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MICHAEL K. JEANES
Clerk of the Superior Court
By Lizethe Rivas, Deputy
Date 05/05/2017 Time 16:48:28
Description Amount
----- CASE# LC2017-000144-001 -----
SP ACT PET RV/ST ADM 319.00 W

TOTAL AMOUNT 0.00
Receipt# 25918262

9 **IN THE SUPERIOR COURT FOR MARICOPA COUNTY**
10 **IN AND FOR THE STATE OF ARIZONA**

12 PIMA COUNTY, PIMA COUNTY
13 REGIONAL FLOOD CONTROL
14 DISTRICT

14 Appellants,

15 vs.

17 MISAEL CABRERA, DIRECTOR OF
18 THE ARIZONA DEPARTMENT OF
19 ENVIRONMENTAL QUALITY,

19 Appellee.

Case No. LC 2017-000144

**NOTICE OF APPEAL FOR
JUDICIAL REVIEW OF FINAL
ADMINISTRATIVE DECISION**

21 Pima County ("County") and the Pima County Regional Flood Control District
22 ("District") file this Notice of Appeal pursuant to A.R.S. § 12-904(A).

23 **PARTIES, JURISDICTION, AND VENUE**

- 24 1. Pima County is a body politic and corporate, and a political subdivision of the
25 State of Arizona.
26 2. The Pima County Regional Flood Control District is a special taxing district

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- 1 organized pursuant to Title 48, Chapter 21, Article 1 of the Arizona Revised
2 Statutes.
- 3 3. Misael Cabrera (“Cabrera”) is the Director of the Arizona Department of
4 Environmental Quality (“ADEQ”) and is sued in his official capacity. The
5 principal offices of ADEQ are located in Maricopa County.
- 6 4. ADEQ issued a Section 401 water quality certification (“§ 401 Certification”) to
7 Rosemont Copper Company on February 3, 2015.
- 8 5. On March 5, 2015, County and District jointly filed an administrative appeal of
9 ADEQ’s decision to issue the Certification. A copy of that document (without
10 attachments) is attached hereto as Exhibit A.
- 11 6. ADEQ, through a March 23, 2015 letter (attached hereto as Exhibit B), denied
12 Appellants’ appeal based on ADEQ’s assertion that it lacks jurisdiction to consider
13 the appeal.
- 14 7. Relying on its interpretation of A.R.S. § 49-202, ADEQ argued that it lacked
15 jurisdiction to hear Appellants’ § 401 Certification challenge because, for
16 Certifications related to individual § 404 permits, only the permit applicant may
17 appeal the Certification.
- 18 8. Conversely, Appellants assert that administrative appeal rights provided at A.R.S.
19 § 41-1092.03(B) govern Appellants’ challenge of the § 401 Certification.
- 20 9. A.R.S. § 41-1092.03(B) allows any party adversely affected by an appealable
21 agency action to challenge the action through an administrative appeal.
- 22 10. Appellants, on April 1, 2015, filed a Request for Reconsideration with ADEQ
23 addressing the jurisdictional issue. A copy of the Request for Reconsideration is
24 attached hereto as Exhibit C.
- 25 11. ADEQ, in a letter dated May 1, 2015 (attached hereto as Exhibit D), again asserted
26 lack of jurisdiction for its denial of Appellants’ appeal.

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- 1 12. Pursuant to A.R.S. § 12-902(A)(1), Appellants asked this Court (Maricopa
2 Superior Court Case No. LC2015-000243) for relief from ADEQ's refusal to
3 consider Appellants' administrative appeal of the § 401 Certification.
- 4 13. In that action, Appellees argued ADEQ's decision denying the appeal was not a
5 "final agency action" but merely advisory, thereby precluding appeal to this Court
6 due to, again, lack of jurisdiction.
- 7 14. Judge McClennen was troubled by ADEQ's attempt to insulate itself from
8 challenges to its administrative decisions by labeling them advisory and, in an
9 order dated July 14, 2016 (attached hereto as Exhibit E), remanded the matter to
10 ADEQ requiring that it issue a final administrative decision regarding Appellants'
11 appeal.
- 12 15. On remand, the underlying jurisdictional issue regarding the interplay between
13 A.R.S. § 49-202 and A.R.S. § 41-1092.03(B) was briefed and a hearing held
14 before the Office of Administrative Hearings (OAH).
- 15 16. The Administrative Law Judge issued a decision finding that the § 401
16 Certification was an appealable agency action, but concluding that A.R.S. § 49-
17 202 does preclude Certification challenges from anyone but the applicant. A copy
18 of that decision is attached hereto as Exhibit F.
- 19 17. As permitted by A.R.S. § 41-1092.08(B), the Director of ADEQ reviewed the
20 OAH decision and issued a Final Administrative Decision accepting the OAH
21 decision. A copy of the Director's decision is attached hereto at Exhibit G.
- 22 18. This action seeks judicial review of ADEQ's decision made by Cabrera, as
23 Director of ADEQ.
- 24 19. Jurisdiction in Superior Court to review ADEQ's administrative decision is proper
25 pursuant to A.R.S. § 12-905(A).
- 26

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1 20. Venue in Maricopa County Superior Court is proper pursuant to A.R.S. §§ 12-
2 401(16) and 12-905(B).

3 **BACKGROUND**

4 21. Section 404 of the Federal Water Pollution Discharges Prevention and Control Act
5 (also known as the Clean Water Act or “CWA”) (33 U.S.C. §§ 1251 to 1387)
6 authorizes the Secretary of the Army, through the Corps of Engineers (or “COE”),
7 to issue permits for the discharge of dredged or fill material into navigable waters.
8 33 U.S.C. § 1344(a).

9 22. As a pre-condition for obtaining a “Section 404 permit”, an applicant must provide
10 to the COE a so-called Section 401 water quality certification that the proposed
11 discharge will comply with “applicable provisions of sections 1311, 1312, 1313,
12 1316, and 1317” of the CWA. 33 U.S.C. § 1341(a).

13 23. Section 401 certifications are issued by the state in which the discharge originates.
14 33 U.S.C. § 1341(a).

15 24. ADEQ is authorized, pursuant to A.R.S. § 49-202, to issue the Section 401
16 certifications on behalf of the State.

17 25. Rosemont Copper Company (“Rosemont”) applied to ADEQ for a Section 401
18 certification on January 12, 2012.

19 26. ADEQ issued a draft certification in March of 2014.

20 27. County and District jointly filed three sets of comments (March 21, 2014; April 4,
21 2014; and July 16, 2014) in response to ADEQ’s request for comments on the
22 draft certification.

23 28. ADEQ issued a final Section 401 certification (the “§ 401 Certification”) to
24 Rosemont on February 3, 2015.

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- 1 29. Appellants timely appeal the § 401 Certification’s issuance on March 5, 2015,
2 citing, among other things, ADEQ’s failure to comply with Arizona notice and
3 comment law when considering and issuing the Certification.
- 4 30. ADEQ refused to accept Appellants’ appeal alleging that A.R.S. § 49-202(H)
5 precludes appeal of water quality certifications if the underlying permit is an
6 individual, rather than a nationwide or general Clean Water Act § 404 (33 U.S.C.
7 § 1344) permit.
- 8 31. Regulations promulgated pursuant to § 404 of the Clean Water Act define an
9 “individual permit” as:
10 a Department of the Army authorization that is issued following a case-
11 by-case evaluation of a specific project involving the proposed
12 discharge(s) in accordance with the procedures of this part and 33 CFR
13 part 325 and a determination that the proposed discharge is in the public
14 interest pursuant to 33 CFR part 320.
- 15 33 CFR § 323.2(g).
- 16 32. Those same regulations define a “general permit” as:
17 a Department of the Army authorization that is issued on a nationwide
18 or regional basis for a category or categories of activities when:
19 (1) Those activities are substantially similar in nature and cause only
20 minimal individual and cumulative environmental impacts; or
21 (2) The general permit would result in avoiding unnecessary
22 duplication of regulatory control exercised by another Federal, State,
23 or local agency provided it has been determined that the
24 environmental consequences of the action are individually and
25 cumulatively minimal.
- 26 33 CFR § 323.2(h).

