Inter Tribal Association of Arizona

21 TRIBAL NATIONS

May 31, 2022

Via Email (kasanenni.swathi@azdeq.gov)

Ak-Chin Indian Community
Cocopah Tribe
Colorado River Indian Tribes
Fort McDowell Yavapai Nation
Fort Mojave Indian Tribe
Gila River Indian Community
Havasupai Tribe
Hopi Tribe
Hualapai Tribe
Kaibab Band of Paiute Indians
Pascua Yaqui Tribe
Pueblo of Zuni
Quechan Tribe
Salt River Pima-Maricopa Indian Community
San Carlos Apache Tribe
San Juan Southern Paiute Tribe
Tohono O'odham Nation
Tonto Apache Tribe
White Mountain Apache Tribe
Yavapai-Apache Nation
Yavapai-Prescott Indian Tribe

Arizona Department of Environmental Quality
Water Quality Division
Attn: Swathi Kasanneni
1110 W. Washington St.
Phoenix, AZ 85007

Re: Inter Tribal Association of Arizona's Comments and Objections to ADEQ's Renewal and Amendment of the Resolution Copper Mining AZPDES Permit No. AZ0020389 (LTF No. 90471)

Dear Ms. Kasanneni:

These comments are being submitted on behalf of the Inter Tribal Association of Arizona (ITAA) to the Arizona Department of Environmental Quality (ADEQ) pertaining to ADEQ's proposal to renew and amend the Arizona Pollutant Discharge Elimination System (AZPDES) Permit No. AZ0020389 for Resolution Copper Mining (Resolution or RCM).[1] ITAA is a non-profit inter Tribal consortium of 21 Member Tribes in Arizona who have been working together to advocate on matters of Tribal concern since 1952.

As you are aware, the draft permit at issue here is associated with Resolution's plans to develop a new and unprecedented mining project near Superior, Arizona, which is located at the heart of a Sacred Site and Traditional Cultural Property for the San Carlos Apache Tribe and other Member Tribes of ITAA.

ITAA previously provided written comments to ADEQ in 2010 in reference to the prior version of this AZPDES permit (Inter Tribal Council of Arizona, Inc. Comments to AZPDES Permit No. AZ0020389, dated July 30, 2010)[2] and again in 2016 (Inter Tribal Association of Arizona' Comments and Objections to ADEQ's Renewal of the Resolution Copper Mining AZPDES Permit No. AZ0020389). Since many of ITAA's prior concerns remain relevant to ADEQ's current proposal to renew and amend RCM's AZPDES permit, these comments are expressly incorporated here by reference, as if stated in full in these comments.

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[1] Public Notice: www.azdeq.gov/node/8781

[2] The Inter Tribal Association of Arizona is formerly known as the Inter Tribal Council of Arizona.

2214 North Central Avenue, Phoenix, Arizona 85004 | p 602.258.4822 | f 602.258.4825

In addition to concerns raised previously on this permit, which still remain, the recent amendments proposed in the current draft AZPDES Permit No. AZ0020389 renewal present new, additional concerns for the health of downstream communities and the designated uses of Queen Creek.

For the reasons discussed below, ITAA urges ADEQ to, among other things, stay the issuance of an AZPDES permit for RCM until ADEQ has finally completed a Total Maximum Daily Load (TMDL) study for Queen Creek. ADEQ's failure to complete the TMDL for Queen Creek for over two decades, coupled with its apparent lack of any discernable plan to complete the TMDL any time soon, is a gross failure of ADEQ's responsibilities under the Clean Water Act. From our review of the TMDL records made available to us, it appears that ADEQ has struggled to complete a TMDL study for Queen Creek due to, among other things, the significant level of background copper in its receiving waters. If ADEQ is, in fact, unable to complete a waste load allocation for Queen Creek (which is listed on the 303(d) list as impaired for copper, lead, and selenium), ADEQ should not issue an AZPDES permit for Resolution that would allow additional copper loading in the Creek.

Accordingly, until this issue is resolved in compliance with the Clean Water Act, and only after a TMDL has been completed, should ADEQ revisit this draft AZPDES permit and institute robust standards, limitations, and permit requirements in conformance with existing law that are truly protective of the environment, public health, and the receiving waters of Queen Creek. As further noted below, however, the proposed permit as currently written fails to meet this test and it must be carefully reconsidered prior to issuance.

