # <input style="width: 90%;" type="text"/>	Q100 cfs <input style="width: 90%;" type="text"/>
Secondary Street: <input style="width: 90%;" type="text"/>	Channel Type <input style="width: 90%;" type="text"/>	Length <input style="width: 90%;" type="text"/>	Width <input style="width: 90%;" type="text"/>

Maintenance Activity	<input type="checkbox"/> Sediment Removal (Category 1)	<input type="checkbox"/> Stream Bed Stabilization (Category 2)	<input type="checkbox"/> Bank Stabilization (Category 3)	<input type="checkbox"/> Channel Reshaping (Category 4)
	<input type="checkbox"/> Stormwater Facilities (Category 5)	<input type="checkbox"/> Emergency Activities (Category 6)		

General description of work: (Include purpose, work description, disposal area, materials, etc.)

Equipment Backhoe Dump Truck Excavator Loader Grader Hand tools Other

Duration of Work	Est. Start/End Date	<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>	
Impact to WUS?	Permanent		Temporary	
	<input type="checkbox"/> Yes <input type="checkbox"/> No	Acres	Linear Feet	Acres Linear Feet
Channel Bottom				
Channel Bank				
Total				

Riparian Classification

Riparian Disturbance Area in acres (if applicable)

Type of Discharge Material (list all)	Volume (cy)
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>

<input type="checkbox"/> U. S. Fish and Wildlife Review http://www.azgfd.gov/hgis/	MSCP Section 10 Eligible?	Section 7 Review Required?	
	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	
<input type="checkbox"/> Cultural Resource Review	Survey Required?	Consultation Required?	
	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A	

Total

Supporting Documentation

<input type="checkbox"/> Map(s) (Aerial or USGS Quad)	<input type="checkbox"/> Cross Section Drawing(s)
<input type="checkbox"/> Plan View Drawing(s) (to scale)	<input type="checkbox"/> Site Photos <input type="checkbox"/> Reports

Concurrence Notification Form For ADOT Regional General Permit 96

1. Date Submitted (by ADOT):	2. Date Approved (by Corps):
3. Corps File Number:	4. ADOT Project Number (Tracs or MWO):
5. Applicant Info.	6. Agent Info. (if different from Applicant)
a. Name:	a. Name:
b. Address:	b. Address:
c. Email:	c. Email:
d. Phone Number:	d. Phone Number:
7. Project Name:	8. Project Location:
9. Name of Waterbody:	10. Center Latitude/Longitude in DD NAD83:
11. Type of Waterbody (perennial, ephemeral, wetland, etc):	12. Is the project within 1 mile of an Outstanding, Impaired, or Not-Attaining Water?
13. Directions to the Site:	14. Township, Range, Section:
15. Project Purpose and Description of Existing features/Facility/Fill:	
16. General Description of Work, including plans to divert water/dewater (If bank stabilization project, describe whether method is permeable or impermeable and include both linear footage and average cubic yards per linear footage in boxes 19 and 20 below.):	
17. Estimated Start Date:	18. Estimated End Date:
19. Amount (cubic yards), Description, and Location of Material being Discharged:	
20. Surface Area in Acres (or linear feet if applicable) of Wetlands or Waters being filled (Include both temporary and permanent impacts):	

21. Describe Avoidance, Minimization, and Compensation (include description of any post-construction site restoration/revegetation):

22. Endangered Species Act Compliance:

23. Cultural Resource Review:

24. 401 Certification Type:

25. List attachments (examples: biology document, 401 certification, cultural document, vicinity map, plans/drawings, impact calculations and/or figures, site photos, etc)

Applicant Signature

Date

Submit Form to:

Jesse Rice
Regulatory Project Manager
U.S. Army Corps of Engineers
Los Angeles District
Regulatory Division, Arizona Branch
3636 N. Central Avenue Suite 900
Phoenix, AZ 85012-1939
602-230-6854
Jesse.M.Rice@usace.army.mil

Save a copy of the completed form in the project file.