- 1 33. Finally, a “nationwide permit” is defined by the regulations as “a type of general
2 permit which authorizes activities on a nationwide basis unless specifically
3 limited.” 33 CFR § 330.2(b).
- 4 34. The Certification issued by ADEQ to Rosemont supports Rosemont’s underlying
5 “individual” § 404 permit application which is currently pending before the U.S.
6 Corps of Engineers.
- 7 35. While Appellants cited A.R.S. § 49-202(H) as a basis for appeal in their Notice of
8 Appeal, they also cited A.R.S. Title 41, Chapter 6, Article 10 and provided a
9 showing that both Appellants qualified under that statute to appeal the
10 Certification.
- 11 36. A.R.S. Title 41, Chapter 6, Article 10 allows appeal:
12 by a party who will be adversely affected by the appealable agency
13 action or contested case and who exercised any right provided by law to
14 comment on the action being appealed or contested, provided that the
15 grounds for the notice of appeal or request for a hearing are limited to
16 issues raised in that party's comments.
17 A.R.S. § 41-1092.03(B).
- 18 37. A.R.S. § 41-1092.03(B) is part of the larger Arizona Administrative Procedure Act
19 (“APA”): A.R.S. Title 41, Chapter 6.
- 20 38. The APA specifically addresses its relationship to other statutes:
21 This chapter [chapter 6] creates only procedural rights and imposes only
22 procedural duties. They are in addition to those created and imposed by
23 other statutes. To the extent that any other statute would diminish a right
24 created or duty imposed by this chapter, the other statute is superseded
25 by this chapter, unless the other statute expressly provides otherwise.
26 A.R.S. § 41-1002(B).

COUNT ONE

Judicial Review of Administrative Decision

39. Appellants incorporate by reference all of the preceding paragraphs and allegations of this Notice of Appeal, as if set forth herein.

40. ADEQ acted arbitrarily and capriciously, abused its discretion, and acted contrary to law when it refused to accept Appellants' appeal in this matter.

41. ADEQ's decision to reject Appellants' appeal was in error, arbitrary and capricious, contrary to law, and an abuse of discretion because ADEQ's misinterpretation of A.R.S. § 49-202(H) improperly divests Appellants of their right to appeal granted under A.R.S. Title 41, Chapter 6, Article 10.

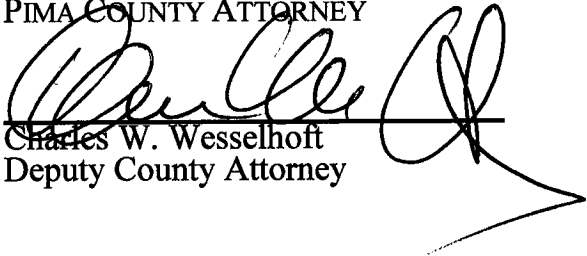
RELIEF

42. Appellants Pima County and Pima County Flood Control District seek the following relief:

- a. Reverse ADEQ's decision denying Appellants' Notice of Appeal in this matter and remand the matter to ADEQ for consideration of the substantive arguments made in Appellants' Notice of Appeal.
- b. Award Appellants attorneys' fees pursuant to A.R.S. § 12-348.01 and costs pursuant to A.R.S. § 12-341, incurred and expended herein.
- c. Grant Appellants such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED May 5, 2017.

BARBARA LA WALL
PIMA COUNTY ATTORNEY

By 
Charles W. Wesselhoff
Deputy County Attorney

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Copies hand delivered on May 5, 2017
to the Clerk of the Court.

Copies mailed:
May 5, 2017, to:

Misael Cabrera, Director
Arizona Department of Environmental Quality
1110 W. Washington Street
Phoenix AZ 85007

Curtis Cox
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1275 W. Washington Street
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Norman James
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By: Stacey Bowman

Exhibit A
Notice of Appeal

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11 **ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY**

12 **PIMA COUNTY, a body politic; and**
13 **PIMA COUNTY REGIONAL FLOOD**
14 **CONTROL DISTRICT,**

15 **Appellants,**

16 **vs.**

17 **THE STATE OF ARIZONA, and**
18 **THE ARIZONA DEPARTMENT OF**
19 **ENVIRONMENTAL QUALITY,**

20 **Respondents.**

21 **NOTICE OF APPEAL**

22 **I. INTRODUCTION**

23 This is a challenge by Pima County and the Pima County Regional Flood Control District
24 (the "Appellants") to the Arizona Department of Environmental Quality's ("ADEQ")
25 issuance of a Clean Water Act Section 401 Water Quality Certification ("Certification")
26 to Rosemont Copper Company ("Rosemont") for its Rosemont Copper Project (the
"Mine"). A copy of the issued Certification is attached hereto as Exhibit A.

27 **II. JURISDICTION AND STANDING**

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a. This Petition is Proper in this Forum

Issuance of Clean Water Act Section 401 Certification in Arizona is authorized under pertinent portions of A.R.S. § 49-202. Specifically, ADEQ is authorized to process § 401 certification requests in accordance with subsections C through H of A.R.S. § 49-202. A.R.S. § 49-202(B). A.R.S. § 49-202(H) provides the pathway for appealing an ADEQ § 401 certification decision. Pursuant to that subsection, “[a]ny person who is or may be adversely affected by the denial of or imposition of conditions on the certification of a nationwide or general permit may appeal that decision pursuant to title 41, chapter 6, article 10” entitled “Administrative Hearing Procedures.” Article 10 further provides: “A party may obtain a hearing on an appealable agency action or contested case by filing a notice of appeal or request for a hearing with the agency within thirty days after receiving the notice prescribed in subsection A of this section.” The article 10 procedures allow appeal by “a party who will be adversely affected by the appealable agency action or contested case and who exercised any right provided by law to comment on the action being appealed or contested, provided that the grounds for the notice of appeal or request for a hearing are limited to issues raised in that party's comments.” A.R.S. § 41-1092.03(B). While ARS § 49-202(B) does not require Appellants to have commented on the appealed action, as noted below, Appellants did submit comments.

b. Appellants are Entitled to Bring this Action

i. Appellants are Adversely Affected by the Agency’s Action

Both Pima County (“County”) and the Pima County Regional Flood Control District (“District”) will be adversely affected by the ADEQ action. Appellants own the land and

1 water rights in the Outstanding Waters reach of Davidson Canyon and the Outstanding
2 Waters reach downstream of Davidson Canyon. Both of these Outstanding Waters
3 reaches are downstream of surface water and ground water impacts resulting from the
4 construction and operation of the Mine. In addition, Appellants manage the Bar V ranch
5 and Cienega Creek Natural Preserve for wildlife and recreational purposes plus oversee
6 ranching at the Bar V Ranch. These facilities are also located downstream of the surface
7 water and ground water impacts resulting from the construction and operation of the
8 Mine. Allowing Rosemont to proceed with the proposed construction and operation of
9 the Mine will result in degradation of the quality of the surface water in Outstanding
10 Waters located on Appellant's properties and in adverse impacts to surface waters and
11 uses thereof on the Bar V Ranch.