1. The Resolution Mine is a New Source that is Subject to New Source Performance Standards under the Clean Water Act

ITAA once again asserts that the Resolution's Mine is a "new source" within the meaning of 40 C.F.R. §§ 122.2 and 122.29. ADEQ's arguments to the contrary continue to be unavailing. Because these arguments are well known to ADEQ, ITAA will not restate its reasoning for its position here, but rather references ADEQ to ITAA's previous written comments on this permit from 2010 and again, from 2016, which are expressly incorporated here as if set forth in full. ITAA also incorporates the arguments made by its Member Tribe, the San Carlos Apache Tribe, in its ongoing litigation surrounding this permit, including in detailed briefings before the Arizona Court of Appeals.

2. ADEQ Cannot Issue the Proposed AZPDES Permit Until A TMDL for Queen Creek Has Been Completed

As noted briefly above, ITAA urges ADEQ to stay the issuance of an AZPDES permit for RCM until ADEQ has finally completed a Total Maximum Daily Load study for Queen Creek. ADEQ's failure to complete the TMDL for Queen Creek for over two decades, coupled with its apparent lack of any discernable plan to complete the TMDL anytime soon, is a gross failure of ADEQ's responsibilities under the Clean Water Act. From our review of the TMDL records made available to us, it appears that ADEQ has struggled to complete a TMDL study for Queen Creek due to the significant level of background copper in its

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receiving waters. If ADEQ is, in fact, unable to complete a waste load allocation for Queen Creek, ADEQ should not issue an AZPDES permit for Resolution that would allow additional copper loading in the Creek.

The reach of Queen Creek from the headwaters to Superior WWTP discharge has been listed on Arizona's 303(d) List of Impaired Waters due to exceedances in dissolved copper loading (since 2002), lead (total) (since 2010), and selenium (total) (since 2012). Other reaches of Queen Creek and its tributaries are also listed on the 303(d) List of Impaired Waters due to exceedances in dissolved copper loading.[3]

ADEQ has been working on this TMDL for over twenty years (since at least 2002 when the reach of Queen Creek was first impaired for copper loading), but it has never been completed. In late 2017, ADEQ released a draft TMDL for public comment on three reaches of Queen Creek, Arnett Creek and two unnamed drainages.[4] Our review of various drafts of the TMDL study and other related records (obtained via a public records request), shows repeated and direct references by ADEQ to Resolution and this AZPDES permit. Our review also reveals that ADEQ has been engaged, for many years, in an unsuccessful attempt to reconcile the TMDL and its Waste Load Allocation with Resolution's proposed discharge to Queen Creek under this permit, and indeed, one draft reviewed (dated August 2016) just abruptly ends mid-sentence on Resolution Copper's mass-based Waste Load Allocation ("The outfalls for the Resolution Copper permit are designed ******...").

In September 2018, after nine months of silence following the close of the 2017 TMDL public comment period, ADEQ circulated an email with the subject: "Queen Creek TMDL Update: Project on Hold." The email stated:

> "Greetings Interested Parties,
> Thank you for your interest in the Queen Creek TMDL project.
> Following two public meetings held by ADEQ to discuss the draft report, written feedback was gathered which revealed technical issues needing to be addressed. In order to best achieve our mission to protect public health and the environment of Arizona, ADEQ is suspending normal project activities until these issues can be completely resolved. Once resolved, we will provide an update and the TMDL project can move forward."[5]

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[3] *See* Arizona's 2018 303(d) List of Impaired Waters: https://static.azdeq.gov/pn/pn_303d_2018draft.pdf. *See also* ADEQ Surface Water Monitoring and Assessment: https://azdeq.gov/programs/water-quality-programs/surface-water-monitoring-and-assessment. *See* Queen Creek TMDL Factsheet: https://azdeq.gov/sites/default/files/middlegila_qc_headwater_fs.pdf

[4] *See* ADEQ Public Notice of TMDL Analysis for Three Reaches of Queen Creek, Arnett Creek and Two Unnamed Drainages (September 2017): https://azdeq.gov/public-notice-tmdl-analysis-three-reaches-queen-creek-arnett-creek-and-two-unnamed-drainages

[5] Email from ADEQ dated September 2018.

In April 2022, attorneys for ITAA filed a public records request with ADEQ requesting updated documents and materials on the status of this long-overdue Queen Creek TMDL. In May 2022, the ADEQ Records Division responded noting that "[t]here has been no movement on completing the Queen Creek TMDL", therefore ADEQ "didn't expect to find any more recent documentation" than the September 2017 Queen Creek TMDL draft.[6] Sadly, it has become abundantly clear that instead of completing the TMDL in conformance with the Clean Water Act (which it apparently cannot do if this permit is issued), ADEQ has instead chosen to indefinitely delay completion of study. It has not, however, decided to forego issuance of the instant AZPDES permit, which will result in unlawful copper loading to Queen Creek. This violates the Clean Water Act.

