

July 13, 2018

Arizona Department of Environmental Quality  
1110 West Washington Street, Suite 127  
Phoenix, Arizona 85007

Dear Mr. Baggione, Ms. Cross, Mr. Koester, Ms. Osterberg and Ms. Welborn:

As stakeholders in land and water management in Arizona and participants in the initial 404 primacy assumption meetings, we offer the following comments regarding our concerns about a state-led Clean Water Act Section 404 permitting system generally and the assumption process up to this point.

First and foremost, inadequate deliberation was given to the question of whether the Arizona Department of Environmental Quality (ADEQ) should assume primacy for this important Clean Water Act program. While a 2018 bill signed into law enables ADEQ to assume primacy, it does not compel it. Since the legislature did compel action in other similar bills (see SB1494) but in this case chose not to, one can surmise that exploration by ADEQ of whether primacy is in the best interest of the state or not was expected and the reason the bill was written to not require assumption.

ADEQ staff has explained that this process allows deliberation to occur because if any insurmountable obstacle is discovered in the technical working groups, the process may be halted. However, the working groups have not been directed to consider whether assumption should occur, but rather to develop blueprints for how it should occur. ADEQ staff has also stated that they are entering into this process with the assumption that the state *will be* moving forward with primacy. This is not conducive to gathering public input regarding whether ADEQ should assume primacy. Because of the concerns we outline below, we maintain that the 404 program should continue to reside with the Army Corps of Engineers.

### **Cost and Funding of the 404 Permit Program**

A primary concern that has been voiced by a diversity of stakeholders across the board at meetings in Phoenix and in Tucson is that state primacy of dredge and fill permits will come at a high price. Virginia's Department of Environmental Quality, weighing whether to pursue primacy, found that assumption would cost the state \$18 million over the first five years, and \$3.4 million annually thereafter. ADEQ staff have indicated a \$2 million annual cost for the program. The public, deliberative process that should occur surrounding whether ADEQ should assume primacy should include an in-depth look at the economics of the decision, including the immediate costs of program development and implementation as well as the perpetual costs of overseeing the program, liabilities associated with this authority, investigation costs for reports of unauthorized activity, enforcement actions, and maintenance of mitigation projects and properties.

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

Managers states that “states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program.” While states can get Environmental Protection Agency (EPA) funds to support the “development of state wetland regulatory programs,” the primary costs are in the program’s administration. Michigan’s 404 program, though “broadly supported,” faced opposition due to its cost during “challenging economic conditions.” In 2009, the program was nearly handed back to the federal government due to cost concerns. We have the opportunity to learn from the experiences of other states, and should view assumption of these costs with extreme caution, rather than proceeding with an intention to move forward before even finding out what the price tag will be.

Of grave concern is the possible outcome that because ADEQ intends to fund the program through permitting fees, the agency will become motivated to quickly issue permits that would otherwise require careful consideration. If the state elects to assume primacy and the costs that come with it, a dedicated funding source must be developed so that the state is not incentivized to issue permits for the wrong reasons and so there is funding for program staff during times when fewer permits are requested, such as economic downturns. And as a business representative observed in the course of the first meeting in Tucson, there will inevitably be litigation and the state will have to meet those costs.

#### **Lack of State Expertise Regarding 404 Program**

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

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

#### **Lack of State Environmental Assessment Program**

If ADEQ assumes responsibility for the 404 permit program, there will be no implementation of the National Environmental Policy Act (NEPA) for major projects that now require 404 permits, and the state has no comparable environmental impact assessment law. Without NEPA, the public is robbed of an opportunity to review and analyze comprehensive information about the environmental and related economic and social impacts of a proposed action and to advocate for

their communities and for the environment. ADEQ representatives stated at the Tucson meeting that the 404(b)(1) guidelines would be the equivalent of NEPA and suggested that somehow ESA and NEPA were part of the same law. Neither statement is accurate. As the Arizona Department of Transportation states in a current comment period they are running on assumption of NEPA, Arizona does not have an environmental review law (or its equivalent). The state legislature needs to pass a law that provides for an environmental impact assessment for state actions, complete with robust public involvement, prior to assuming responsibility for the Section 404 permit program.