12
13 **ii. Appellants Commented on the Action being Appealed**

14
15 Appellants submitted three sets of comments for ADEQ consideration in this matter:

- 16
17 1. The first County/District comment, attached hereto as Exhibit B, was
18 submitted to ADEQ on March 21, 2014;
- 19
20 2. The second County/District comment, attached hereto as Exhibit C, was
21 submitted to ADEQ on April 4, 2014; and
- 22
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1 3. The third County/District comment, attached hereto as Exhibit D, was
2 submitted to ADEQ on July 16, 2014. This comment provided supplemental
3 information.¹
4

5 County/District comments contained in Exhibits B and C were timely submitted.² As
6 those Exhibits show, Appellants commented on the draft Certification. However, portions
7 of the final Certification and of documents used in the ADEQ decision-making process
8 were never available for public review and comment in the action below. Further, there is
9 no public record concerning ADEQ response to public comments or of what criteria
10 ADEQ used to modify the draft Certification. Those issues will be addressed below.
11

12 c. This Petition is Timely
13

14 The appeal procedure, A.R.S. title 41, chapter 6, article 10, sets forth a thirty day
15 limitation for filing a notice of appeal on an appealable agency action. A.R.S. § 41-
16 1092.03(B). To date, neither Appellant has received official notice of ADEQ's
17 Certification issuance. To ensure the timeliness of this appeal, Appellants are filing this
18 action within thirty days of the ADEQ signature date.
19

20 d. Scope of Review and Basis for Reversal
21

22 Review of ADEQ's action is limited by statute:
23
24
25

26 ¹ The information was also provided to the involved federal agencies for ESA consultation on the § 404 permit decision.

² The initial comment period closed on March 24, 2014 but was extended by ADEQ until April 7, 2014.

1 The court shall affirm the agency action unless after reviewing the administrative
2 record and supplementing evidence presented at the evidentiary hearing the court
3 concludes that the action is not supported by substantial evidence, is contrary to
4 law, is arbitrary and capricious or is an abuse of discretion.

5 A.R.S. § 12-910(E).

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9 **III. BASIS OF APPEAL**

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11 In issuing the Certification, ADEQ acted arbitrarily and capriciously and abused its
12 discretion. ADEQ has produced no explanation of the basis for its decision to issue,
13 despite extensive comments by Appellants (and others), a final Certification that is nearly
14 identical to the draft version issued [date]. Further, ADEQ included documents in its
15 decision record that were not in the available for public review and comment.
16 Specifically, ADEQ considered Rosemont’s December 2014 “Surface Water Mitigation
17 Plan.” That plan is flawed and the flaws raise serious questions about Rosemont’s ability
18 to meet the Arizona surface water quality standards (“SWQS”) and maintain existing
19 uses, including recreation, wildlife and livestock.

20

21 a. Facts

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- i. Pima County and Pima County Regional Flood Control District have Invested Millions of Taxpayer Dollars to Protect Lands in the Cienega Creek Groundwater Basin.

1 Pima County has worked to protect and conserve natural resources in the Cienega basin
2 since 1986, with the creation of the Cienega Creek Natural Preserve. According to the
3 County Administrator's Office, total acquisition costs for lands in the Cienega Creek
4 basin total nearly \$64 million. Most notably, these include portions of lower Cienega
5 Creek and Davidson Canyon, downstream of the proposed mine. The Cienega Creek
6 Natural Preserve is a 4000-acre protected area owned by Pima County Regional Flood
7 Control District containing intermittent and perennial flow reaches, and springs supported
8 by a shallow water table. Acquisition costs total \$8.6 million for the Preserve.
9 Acquisition began in 1986 and was largely completed in the early 1990s.

10

11 The Bar V Ranch, located along Davidson Canyon south of Interstate Highway 10 was
12 acquired for \$8.1 million in 2005. The State Transportation Board unanimously approved
13 a contribution of \$500,000 to acquire 600 acres of the ranch along Davidson Canyon to
14 preserve viewsheds along state-designated scenic roads and highways. Bar V Ranch
15 includes a vital wildlife linkage recognized by Arizona Game Fish Department along
16 Davidson Canyon.

17

18 In addition, the county also acquired 58 acres near the Empire Mountains at a cost of
19 \$190,000 called the Amadon and Nunez properties. These lands are located five to six
20 miles east of the mine, and were purchased in conjunction consistent with the U. S.
21 Bureau of Land Management's plan for Las Cienegas National Conservation Area.

22

23

- ii. Pima County and Pima County Regional Flood Control District have
Acted to Protect Water and Water Quality along Cienega Creek and
Davidson Canyon.

24

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1 The presence of water combined with riparian vegetation creates wildlife habitat of very
2 high value supporting diverse populations of mammals, birds, fish, reptiles, and
3 amphibians. Several special status species are present within the Preserve including the
4 endangered Gila Topminnow, the threatened Gila Chub Mexican garter snake, and the
5 yellow-billed cuckoo. These same water conditions create an area with very high values
6 for recreation, educational opportunities and scenic quality, as well as wildlife.

7
8 The ecological and recreational significance of the Preserve is amplified because it is one
9 of a very few remaining examples of a desert riparian environment. Environments of this
10 type once paralleled many of the water courses and drainages in southern Arizona such as
11 the Santa Cruz River near Tucson. During the past century, the extent of these riparian
12 areas has been greatly reduced.

13
14 When the Preserve was established in 1986, the Pima County Board of Supervisors,
15 sitting as the Board of Directors of the Pima County Flood Control District, adopted a
16 Declaration of Restrictions, Covenants, and Conditions that applies to areas along
17 Cienega Creek and Davidson Canyon. This document states that the Preserve was
18 established ...for the purposes of the preservation and protection of the natural and scenic
19 resources of the property,...

20
21 At the same time, the Board stated that Pima County's management goals, simply stated,
22 are to maintain the present natural characteristics of the Cienega Creek Natural Preserve,
23 and if possible, to allow natural restoration of the climax vegetation...The following
24 management policies support Pima County's desire to maintain our last remaining low-
25 elevation perennial stream in as natural a condition as possible"

26

1 The restrictions that run with the land also state that ... Pima County shall not conduct,
2 nor permit any other person to conduct mining, quarrying, sand hauling, fill hauling, or
3 timbering of any kind on the Preserve. Hunting or trapping of birds or animals, grazing of
4 cattle, or the destruction or removal of plants, shrubs, trees, except with written
5 permission of Pima County, is expressly prohibited. In the interest of resources
6 protection, no discharge of waste or by-products or materials on land or into water
7 channels that might result in harm to wildlife or human water supplies will be permitted.

8
9 As acquisitions proceeded over the next decade, the District obtained historic water rights
10 and transferred their uses to recreation and wildlife purposes to protect streamflow
11 occurring within the Natural Preserve. As authorized by the Board of Supervisors in
12 1986, the District also filed for in-stream flow rights, receiving an instream flow
13 certificate in 1993. The County holds water rights for stock-watering purposes along
14 Davidson Canyon.

15
16 At the request of Pima County Regional Flood Control District, Pima Association of
17 Governments began monitoring groundwater levels at three sites within the Preserve in
18 1989. This program was expanded to include groundwater monitoring along Davidson
19 Canyon and base flow discharges along Cienega Creek in the early 1990s. PAG continues
20 to monitor groundwater levels and surface water discharges today.

21
22 Pima County Regional Flood Control District and Pima County have also taken steps to
23 protect water quality of Cienega Creek and Davidson Canyon, beginning in 1987 with
24 water quality sampling. An interagency proposal was submitted in 1990 to protect
25 Cienega Creek within the Natural Preserve under the State of Arizona's Unique Waters
26 program, which imposes anti-degradation standards under state water quality rules. This

1 designation was received in 1992 for the lower Cienega Creek. The designation was
2 amend in 2002 in include portions of upper Cienega Creek located on U.S. Bureau of
3 Land Management land.

4
5 In recognition of Davidson Canyon's outstanding ecological and recreational values,
6 Pima County purchased the Bar V Ranch, consisting of 1763 acres of private lands and
7 12,674 acres of State Trust Land grazing leases. Bar V Ranch includes four channel miles
8 of Davidson Canyon and a working ranch. A riparian enclosure fence has been
9 constructed along part of the wash. The Cienega Creek Natural Preserve downstream has
10 an additional two miles of Davidson Canyon's flow and has also been excluded from
11 livestock grazing.

12
13 In 2005, Pima County Administrator C. H. Huckelberry requested to classify Davidson
14 Canyon as an Outstanding Water, pursuant to R18-11-112 of the Arizona Administrative
15 Code. The purpose was to protect the high quality water that Davidson provides to
16 Cienega Creek via springs and groundwater underflows.