It is also noteworthy that ADEQ appears to have no discernible plan to complete the TMDL study any time soon. Interestingly, the case of *Columbia Riverkeeper v. Wheeler,* 944 F.3d 1204 (9th Cir. 2019) involved a citizen suit to compel the EPA to develop and issue a long-overdue TMDL for the Columbia and Snake Rivers, after years of inaction by the states of Washington and Oregon. In this case, the Ninth Circuit concluded that "[w]here a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA's mandatory duty to act." *Id.* at 944 F.3d at 1211.

ADEQ's prolonged inaction on the Queen Creek TMDL for over two decades and the project's recent suspension in September 2018, coupled with ADEQ's recent admission of "no movement on completing the Queen Creek TMDL" in May 2022, plainly indicates that ADEQ lacks a schedule or credible plan for producing the TMDL. Indeed, ADEQ has done the opposite of prioritizing this obligation, even though ADEQ simultaneously seeks to issue an AZPDES permit to Resolution that will result in more copper loading to an already impaired water. Incredibly, the 2022 Water Quality in Arizona 305(b) Assessment Report Appendix D notes the priority ratings on these water bodies as Medium and Low.

41	QUEEN CREEK	15050100-014A	COPPER	Medium
42	QUEEN CREEK	15050100-014A	LEAD	Low
43	QUEEN CREEK	15050100-014B	COPPER	Medium
44	QUEEN CREEK	15050100-014C	COPPER	Medium
45	UNNAMED TRIB (UQ2) TO QUEEN CREEK	15050100-1003	COPPER	Low
46	DEVILS CANYON	15050100-1662	COPPER	Low
47	DEVILS CANYON	15050100-1662	MERCURY	Low
48	ARNETT CREEK	15050100-1818	COPPER	Medium
49	UNNAMED TRIB (UQ3) TO QUEEN CREEK	15050100-1843	COPPER	Low

Finally, even Arizona's TMDL statutes (A.R.S. § 49-231 et seq.) require that "[t]otal maximum daily loads that are required to be developed for WOTUS that are included for the first time on subsequent lists shall be developed within fifteen years of the initial inclusion of the water on the list." A.R.S. § 49-233(B) (emphasis added). This has not occurred. The fact that ADEQ has not completed the required TMDL for the impaired water in this case does not mean that the discharger or ADEQ is free to bypass the strict requirements of the Clean Water Act and issue this permit. To the contrary – the AZPDES permit cannot be issued until the TMDL is completed.

[6] Email from ADEQ Records Center received May 2022.

3. A Renewal or "Amendment" of the Permit is Not Permitted During the Ongoing Appeal

As ADEQ is aware, AZPDES Permit No. AZ0020389 (signed January 19, 2017, effective January 23, 2017) has been appealed. See *San Carlos Apache Tribe v. State of Arizona, et al.* Arizona Court of Appeals, Division 1, Case No. 1 CA-CV 21-0295. ADEQ is also certainly aware that this appeal of this permit is ongoing.

As an appealed AZPDES Permit it is subject to A.R.S. § 49-324(E). At the time the AZPDES Permit was signed, A.R.S. § 49-324(E) read:

> "E. Notwithstanding section 41-1092.11, if a notice of appeal of a permit that is issued under article 3.1 of this chapter is filed, those permit provisions that are specifically identified in the notice of appeal as being contested and those other permit provisions that cannot be severed from the contested provisions are automatically stayed while the appeal is pending, including during any court proceedings. Uncontested permit provisions that are severable from the contested provisions are effective and enforceable thirty days after the director serves notice on the applicant, the water quality appeals board and any party who commented on the proposed action of the conditions that are uncontested and severable."

A.R.S. § 49-324(E) was amended in 2021 (H.B. 2042, signed Feb. 24, 2021), substantially reducing the range of this stay provision. However, since the appeal predates these changes, these new changes do not apply to this ongoing AZPDES Permit appeal.

A.R.S. § 1-244 states that "No statute is retroactive unless expressly declared therein", which has not occurred here. Arizona courts have repeatedly affirmed this. A statute has prospective operation only, unless the statute plainly indicates an intent that it have retrospective effect. *Rodriguez v. Terry* 79 Ariz. 348 at 350 (1955); *Cummings v. Rosenberg* 12 Ariz. 327 (1909). Unless a statute expressly applies retroactively, it presumptively applies prospectively. *State v. Fell* 209 Ariz. 77 at 83 (App. Div. 2 2004) (review granted, affirmed 210 Ariz. 554). "Legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events." *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195 at 205 (1999), citing *Hall v. ANR Freight System, Inc.*, 149 Ariz. 130 at 139 (1986).