### **Protection of Endangered Species and Cultural Resources**

We are additionally concerned that endangered species and cultural resources will not receive the protections that they do under a federal program. A state assuming primacy must work to implement alternative means of coordination with “other federal resource programs.” If permits will be administered under state law, rather than federal law, the state must develop “alternative mechanisms” to “ensure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs.” (Clean Water Act, Section 404) Even if a state-led program develops guidelines or procedures that are modelled after the protections of NEPA, the National Historic Preservation Act, and the Endangered Species Act (ESA), policies and even rules may not offer the equivalent legal protections of a federal law. Federal agencies also have mandates to coordinate with one another, so to retain the benefits of collaboration, a state assuming primacy must work to implement alternative means of coordination with other federal resource programs. If primacy is to be assumed, ADEQ must find ways to protect ecosystems and endangered species to the same degree afforded by Section 7(a)(2) of the ESA. Oregon recently approached this requirement by developing a memorandum of agreement with the US Fish and Wildlife Service (USFWS) whereby the Service would still be part of the state decision-making process. It is critical to involve USFWS in these decisions as in the Oregon example. Regarding cultural resources, coordination will be critical. Currently, ADEQ appears to do little coordination on permitting with the State Historic Preservation Office (SHPO) and is likely to do the same with this permit program. This will put cultural resources further at risk. Coordination with SHPO must be increased and formalized.

### **Case Law relating to 404 Permits**

There are nuances on issues around 404 regulation that have been established and/or settled in the federal courts. Changing this regulatory framework at the state level invites the possibility that some of these legal issues could be reopened in a new wave of litigation. This is something that ADEQ should consider in the context of eventual program costs.

### **General Concerns about Technical Work Groups and Meetings to Date**

Regarding the stakeholder meetings in Phoenix and Tucson and the technical workgroups for which you are currently accepting applications, we are concerned that the broader public has no opportunity to engage in this process. Meetings have been held during regular work hours and the technical workgroups that are being formed are exclusionary. By the time this process reaches rulemaking, products will have been developed that would be difficult for members of the public that have been excluded up to that point to influence.

Further, the time frames around this process are aggressive and unrealistic; there has been a lack of proper notice for the meetings or outreach to the public (even to attendees at previous meetings who signed up on the information list but received no information); the representation of comments made at previous meetings is inadequate and distorted; there is a stated goal to achieve a misguided, false “balance” on work groups that actually diminishes public input and works to the advantage of industry/development professionals; there is an appearance that this process will be driven by politics and not science, law, or good public policy; and there is an oversimplification of the process reflected in the choice of work group subject/issue areas.

### Summary

In summary, state assumption of the 404 program would be long, arduous, costly and unlikely to achieve the protections of the federal program. Some of us will continue to participate in this process with an interest in seeing the state decide to allow the program to remain with the Army Corps of Engineers and to instead focus on improving the state’s current programs. Since **SB1493 makes it optional for ADEQ to pursue control of the Section 404 permit program (ARS § 49-203 (B) 9)**, stating that the director **may** “ADOPT BY RULE A PERMIT PROGRAM FOR THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO NAVIGABLE WATERS FOR PURPOSES OF IMPLEMENTING THE PERMIT PROGRAM ESTABLISHED BY 33 UNITED STATES CODE SECTION 1344,” ADEQ should start by working with the Army Corps to determine which waters in Arizona are subject to state assumption, and then prepare a detailed feasibility analysis with expected staffing and budget figures, present this analysis to the public, and solicit comments about the advisability of proceeding, *before* moving ahead with developing plans for implementation.

Sincerely,

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