17
18 Davidson Canyon is a rare, spring-fed, low-elevation desert stream that supports leopard
19 frogs, and at times, the native fish known as the long-fin dace. The Arizona Game and
20 Fish Department has recognized this as one of the most important wildlife migration
21 corridors in this part of Arizona, linking the Rincon, Empire and Santa Rita Mountains
22 (see Arizona Wildlife Linkage Assessment, 2006). Sky Island Alliance has monitored
23 wildlife use of Davidson Canyon below the Rosemont Mine in several places periodically
24 since 2001. Their data show that Davidson Canyon is used by black bear, mountain lion,
25 bobcat, coatimundi, white-tailed deer and at least three species of skunks.

26

1 Water chemistry data indicated that the water in the bottom of Davidson Canyon is
2 excellent, lower in total dissolved solids than the base flows in the main channel of
3 Cienega Creek where the Unique Waters designation had already been received from the
4 State. In addition, an isotope study by Pima Association of Governments showed that
5 groundwater underflows from Davidson Canyon contribute a significant portion of the
6 base flow in Cienega Creek, which is already designated as a Unique Water.

7
8 b. Legal Framework

9
10 i. The Section 401 Process and Required Consideration under Federal
11 and Arizona Law

12
13 This matter arises under §401 (33 U.S.C. § 1341) of the Federal Water Pollution Control
14 Act (33 U.S.C. §§ 1251 to 1387; otherwise known as the Clean Water Act) and A.R.S. §
15 49-202. Rosemont applied for a § 404 (33 U.S.C. §1344) permit from the U.S. Corps of
16 Engineers for activities Rosemont plans related to the development of the Mine. As a
17 precondition to the issuance of a § 404 permit for the Mine, the State of Arizona must
18 issue a § 401 water quality certification. In that document, the State must certify that
19 Rosemont's § 404 activities will comply with applicable Arizona water quality standards
20 (WQS) and allow for maintenance of existing uses. Section 401(a)(1) provides:

21 Any applicant for a Federal license or permit to conduct any activity . . . which
22 may result in any discharge into the navigable waters, shall provide the licensing
23 or permitting agency a certification from the State in which the discharge
24 originates or will originate . . . that any such discharge will comply with the
25 applicable provisions of [the Clean Water Act].

26 33 U.S.C. 1341(a)(1).

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Both federal and Arizona law require the State to ensure compliance with all applicable WQS before issuing a § 401 water quality certification. If the Mine will violate water quality standards and cannot be reasonably expected to meet those standards through remedial measures, ADEQ must deny certification. *See* 33 U.S.C. § 1341(a)(1) and (a)(3). The Clean Water Act also authorizes the State to impose conditions on the Certification necessary to ensure compliance with WQS. 33 U.S.C. 1341(d).

ADEQ is statutorily designated as the State’s agency responsible for issuing § 401 Certifications. A.R.S. § 49-202(A). ADEQ is required to issue rules governing how it will evaluate §401 applications but has done so only in a limited sense. The rules pertaining to antidegradation provide that

[t]he Director shall conduct the antidegradation review of any discharge authorized under a nationwide or regional § 404 permit as part of the § 401 water quality certification prior to issuance of the nationwide or regional permit. The Director shall conduct the antidegradation review of an individual § 404 permit if the discharge may degrade existing water quality in an OAW or a water listed on the 303(d) List of impaired waters. For regulated discharges that may degrade water quality in an OAW or a water that is on the 303(d) List of impaired waters, the Director shall conduct the antidegradation review as part of the § 401 water quality certification process.

AAC R18-11-107.01(D).

1 Further, ADEQ is to evaluate “whether the effect of the discharge will comply with the
2 water quality standards for navigable water established by department rules adopted
3 pursuant to § 49-221, subsection A, and § 49-222.” A.R.S. § 49-202(C).

4
5 ADEQ, by rulemaking, established “Outstanding Arizona Water” (“OAW”) designations
6 for pertinent reaches of Cienega Creek and in Davidson Canyon. AAC R18-11-112(G)(8)
7 and (G)(21). Both of these waters are downstream of Mine activities. As OAW’s, both
8 streams warrant additional protection under Arizona law. Specifically, they are subject to
9 Tier 3 antidegradation protection pursuant to AAC R18-11-107(D). Tier 3
10 antidegradation protection requires that “existing water quality shall be maintained and
11 protected in a surface water that is classified as an OAW under R18-11-112. Degradation
12 of an OAW under subsection (C) is prohibited.” AAC R18-11-107, *emphasis added*.

13
14 Additional regulatory Tier 3 protections include:

- 15 • A new or expanded point-source discharge directly to an OAW is prohibited.
- 16 • A person seeking authorization for a regulated discharge to a tributary to, or
17 upstream of, an OAW shall demonstrate in a permit application or in other
18 documentation submitted to the Department that the regulated discharge will
19 not degrade existing water quality in the downstream OAW.
- 20 • A discharge regulated under a § 404 permit that may affect existing water
21 quality of an OAW requires an individual § 401 water quality certification to
22 ensure that existing water quality is maintained and protected and any water
23 quality impacts are temporary. Temporary water quality impacts are those
24 impacts that occur for a period of six months or less.

25 AAC R18-11-107.01(C)(2) through (4).

26

1 ii. Public Notice Requirements Under Federal and Arizona Law
2

3 Nowhere does Arizona law specifically address the Clean Water Act requirement that the
4 state “establish procedures for public notice in the case of all certifications by it and, to
5 the extent it deems appropriate, procedures for public hearings in connection with
6 specific applications.” 33 U.S.C. § 1341(a)(1). Arizona statutes include a general
7 provision for public participation in ADEQ processes. That provision requires ADEQ to,
8 by rule, “prescribe procedures to assure adequate public participation in proceedings of
9 the department under this chapter.” A.R.S. § 49-208(A). Further, the public participation
10 procedures, at a minimum, must “prescribe public notice requirements including the
11 content and publication of the notice, provide an opportunity for public hearings and
12 specify the procedures governing the hearings and require the public availability of
13 relevant documents.” *Id.*, *emphasis added*.
14

15 Arizona rules promulgated pursuant to A.R.S. § 49-208 require ADEQ to:

- 16 1. Publish the notice as a legal notice at least once, in one or more newspapers of
17 general circulation in the county or counties concerned;
- 18 2. Include in the notice the following information:
- 19 3. The major issue under consideration or a description of the reason for the
20 action;
- 21 4. The Department’s proposed action and effective date for that action;
- 22 5. The location where relevant, nonconfidential documents may be obtained and
23 reviewed during normal business hours;
- 24 6. The name, address and telephone number of a person within the Department
25 who may be contacted for further information;
- 26

1 7. The location where public comments may be addressed, and the date and time
2 by which comments shall be received.

3 AAC R18-1-401(A).

4
5 c. ADEQ Based a Portion of Its Decision on a Relevant Document that was not
6 Subject to Public Review and Comment

7
8 The Certification identifies, in section 3 (Information Reviewed), a document entitled
9 “Surface Water Mitigation Plan” (the “Plan”, a copy of the narrative portion of which is
10 attached hereto as Exhibit E), which was prepared by Rosemont in December, 2014. This
11 submittal by Rosemont to ADEQ came long after the close of the public comment period³
12 and approximately only a month prior to ADEQ’s decision to issue the Certification. At
13 no point during this period did either Rosemont or ADEQ make an attempt to inform the
14 public of the Plan’s existence or to solicit input on the Plan’s content. That it is included
15 in the “Information Reviewed” list signifies that it is a relevant document and, indeed,
16 represents a critical piece of information in ADEQ’s decision-making process.