In short, ADEQ's attempt to simply move forward normally with this application "like any other"[7] is not permitted under the statute. The current AZPDES Permit materials are silent as to whether this permit would continue to be stayed once issued, suggesting it would not. ADEQ cannot bypass the Legislature's exclusive authority to determine when and whether a statute will apply retroactively. ADEQ also cannot bypass or "moot" the stay of this AZPDES

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[7] *See* Email from Chris Montague-Breakwell to Swathi Kasanneni dated July 27, 2021 at 5:09 PM (received via Public Records Request) stating in relevant part "issue the permit as we normally would" and "start processing this application like any other."

Permit simply by taking action to renew or reissue a stayed permit that is subject to ongoing appeal. Such actions are unconstitutional and a violation of existing law.

Lastly, ADEQ appears to take the position that Resolution has applied for a "reissuance", not an amendment, of their permit. ADEQ's position does not align with proper procedure and is contrary to their own permit materials. Multiple permit changes, *i.e.* "amendments" have been requested by Resolution in their Permit Application. *See* Permit Fact Sheet at VII, p.5-6; *see also* Resolution's Permit Application dated July 23, 2021, (received *via* public records request). Of course, all of these maneuvers by ADEQ to justify its efforts to issue the AZPDES permit to RCM could be avoided if ADEQ simply stayed the issuance of this permit until conclusion of the litigation as required by law.

4. Monitoring and Testing Parameters for Cyanide in Outfall 001 and 002 Discharges Were Changed to Cyanide (as free cyanide) Without Notice or Explanation

"Cyanide" has been a required parameter for trace substance monitoring at Outfalls 001 and 002 since at least 2010. *See* 2010 AZPDES Permit at Tables 2.a and 2.6, p. 4-5; *see* 2016 AZPDES Permit at Tables 2.a and 2.b, p. 6. The February 1, 2022 Draft Permit also indicates that "Cyanide" is still a required parameter for trace substance monitoring at Outfalls 001 and 002 (Tables 2.a and 3.b, p. 5-6). Moreover, Resolution's AZPDES Renewal and Amendment Application submitted July 23, 2021, does not request any changes to monitoring parameters for cyanide.

However, in the March 9, 2022 Draft Permit (Tables 2.a and 3.b, p. 5-6), this parameter for Assessment Level Monitoring at Outfalls 001 and 002 was changed from "Cyanide" to "Cyanide (as free cyanide)." No explanation is given for this change and the change is not flagged anywhere in the materials.[8] ADEQ also did not make any adjustments associated with this change in the concentration assessment levels. These changes should be justified and explained by ADEQ.

Another unexplained revision appears regarding Discharge Characterization Testing for Outfalls 001 at Table 4.a. *See* 2/1/22 Draft Permit at p. 8 as "Cyanide"; 3/9/22 Draft Permit at p. 8 as "Cyanide (as free cyanide)" and for Outfall 002 at Table 4.b; 2/1/22 Draft Permit at p. 9 as "Cyanide"; 3/9/22 Draft Permit at p. 9 as "Cyanide (as free cyanide)."

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[8] Copies of the AZPDES Draft Permit and Draft Fact Sheet were first circulated for public review on February 1, 2022. However, the Public Notice versions of these AZPDES Permit materials circulated on March 9, 2022, were not identical to the previously circulated versions. The material changes between the two draft permits were neither flagged to the public nor explained by ADEQ. This is problematic, including for the obvious reason that interested parties have now had over a month to review the versions first circulated, and were neither anticipating nor notified of any changes made by ADEQ between the documents. This impairs the public's ability to meaningfully review and comment on the draft permit and it is inconsistent with the public notice and comment requirements under Arizona law.

These are not insignificant changes. Cyanide is a type of chemical compound, of which many types are acutely toxic. Cyanide content can be measured in multiple ways – as total cyanide, or as different categories of form (as available cyanide, as free cyanide, etc.). Changing assessment monitoring from "Cyanide" (presumably total cyanide, which is the sum total of all inorganic chemical forms of cyanide that can dissociate and release free cyanide under certain conditions) to "Cyanide (as free cyanide)" is a reduction in scope. It would not capture total cyanide in the discharges from Outfalls 001 and 002.