17
18 The Clean Water Act requires Arizona to provide public notice of the § 401 process
19 consistent with Arizona public participation procedures. U.S.C. § 1341(A). Those
20 Arizona procedures require relevant documents to be publicly available (A.R.S. § 49-
21 208(A)) and the public to be notified where they can be viewed. AAC R18-1-401(A). A
22 relevant document, made part of the record at the last possible minute and with no notice
23 to the public until the decision has been made, does not comply with either the Clean
24 Water Act or Arizona statutes. The resulting Certification is, therefore, void.

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³ Extended comment period ended April 7, 2014

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d. Rosemont's Surface Water Mitigation Plan is Fatally Flawed

- i. The Plan, and therefore, the Certification, Improperly Relies on an As-Yet-to-be-Developed Surface Water Model

Section 4.0 of the Plan advises that a Surface Water Model (the "Model") "is planned." Plan, Sec. 4.0. This Model is to "quantify potential changes surface water runoff" and to "quantify potential flow reductions." *Id.* The apparent intent is to identify whether Mine construction changes "affect, or have the potential to affect, downstream water quality." *Id.* Rosemont's schedule shows implementation of the Model in January, 2017, after nearly two years of development. Plan, Sec. 6.0

Since the downstream OAWs are covered by Tier 3 of the Arizona antidegradation standard, they cannot be degraded. AAC R18-11-107(D). There is no room for maybes and unknowns; this is an absolute prohibition. Despite the lack of a surface water model and, consequently, no idea of the Mine's impacts on downstream OAWs, ADEQ issued the Certification based solely on Rosemont's promise that it will develop the Model and implement it two years from now. Furthermore, without the model, there is no demonstration that the proposed mitigation measures can be effective. While ADEQ has some discretion in this matter, it must make a serious effort to determine whether the Mine will impact the OAWs and, if so, whether the mitigation measures will be effective. The lack of a surface water model leaves ADEQ with nothing but Rosemont's promises. Until the model is developed, there is no comfort level that Mine activities will be protective of the OAWs. Further, without a model, there can be no demonstration that

1 Rosemont's mitigation can be effective in offsetting the anticipated declines identified in
2 the FEIS and other documents.

3
4 An arbitrary and capricious decision is one where there has been "an unreasoning action,
5 without consideration and in disregard for facts and circumstances." *Maricopa County*
6 *Sheriff's Office v. Maricopa County Employee Merit Commission, et al.*, 211 Ariz. 219,
7 223 (2005). Issuance of the Certification without the model is arbitrary and capricious.

8
9 **ii. ADEQ has Improperly Approved Definitions Requiring any Impacts**
10 **Resulting from Regulated Construction Activities to be Include in the**
11 **"Baseline" and would Require these Impacts to be Deemed "Natural**
12 **Variation"**

13
14 ADEQ approved a definition of baseline water quality conditions that includes water
15 quality changes resulting from Phase 1 construction of impoundments. Including those
16 impacts as part of baseline and pre-judging any resulting changes as "natural variation" is
17 arbitrary and capricious and is contrary to law. These definitions were never provided to
18 the public until now, so there is no previous record of our commenting on this issue.
19 These definitions go far beyond the intent of describing how reductions in surface water
20 volumes will be mitigated.

21
22 The surface water mitigation plan's definition of baseline also conflicts with the USFS
23 FEIS which states, "baseline conditions would be established prior to mine construction
24 (before pre-mining phase)" (see FEIS appendix B at B-16).

25
26 The Certification provides in Section 1:

1 Subject to the conditions in Section 5, ADEQ certifies that based on the
2 information in Section 3 and in consideration of comments received in response to
3 public notice of the draft Certification decision issued February 21, 2014, the
4 activities proposed for **Rosemont Copper Project** will not violate applicable
5 surface water quality standards (SWQS) in the subject water bodies including
6 McCleary, Wasp, Trail, Barrel and Davidson Canyons and Cienega Creek in the
7 Santa Cruz Watershed, near Greaterville, Pima County.

8 **Certification, Sec. 1.**

9
10 In reaching this decision, ADEQ cites both the draft memorandum entitled “Revised
11 Analysis of Surface Water” and the “Surface Water Mitigation Plan.” Certification, Sec.
12 3, Items 16 and 26, respectively. In the Certificate, ADEQ also approves the Surface
13 Water Mitigation Plan, whose purpose is stated below in the Certificate’s Specific
14 Conditions:

15 The applicant has prepared, and ADEQ has approved, a Surface Water Mitigation
16 Plan, December, 2014, to maintain aquatic and riparian resources at pre-project
17 levels in the Outstanding Waters portions of Davidson Canyon Wash and Lower
18 Cienega Creek. The purpose of the plan is to detail the measures that will be taken
19 to offset predicted reductions in surface water flows and sediment, resulting from
20 the construction and operation of the Rosemont Copper Project, and a schedule for
21 implementation of such measures.

22
23 Upon issuance of this Certification, the applicant shall begin implementing the
24 Surface Water Mitigation Plan. Any proposed changes to this plan by the applicant
25 shall be submitted in writing to ADEQ. ADEQ shall coordinate with the USDA
26

1 Forest Service and CoE to determine if the changes are warranted and they should
2 be approved.

3
4 Should the results of monitoring by ADEQ, the applicant or others and/or revised
5 hydrologic modeling (ROD Mitigation Measures FS-BR-22, FS-BR-27, FS-GW-
6 02, FS SR-05) demonstrate that, as a result of the certified activities, water quality
7 upstream of or in the OAW segments in Davidson Canyon Wash and/or Lower
8 Cienega Creek has been degraded, ADEQ will request that the CoE suspend the
9 CWA 404 Permit in order for ADEQ to evaluate the issues and require additional
10 mitigation measures should the impacts be more than temporary degradation.

11
12 Any unauthorized material changes in, or failure to implement the Surface Water
13 Mitigation Plan, as it is currently approved or as amended in the future by the
14 applicant and approved by ADEQ, may be grounds for ADEQ requesting the CoE
15 modify, suspend or revoke the CWA 404 permit pursuant to 33 CFR 325.4(a)(2).

16 Certification, Spec. Cond. 1.

17
18 While the purpose of the Plan is to detail the measures that will be taken to offset
19 predicted reductions in surface water flows and sediment, Section 1 of the Plan, on page
20 3, goes far beyond this intent. "Baseline" water quality is defined to include impacts that
21 could occur during construction activities:

22 Monitoring discussed in this Plan is separated into two phases: Phase 1 and Phase
23 2. Phase 1 monitoring includes the time period from 2006 to the present and to the
24 point when Project construction activities begin to affect stormwater flow and
25 drainage. The installation of additional monitoring stations/locations (see Section
26 2.2.2 of this Plan) is assumed phased in during this period and is based on Rights

1 of Way from the Arizona State Land Department (ASLD). This time period covers
2 the baseline monitoring that was initiated in 2006. As a note, any trends, water
3 quality changes, or other anomalies observed in the Phase 1 data are understood to
4 be due to natural variations or other activities not associated with the Project;
5 and
6 Phase 2 monitoring will begin when major construction activities occur at the
7 Project site, i.e., when larger-scale stormwater impoundments are constructed at
8 the Project site and used to contain stormwater.

9 Plan, Sec. 1.2.1.

10

11 Note that Phase 1 includes “to the point when Project construction activities begin to
12 affect stormwater flow and drainage”, but Phase 2 does not begin until “larger-scale
13 stormwater impoundments are constructed and used to contain stormwater”. This is
14 vague and confusing, especially because there are so many impoundments of different
15 sizes and none are specifically referenced in the Plan or description of activities being
16 certified. Clearly, though, Rosemont intends to perform substantial amounts of
17 construction during baseline development.

18

19 Activities being certified are described in the Certification, Section 2, in a way that is also
20 vague and confusing:

21

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NOTE: During the development of the Final Environmental Impact statement (FEIS), changes were made to the project design that modified certain activities proposed in the CoE Public Notice/Application No. SPL-2008-00816-MB (Public Notice). This Certification is based on activities described in the Public Notice, with the exception of activities modified by the selected action in the USDA Forest Service's Record of Decision and FEIS. These modifications to the planned

1 activities include the removal of the heap leach facility and process, elimination of
2 fill in McCleary Canyon and the removal of the flow-through drain systems under
3 the waste rock storage areas and dry stack tailings facilities.