Incredibly, in all of these changes, the assessment level concentrations have not been adjusted. Therefore, under these new permit revisions, levels of total cyanide in the discharges are allowed to be much higher than before, since only free cyanide levels are now being tested. This is inconsistent with requirements of law.

5. The Definition of a "Qualifying Storm Event" for Whole Effluent Toxicity Monitoring Was Changed by a Factor of 10 Between the Permit Drafts, With No Explanation

Under the AZPDES Permit terms, the permittee is required to monitor discharges for Whole Effluent Toxicity (WET). If toxicity is detected in the samples above certain levels, follow-up testing and additional processes for Toxicity Identification Evaluation (TIE)/Toxicity Reduction Evaluation (TRE) under the permit are required.

The February 1, 2022 Draft Permit (Part I(D), pages 7-8) states that WET Monitoring samples for Outfall 001 are to be collected at Collection Pond No. 105 (CP-105) during qualifying storm events, defined as "rainfall in the amount of 0.1 inches or more with in [sic] the first 24-hours of the storm event."

This definition was changed by a factor of 10 in the subsequent March 9, 2022 Draft Permit (Part I(D), pages 7-8), without any notice or explanation to the public: "A qualifying storm event is rainfall in the amount of one inche [sic] storm in the first 24-hours."

The definition for "qualifying storm event" is a new addition. However why this definition was changed silently between the two documents by a factor of 10 is never explained. Rainfall events occurring in excess of 0.1 inches in 24 hours are far more frequently occurring than rainfall events occurring in excess of 1 inch in 24 hours. This means sampling for WET Monitoring testing would occur far less frequently than was first proposed, with no explanation or rationale. ADEQ has therefore limited the protective nature of the permit without notice to the public, and the reason why this permit terms were changed, and at who's request has never been disclosed. At minimum, this tactic violates the notice and comment requirements under Arizona law.

6. The Requirement for an Annual Best Management Practices (BMP) Report Was Removed, With No Explanation

The February 1, 2022 Draft Permit (Part IV(C)(12), page 22) contained a new provision to require that a BMP Annual Report to be submitted to ADEQ by September 30th

of each year "that documents compliance, and any changes to the BMP Plan." This entire section (12) was deleted from the March 9, 2022 Draft Permit (page 22), again without notice to the public or any explanation in violation of ADEQ's notice and public comment obligations under Arizona law.

7. Failure to Obtain Water Quality Data on the Potential Discharge Through Outfall 001

The Process Flow Diagram (shown on the following page) and Site Drainage Maps attached to the AZPDES Renewal Application[9] indicate that stormwater from across the West Plant site drains to and is collected in Collection Pond No. 105 (CP-105, formerly "Indian Pond") where it can then be discharged through Outfall 001. The West Plant Site is located north of Highway 60 in Superior, just north of Queen Creek, and drains south towards Queen Creek.

Mining activities on the West Plant site have occurred for over a century (*see* VRP Site Plan p.3), resulting in a significant amount of toxic pollutants in the area produced by smelting activities, emissions, tailings ponds, and other mine waste. As a result, remediation activities were undertaken. These activities have just recently concluded[10] to clean up these "smelter-affected soils (SAS) at the West Plant Site" (*see* VRP Site Plan, p.1) and other sources of contamination containing arsenic, copper, and lead, as well as low pH, heavy metals, and other pollutants. While reclamation work may abate some of these sources of contamination, it is of course never 100% effective.

Notably, reclamation work did not include the entire West Plant site area. Certain sites were postponed or excluded from remediation including the 3-acre smelter complex area containing historic smelter buildings and infrastructure, the 2-acre main channel culverts area, the 4-acre depot pond, the 24-acre slag pile, and the 1-acre historic disposal facility (*see* VRP Site Plan, p.9 to 10).

In sum, there are multiple sites located across the West Plant site which have the potential to convey pollutants and other constituents of concern into Queen Creek via discharge of stormwater at Outfall 001.