4 Certification, Sec. 2.

5
6 However, the resubmitted § 404 application (the "404 Application") describes Surface
7 Water Management on page 3. In that description, Rosemont advises:

8 For the purposes of stormwater management, the open pit, the heap leach facility,
9 and the plant site are closed systems, with all direct rainfall contained on site.

10 Currently designed stormwater diversions include the flow-through drain system,
11 process water temporary storage (PWTS), and open pit diversions. In addition to
12 the primary diversions, a storage and recovery system sump will be developed in
13 the waste rock storage area. Project water management facilities are intended to
14 have sufficient capacity to handle runoff generated from 100-year, 24-hour storm
15 events. Sediment control facilities are designed to reduce the total suspended solid
16 loads to the minimum practical level in the 10-year, 24-hour storm event, defined
17 as total suspended sold [*sic*] concentrations equal to existing conditions.

18
19 Stormwater flows from the plant site will be collected in the lined PWTS pond,
20 located immediately downgradient of the plant site. The PWTS pond functions as
21 a closed system with all water that is directed to the pond from the plant, in
22 addition to collected stormwater runoff, incorporated into the process water flows.

23
24 The buttresses of the dry stack tailings facility will advance ahead of the tailings
25 surface to provide containment while concurrent reclamation and best
26 management practices, such as settling ponds, will be used to limit soil erosion in

1 the outer slopes. The top of the tailings area is impervious and will be sloped
2 inward so precipitation falling on top of the active tailings area will remain on top
3 and evaporate. Ponded water may be pumped to the PWTs pond as needed to limit
4 infiltration into tailings mass. Stormwater management at the waste rock facilities
5 will be similar to that for the dry tailings facility.

6 404 Application, page 3.

7
8 As noted in the Certification, the project description and activities were modified in the
9 draft ROD and FEIS. The FEIS identifies an 18- to 24-month preconstruction period that
10 includes pit construction and diversion of the intercepted runoff to Barrel Canyon, not
11 impoundment. Specifically: see p. xvi of the FEIS executive summary:

12 The project would be located primarily within the Barrel Canyon drainage and its
13 tributaries. Diversion channels would be constructed to intercept runoff from
14 precipitation and route it around the mine facilities for discharge to lower Barrel
15 Canyon, downstream of the project. Over time, the northern tailing facility would
16 expand south and east and would cover a portion of the Barrel Canyon.

17 FEIS, p. xvi.

18

19 The FEIS further provides:

20 Preproduction stripping of overlying rock would require 18 to 24 months
21 (premining stage) to prepare for full-scale mining operations, train work crews,
22 construct access and haul roads, and clear and grub the pit and tailings and waste
23 rock facilities that would be disturbed during the initial years of operation.

24 FEIS, p. xvii.

25

26

1 Page 14 of the July 2013 Stormwater Pollution Prevention Plan (SWPPP), which was not
2 listed as a relevant document for the Certification and, therefore, apparently not reviewed
3 by ADEQ, provides much more explicit information regarding sequencing of stormwater
4 controls on the figures 4-13 submitted with the SWPPP. At the minimum, based on these,
5 there could be clearing, grubbing, construction of the crushing, milling and flotation
6 facilities, and at least partial construction of the pit diversion and the haul and access
7 roads during baseline.

8
9 In conclusion, it is clear the baseline is defined in a way that permits 404-regulated
10 activities to occur during baseline water quality data collection. This is illogical in
11 addition to arbitrary and capricious. While it is true under Arizona law that there can be
12 no discharges from the mine workings during active mining and that this prohibition does
13 not apply before mining commences, it is not logical to assume that construction
14 activities at the mine cannot cause any trends, water quality changes or other anomalies,
15 particularly when wholesale diversions of watersheds will occur during the earliest
16 phases of construction.

17
18 The monitoring plan goes further to define any trends, water quality changes or other
19 anomalies as "due to natural variations or other activities not related to the Project"
20 (Section 1 of the Plan at page 3). Approving an applicant's statement requiring official to
21 interpret water quality data in the applicant's favor is arbitrary and capricious, if not
22 contrary to law.

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iii. Rosemont Will Use Improper Adaptive Management Techniques to
Modify the Plan

1 The Surface Water Mitigation Plan, dated December 2014, is a new document that is part
2 of the basis for Certification. This new document advises that a surface water model will
3 be used to identify runoff replacement as a means of mitigating reduction of surface
4 water discharges. At page 18, Rosemont states:

5 In addition to serving as a tool to quantify potential flow reductions due to Project
6 activities, the Model will be used to estimate runoff replacement quantities from
7 off-site mitigation locations. Project effects will be based on existing and new
8 monitoring points located throughout the watershed up-gradient of the USGS
9 Gaging Station. The USGS station is located at the intersection of SR 83 and the
10 Lower Barrel Canyon Drainage.

11 Plan, Sec. 4.0.

12
13 In the Plan, Rosemont proposes the use of an adaptive management process "to ensure
14 the initial intent of the Plan is being met, and that pertinent data is being collected and
15 reported and that site conditions are accurately represented." Plan, Sec. 8.0. It identifies
16 three key components of adaptive management:

- 17 • Testing assumptions - collecting and using monitoring data to determine if
18 current assumptions are valid;
- 19 • Adaptation - making changes to assumptions and monitoring program to
20 respond to new or different information obtained through the monitoring data
21 and project experience: and
- 22 • Learning - documenting the planning and implementation processes and its
23 successes and failures for internal learning as well as the scientific community.

24 Plan, Sec. 8. Rosemont further provides a partial list of elements that may be modified as
25 part of the adaptive management process:

26 Monitoring locations;

1 **Monitoring parameters;**
2 **Monitoring frequencies;**
3 **Assumptions associated with pollutant loading, runoff volume, and/or assimilative**
4 **capacity;**
5 **Modeling approach;**
6 **Mitigation opportunities or requirements;**
7 **Implementation process for mitigation; and**
8 **Information provided and included in the quarterly data summaries and in the**
9 **Annual Summary Report.**

10
11 **Approximately 30% of the surface water entering the OAW at Davidson Canyon**
12 **will be impounded as a result of the Mine, yet there is no plan proposed by**
13 **Rosemont to make up for that reduction in flow. Further, there is no connection**
14 **between the host of data proposed to be collected and a decision to engage in a**
15 **management action that can reverse or mitigate for damages caused. Instead, the**
16 **Certification allows Rosemont to invoke an “adaptive management” process**
17 **whose outcome is not avoiding, minimizing, or mitigation harm to the resource**
18 **(quantity and/or quality of surface water), but instead to refine models.**
19 **Characterizing such an approach as adaptive management is contrary to logic,**
20 **because adaptive management is inherently focused on management actions that**
21 **foster outcomes related the goal of the project, which is:**

22
23 **. . . no degradation to downstream water quality (compared to current water**
24 **quality) due to Project construction, operation, and/or closure activities.**
25 **Additionally, no degradation is anticipated to the water quality in the**
26 **Outstanding Arizona Water (OAW) segment of Davidson Canyon Wash.**

1 Plan, Sec. 1.0.

2

3 The certification ignores a large body of literature and practice of adaptive management
4 in environmental decision processes in general (e.g., Walters 1986; Gregory and Keeney
5 2002; Williams et. al. 2007) and water management in particular (Richter et. al. 2003;
6 Zedler 2003; Richter and Thomas 2007; Medema et. al. 2008). Citations to this literature
7 with brief excerpts is attached hereto as Appendix 1. To our knowledge, no credible
8 application of adaptive management principles and practices are restricted to model
9 validation and refinement, as was certified for Rosemont. In short, while model
10 validation is a key step in adaptive management, such models only serve to improve the
11 outcome of management actions. Rosemont's reliance solely on model refinement is an
12 improper use of the adaptive management method and, consequently, ADEQ's
13 acceptance and approval of this approach as a key component of the Plan is arbitrary and
14 capricious.