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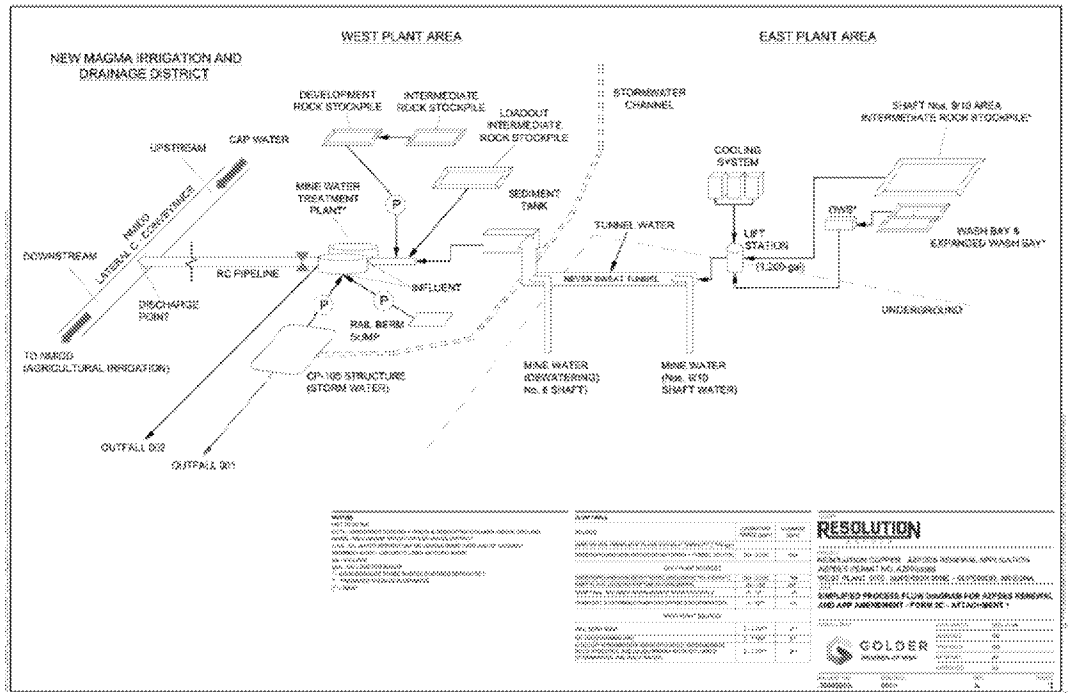
[9] *See* Form 2C, Attachment 1 (dated July 9, 2021) to AZPDES Renewal Application (obtained *via* Records Request). *See also* Form 2F, Attachment 1 (dated July 14, 2021) to AZPDES Renewal Application (obtained *via* Records Request).

[10] *See* IM-Mining.com article noting that remediation reportedly completed in January 2021.



One key ongoing component of this remediation work is continued surface water monitoring, and a demonstration that the contamination source will not cause or contribute to an exceedance of surface water quality standards. A.R.S. § 49-175(B)(3).[11] Given the historic contamination from mining activities in the area, as well as ADEQ's duties under its administration of the AZPDES program, obtaining data on the quality of stormwater which could be drained into CP-105 and discharged through Outfall 001 is a key task.

However, Resolution notes that data on the quality of the stormwater which could be discharged through Outfall 001 "has not been obtained."[12] It also does not appear to be in the process of being obtained. Form 2F (dated July 22, 2021 at p.3, attached to AZPDES Permit Renewal Application) at Section 5.2 states: "No discharge through Outfall 001 has occurred therefore, no discharge data is available. Certification based on absence of active operations, completion of extensive reclamation work, diversion and containment control measures, and ability to pump water to MWTP." ADEQ appears to see no issue with this, since ADEQ did not require any additional information from Resolution Copper on this matter and they apparently failed to obtain this data independently.

[11] The VRP Plan (Sec. 3.3, p.15-16) states that while "[r]unoff from SRUs [soil remediation units] 8, 9, 10, 11, and 12 reports to the Indian Ponds" and is regulated under the individual AZPDES Permit, "[r]unoff from SRUs 1, 5, 6, and 7 reports to washes that cross the West Plant Site property line and ultimately report to Queen Creek" and are regulated under an entirely different permit (AZMSG-62880).

[12] *See* cover letter to AZPDES Renewal Application (obtained *via* Records Request).

The Fact Sheet (p.4) notes that a total of just two water quality samples have been collected. "In 2021, two water samples were collected and tested from water impounded at CP-105 during precipitation events less than a 10-year 24-hour event." No additional samples or data gathering activities are noted, and thus, this appears to be the entirety of water quality data collected for potential discharge through Outfall 001.

Given that stormwater in CP-105 may be discharged to Queen Creek via Outfall 001 without treatment, ADEQ must obtain and fully review baseline water quality data for the potential discharge at Outfall 001 post-reclamation to ensure compliance with the discharge limits imposed by the AZPDES permit. This is fundamental and nothing less than this should be permitted. It is also critical that the water quality data be developed on the influent to assure the successful operation of the MWTP. This is also a critical task, since the failure to fully apprehend the nature of the influent can result in treatment plant failure and a noncompliant discharge.

8. Failure to Obtain Sufficient Water Quality Data on the Potential Discharge Through Outfall 002

The East Plant Site is east of the Town of Superior. The Process Flow Diagram (shown on the prior page) indicates that waters from various sources at the East Plant Site are collected and transported to the Water Treatment Plant at the West Plant Site through the Never Sweat Tunnel.

The Application at Form 2C(I) states that contributing flows to Outfall 002 come from "Various Combined Sources" such as "mine dewatering, stormwater, etc." and references an attachment. Yet, the attachments do not distinguish, or specifically list these various sources. Furthermore, there is no evidence from the materials we have reviewed that any sampling of the feed water from these various sources has occurred.

The Application further says that since no discharge from Outfall 002 to Queen Creek has occurred, "data in the tables is based on sampling of the treated water from the MWTP that is sent to NMIDD." This appears to consist of only 12 samples collected between 2018 and 2021 (Form 2C, Attachment 3 of the Application).

ADEQ should require that robust feed water quality data from these "various combined sources" at the East Plant Site be collected and analyzed for purposes of this permit. Data on the inflow into MWTP is essential to the ongoing functionality of the MWTP. ADEQ's failure to require this information is inconsistent with their mission and obligations in administering the Clean Water Act.

9. In the Absence of Water Quality Data for Potential Outfall 001 Discharge, RCM's Request to Change Permitted Discharge at Outfall 001 from a 100-Year, 24-Hour Storm Event to a 10-Year, 24-Hour Storm Event is Unsupported and Contrary to Law

In the cover letter to their AZPDES permit renewal application,[13] RCM states: "Currently the permit allows for discharge for flow in excess of a 100-year 24-hour storm event, RCM is requesting that be changed to a 10-year 24-hour storm event" (emphasis added). A 100-year storm event means a storm with a statistical probability of exceedance of 0.1% in any given year. A 10-year storm event means a storm with a statistical probability of exceedance of 10% in any given year.[14] This means that in any given year, there would be a 10% probability of RCM discharging untreated stormwater collected from the West Plant Site at CP-105 containing potential pollutants, into impaired Queen Creek.

The remainder of the application materials reviewed contain no justification or explanation in support of this request. In addition, and perhaps of greater concern, is that ADEQ makes no attempt in the permit materials we have reviewed to consider and review this requested change or to give any reason why it may or may not be warranted, or note whether the conditions and computations required by 40 C.F.R. § 440.131(b) have been met. Inexplicably, this substantial and potentially dangerous change is not even listed in the Factsheet at Table VII (which supposedly lists all the major changes in the proposed permit).

40 C.F.R. § 440.131(b) states:

> **(b)** ***Storm exemption for facilities permitted to discharge.*** If, as a result of precipitation or snowmelt, a source with an allowable discharge under 40 CFR part 440 has an overflow or excess discharge of effluent which does not meet the limitations of 40 CFR part 440, the source may qualify for an exemption from such limitations with respect to such discharge if the following conditions are met:
>
> (1) The facility is designed, constructed and maintained to contain the maximum volume of wastewater which would be generated by the facility during a 24-hour period without an increase in volume from precipitation and the maximum volume of wastewater resulting from a 10-year, 24-hour precipitation event or treat the maximum flow associated with these volumes. In computing the maximum volume of wastewater which would result from a 10-year, 24-hour precipitation event, the facility must include the volume which would result from all areas contributing runoff to the individual treatment facility, *i.e.*, all runoff that is not diverted from the active mining area and runoff which is not diverted from the mill area.
>
> (2) The facility takes all reasonable steps to maintain treatment of the wastewater and minimize the amount of overflow.

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[13] Dated July 23, 2021. Obtained *via* Public Records Request.

[14] https://www.usgs.gov/special-topics/water-science-school/science/100-year-flood

(3) The facility complies with the notification requirements of § 122.60(g) and (h). The storm exemption is designed to provide an affirmative defense to an enforcement action. Therefore, the operator has the burden of demonstrating to the appropriate authority that the above conditions have been met.