15

16 In the case of surface water in the Davidson watershed, adaptive management—even as
17 practiced according to industry standards—is not an appropriate tool for surface water in
18 Davidson Canyon. Instead, the focus of the mitigation plan should be on avoidance,
19 minimization, and mitigation of impacts that are already modeled to occur, particularly
20 during construction. In light of the absolute antidegradation requirement of AAC R18-11-
21 107(D) for the OAWs involved, failure to require such a focus is arbitrary, capricious and
22 contrary to law.

23

24 iv. Rosemont's Surface Water Mitigation Plan Does not Include a
25 Stormwater Mitigation Plan nor any Immediate Contingency to Address
26 Stormwater Impacts

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Rosemont opines that it “does not anticipate any adverse changes to water quality or the stability of Davidson Canyon Wash or the OAW segment as the result of Project activities.” Plan, Sec. 5.0. For that reason, it offers only “general concepts” of what it will do should stormwater impacts occur. *Id.* ADEQ’s acceptance of Rosemont’s opinion and the resulting approval of the Plan without stormwater response contingencies is arbitrary and capricious and is contrary to law.

Both Davidson Canyon and Cienega Creek are OAWs (AAC R18-11-112(G)) and are protected by the Tier 3 antidegradation standard. AAC R18-11-107. Tier 3 protections in Arizona law are:

1. Tier 3 antidegradation protection applies only to an OAW listed in R18-11-112(G).
2. A new or expanded point-source discharge directly to an OAW is prohibited.
3. A person seeking authorization for a regulated discharge to a tributary to, or upstream of, an OAW shall demonstrate in a permit application or in other documentation submitted to the Department that the regulated discharge will not degrade existing water quality in the downstream OAW.
4. A discharge regulated under a § 404 permit that may affect existing water quality of an OAW requires an individual § 401 water quality certification to ensure that existing water quality is maintained and protected and any water quality impacts are temporary. Temporary water quality impacts are those impacts that occur for a period of six months or less.

1 AAC R18-11-107.01(C). Two of these protections, (3) and (4) are particularly relevant to
2 the instant discussion.

3
4 Protection (3) requires Rosemont to demonstrate that Mine-related discharges “will not
5 degrade existing water quality.” AAC R18-11-107.01(C)(3). Rosemont has not done so
6 with respect to stormwater discharges. It merely offers its belief that there will be no
7 impacts and advises that it will develop a mitigation plan “[w]hen it is determined that
8 mitigation is required.” Plan, Sec. 5.0.

9
10 Rosemont’s intent to delay development of a mitigation plan leaves open the likelihood
11 that impacts to the OAWs will last more than the “temporary” six-month duration
12 specified in Protection (4). Only after an impact is detected, will Rosemont develop the
13 mitigation plan and implementation of the plan’s response actions will be even further
14 postponed. This is particularly problematic given the inherent delay in reporting impacts
15 to the U.S. Forest Service (only on a quarterly basis) followed in delays in convening
16 meetings of the response committee.

17
18 Rosemont’s failure to make the demonstration necessary to meet the requirement of
19 Protection (3) is contrary to law. ADEQ’s approval of the Plan with the non-compliant
20 demonstration and the lack of an immediate mitigation plan is arbitrary and capricious.

21
22 e. ADEQ Relied Upon Faulty Technical Data in its Decision-Making Process

23
24 As noted above, Appellants submitted three letters during ADEQ’s review of the
25 Rosemont application. ADEQ has made no attempt to address any of these comments in
26 a written explanation of its decision-making process. It issued a final Certification that is

1 essentially identical to the draft version and merely makes passing reference, in the
2 “Information Reviewed” section of the Certification, to the many comments received.
3 This lack of a reasoned response to the comments coupled with the lack of significant
4 revisions between the draft and final Certification suggests the comments were, for the
5 most part, ignored.

6
7 ADEQ’s apparent refusal to consider comments filed is particularly troubling in light of
8 information contained in Appellants’ July 16, 2014 submittal (Exhibit D, hereto). While
9 this document was submitted outside the official comment period, it is not a comment,
10 *per se*, but represents supplemental technical information regarding streamflow and
11 groundwater in Cienega Creek and Davidson Canyon. Attached to the July 16, 2014
12 letter was a document entitled “Impacts of the Rosemont Mine on Hydrology and
13 Threatened and Endangered Species of the Cienega Creek Natural Preserve”⁴
14 (hereinafter, “Powell (2014)”) which points out a statistically significant link between
15 surface water flow extent and groundwater resources in lower Cienega Creek and
16 Davidson Canyon. In particular, Powell (2014) identifies and discusses faulty
17 topographical data relied upon by Rosemont. This new technical data makes invalid
18 Rosemont’s assertion that the Davidson Canyon surface-water system is disconnected
19 from the groundwater system. However, despite the obvious importance of this
20 information in the protection of OAW water quality and the resulting potential for Mine
21 impacts, ADEQ apparently chose to ignore Appellants’ submittal. ADEQ’s failure to
22 consider the data supplied in Appellants’ July 16, 2014 submittal and to factor that data
23 into the Certification is arbitrary and capricious.

24
25 ⁴ Powell, Orchard, Fonseca, and Postillion (2014). Impacts of the Rosemont Mine on hydrology and Threatened
26 and Endangered Species of the Cienega Creek Natural Preserve. The Powell document resulted from a federal
workshop held on June 10 and 11, 2014 to identify new data and analyses pertaining to surface waters. The data
therein was not available during the official comment period in this matter.

1
2 Powell (2104) shows: 1) the corrected channel bed elevations are clearly within
3 elevations that intersect the shallow groundwater table; and 2) groundwater supports
4 intermittent surface flows in the OAW reach. There is, however, no recognition of this
5 information in ADEQ's final Certification nor is there any explanation as to why the
6 information was ignored.

7
8 Figure 1 of Appendix 2 hereto is a graph⁵ produced by Rosemont purporting to show
9 groundwater elevations significantly below stream bed levels. Figure 2 in Appendix 2
10 hereto is the same graph⁶ but with corrected stream bed elevations. The corrected cross-
11 sectional data demonstrate that the following conclusions from Rosemont's Davidson
12 Canyon Conceptual Groundwater Monitoring Plan⁷ are incorrect:

- 13 • "DTW [depth to water] has been persistently 7 to 15 feet below the stream
14 channel in the OAW Reach;"
- 15 • "Persistent DTW below the stream channel bottom, combined with ephemeral,
16 short duration, low discharge, and limited surface-length expression of spring
17 flow, indicates that the groundwater system is usually disconnected from the
18 surface-water system;"
- 19 • "Groundwater is disconnected from the alluvial stream channel"; and
20 • "Potential impacts to the OAW Reach will be limited

21 (Groundwater Plan, page 12) and that ADEQ's reliance⁸ on those conclusions was
22 improper.

23
24
25 ⁵ Figure 5 in Tetra Tech (2010a), Davidson Canyon hydrological conceptual model as assessment of spring impacts.
Tetra Tech project 114-320869. Prepared for Rosemont Copper, Tucson, Arizona.

26 ⁶ Figure 6 in Powell (2014).

⁷ Davidson Canyon Conceptual Groundwater Monitoring Plan, prepared by Engineering Analytics, Inc., March 2012.

⁸ Cited as document 13 in Certification, Section 3.0.

1
2 Appellants, in their April 4, 2014 comments (Exhibit C) discuss ADEQ's decision to
3 ignore isotope work done by Montgomery and Associates in 2010⁹ that clearly supports a
4 hydraulic connection between the OAW reach of Davidson Canyon and the regional
5 aquifer. The statement in the Mitigation Plan that "no degradation is anticipated to the
6 water quality in the Outstanding Arizona Water (OAW) segment of Davidson Canyon
7 Wash" (Plan, Sec. 1.0), in part, presumes that the OAW reach is not connected to the
8 regional aquifer as reported in Tetra Tech (2010a). This overlooks documentation
9 suggesting otherwise, and therefore, contradicts the Certification's assertion that mining
10 activities will not cause degradation to water quality in the OAW.