CP-105 has a capacity of just 90 acre-feet (Fact Sheet, p.3). Nothing in ADEQ's materials analyzes how the 90 acre-feet in total volume has been allocated. There is no information or analysis, for example, on the total volume of water that would be generated by the permittee from all areas contributing runoff in a 24-hour period, in the absence of any additional increase in volume from precipitation, despite this being an express requirement of § 440.131(b)(1). In addition, ADEQ appears to have also failed to separately compute the maximum volume of any addition of flows to CP-105 stemming from a 10-year, 24-hour storm event, despite this also being an express requirement of § 440.131(b)(1). Absent these critical calculations, ADEQ has no way of knowing whether a storm exemption should be applied, and it has no way of knowing what the potential volume and frequency of an untreated discharge could be. This violates the applicable requirements of law noted above.

It cannot be overemphasized that if this permit change is granted by ADEQ, untreated discharges would be allowed from Outfall 001 during any rain event that exceedes a 10-year, 24-hour storm event (an occurrence which can happen with great frequency during Arizona's monsoon season) (Fact Sheet, p.3). This reasonably can be anticipated to occur during the life of this permit. And while RCM "has the option" of treating the water in CP-105 and discharging it through Outfall 002, there is nothing in the permit that requires this. This presents an unnecessary risk to the public at large and the designated uses of Queen Creek and it is inconsistent with the requirements of the Clean Water Act.

10. The Public Hearing Was Insufficient

We understand that a Public Hearing was held on April 11, 2022 at 6:00 p.m., in a purported attempt to comply with the AZPDES amendment permit category (Individual Permit, Major Industrial Facility, Public hearing).[15] This Public Hearing lasted just 30 minutes. It was stated by ADEQ during the Public Hearing that this was "not an opportunity" for the public to ask questions. Instead, ADEQ representatives provided only a brief description of the AZPDES Permit to the public. No specifics were provided on the amendments being requested. This directly violates the requirements of the Arizona Administrative Code (AAC) R18-1-402 (General Public Hearing Procedures), which specifically require more detail during Public Hearings. See at subsection D (emphasis added):

"D. A general public hearing shall be conducted so as to do both of the following:
1. **Inform the public of the exact nature of the action or issue,** and
2. Allow time for persons to make statements and submit written comments."

[15] *See* Billable Hours Report for LTF No. 90471; *see* 18 AAC Ch. 1, Art. 10, Table 10 (p.25).

The Merriam-Webster dictionary defines "exact" (in its adjectival usage, as used above) to mean "1: exhibiting or marked by strict, particular, and complete accordance with fact or a standard and 2: **marked by thorough consideration or minute measurement of small factual details."** (Emphasis added).

None of the requested amendments to this permit were discussed at the Public Hearing. Certainly, no interested member of the public who made the time to register for and attend this Public Hearing at the end of a long day would characterize ADEQ's presentation as having met the first prong of this two-part requirement. This fails to adequately inform the public and comply with applicable law.

11. Resolution's Concurrent Application to Significantly Amend the Related Aquifer Protection Permit Has Not Been Disclosed

It is our understanding that Resolution recently also submitted an application to amend their Area-wide Aquifer Protection Permit (APP) No. P-101703 involving the West Plant Site, which is directly related to the current AZPDES Permit and which covers at least a substantial amount of the same area. We also understand the requested amendments have already been granted by ADEQ.[16]

In our 2016 comments, we noted a similar issue where the APP and AZPDES amendments were requested around the same time. These permits are closely related, and material changes in one permit may be related to the other. We asked that the public be noticed on the connected nature of these permits. Unfortunately, despite our prior comments, the current AZPDES materials again fail to acknowledge that amendments to the related APP Permit have been requested and granted despite their interrelated nature. ADEQ's decision to disassociate these two permits limits the ability of the public to understand the holistic nature of these two permits and therefore wrongfully limits public participation in the process.

Conclusion

In conclusion, the draft AZPDES Permit continues to be fatally flawed, and it violates the Clean Water Act, Arizona law, and other applicable authorities. Given the need to complete a TMDL study for Queen Creek and the ongoing litigation and related stay, this permit should not be reissued but should instead be held in abeyance until both of these events have been completed. Only then should ADEQ take a hard, close look at the requested permit as part of a proper permitting process. Nothing less than this will ensure adequate protections for the environment, the public health and the waters of Arizona.

Thank you for your consideration of the ITAA's comments. Any questions regarding these comments may be directed to ITAA Executive Director, Maria Dadgar at (602) 258-4822.

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[16] *See* Report for LTF No. 93849 (APP, Individual Permit, Other Amendment), now granted.

Sincerely,

INTER TRIBAL ASSOCIATION OF ARIZONA

Maria Dadgar, MBA
Executive Director
Inter Tribal Association of Arizona, Inc.

CC: ITAA Executive Committee
Tribal Leaders

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