11
12 Further, as also discussed in Appellants' July 16, 2014 report (attached to Exhibit D),
13 ADEQ failed to consider and comment on an analysis showing drawdown of the regional
14 aquifer in amounts reported in (Montgomery 2010) can potentially reduce wetted stream
15 length in Lower Davidson Canyon by 30%. This analysis is crucial to illustrate the
16 potential damage to the OAW that will result from drawdowns in the regional aquifer. It
17 undermines Rosemont's argument that the streamflows in Davidson Canyon are unrelated
18 to the regional aquifer and that groundwater is disconnected from the alluvial stream
19 channel. When additional evidence is considered, it is apparent there is a much higher
20 probability of Mine impacts on Lower Davidson Canyon and the Outstanding Arizona
21 Waters. The data concerning these increased risks were apparently not considered by
22 ADEQ in its decision to issue the Certification. That failure produced an arbitrary and
23 capricious decision.

24
25
26 ⁹ Montgomery and Associates, Inc. 2010. Revised report: Groundwater flow modeling conducted for simulation of
proposed Rosemont pit dewatering and post-closure, Vol. 1: Text and tables. Prepared for Rosemont Copper.
Tucson, Arizona.

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IV. CONCLUSIONS

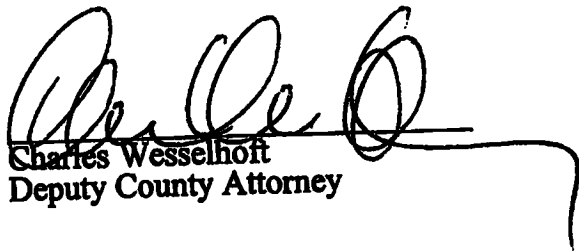
For the reasons provided above, ADEQ's Certification that the activities proposed by Rosemont for the Rosemont Copper Project will not violate applicable surface water quality standards in Davidson Canyon and Cienega Creek is not supported by substantial evidence, is contrary to law, is arbitrary and capricious and is an abuse of discretion. For that reason, ADEQ's decision to issue the Certification must be reversed. Further, approval of the Rosemont Surface Water Mitigation Plan must be rescinded and amended to address the inadequacies discussed herein. Revision of the Plan should be followed by public review and comment. Finally, Rosemont must quantify the extent and duration of "temporary" impacts from Mine operations to the downstream OAWs.

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

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RESPECTFULLY SUBMITTED March 5, 2015.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

By 
Charles Wesselhoft
Deputy County Attorney

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2015, a copy of the above Notice of Appeal, was served on the persons listed below by depositing said document into the U.S. Mail, postage prepaid (certified mail, return receipt requested) prior to 11:59 p.m.

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

and

Hearing Administrator
ADEQ Office of Administrative Counsel
1110 West Washington Street
Phoenix, Arizona 85007

With a copy to:

Office of the Attorney General
Environmental Enforcement Section Administrative Appeals Desk
1275 West Washington Street
Phoenix, Arizona 85007

By: Stacey Beruman

Exhibit B

March 23, 2015 letter from ADEQ



Douglas A. Ducey
Governor

ARIZONA DEPARTMENT
OF
ENVIRONMENTAL QUALITY



Henry R. Darwin
Director

March 23, 2015

Mr. Charles Wesselhoft
Deputy County Attorney
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701

RE: Notice of Appeal (Water Quality Certification to Rosemont Copper Company)

Dear Mr. Wesselhoft:

Arizona Revised Statute (A.R.S.) § 49-202(H) limits administrative appeals of water quality certifications under Title 41, Chapter 6, Article 10. As you noted, A.R.S. § 49-202(H) authorizes an adversely affected person to appeal a certification of a nationwide or general permit. In this case, the requirements of A.R.S. § 49-202(H) have not been met because the State's 401 Water Quality Certification applies to the individual Clean Water Act 404 permit for the Rosemont Copper Project. Since the requirements have not been met, your appeal request is denied.

If you have any questions, feel free to contact me at (602) 771- 224.

Sincerely,

Sherri L. Zendri
Administrative Counsel
Arizona Department of Environmental Quality

cc: Curtis Cox, Arizona Attorney General's Office

Exhibit C

Request for Reconsideration

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

1 **BARBARA LAWALL**
2 **PIMA COUNTY ATTORNEY**
3 **CIVIL DIVISION**
4 Charles Wesselhoft, SBN 023856
5 Deputy County Attorney
6 32 North Stone Avenue, Suite 2100
7 Tucson, Arizona 85701
8 Telephone: 520-740-5750
9 Charles.Wesselhoft@pcao.pima.gov
10 *Attorney for Pima County*

11
12 **ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY**

13 **PIMA COUNTY, a body politic; and**
14 **PIMA COUNTY REGIONAL FLOOD**
15 **CONTROL DISTRICT,**

16 **Appellants,**

17 **vs.**

18 **THE STATE OF ARIZONA, and**
19 **THE ARIZONA DEPARTMENT OF**
20 **ENVIRONMENTAL QUALITY,**

21 **Respondents.**

22 **REQUEST FOR**
23 **RECONSIDERATION**

24 **INTRODUCTION**

25 In a letter from the Arizona Department of Environmental Quality (ADEQ) dated
26 March 23, 2015 (copy attached hereto as Exhibit A) ADEQ denied Appellants Pima
County's and Pima County Flood Control District's appeal of ADEQ's issuance of a
Section 401 water quality certification (Certification) to Rosemont Copper Company.
ADEQ cites, as a basis for denial, an alleged standing limitation in A.R.S. § 49-202(H).
Specifically, ADEQ denied the appeal because the appeal challenged issuance of a

1 certification for an individual, rather than a nationwide or general, permit. For the
2 reasons discussed below, Appellants respectfully request that ADEQ's decision to deny
3 the appeal be reversed.

4

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DISCUSSION

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I. Appellants Pled Applicability of Both A.R.S. § 49-202(H) and A.R.S. § 41-1092.03(B) in Their Assertion of Standing

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10 While Appellants, in their Notice of Appeal ("Notice"), offered A.R.S. § 49-202(H)
11 as a basis for standing, Appellants also relied on the standing provisions of A.R.S. § 41-
12 1092.03(B) and, in particular, explained Appellants' participation in the Certification
13 process and, therefore, their right to appeal the Certification under that statute. State law
14 specifically allows appeal by a "party who will be adversely affected by the appealable
15 agency action or contested case and who exercised any right provided by law to comment
16 on the action being appealed or contested" A.R.S. § 41-1092.03(B). Appellants
17 meet the requirements of A.R.S. § 41-1092.03(B) and have a right to appeal the
18 Certification independent of A.R.S. § 49-202(H).

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II. Appellants are Parties for Purposes of A.R.S. § 41-1092.03(B)

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"Party," for purposes of Title 41, Chapter 6, "means each person or agency named or
admitted as a party or properly seeking and entitled as of right to be admitted as a party."
ARS 41-1001(12). Nothing in Title 41, Chapter 6 is particularly instructive regarding
who is entitled to be admitted as a party. However, there is case law touching on the
subject.

1 ***City of Phoenix v ADEQ, et al.*, 205 Ariz. 576 (Div. 1, 2003) involved a challenge**
2 **by the City of Phoenix (City) of a permit issued by ADEQ to a waste management**
3 **company allowing the company to own and operate a hazardous waste treatment and**
4 **storage facility. The City’s challenge was based, in part, on whether the Resource**
5 **Conservation and Recovery Act¹ (RCRA) and regulations promulgated thereunder**
6 **preempted A.R.S. Title 41, Chapter 6, Article 10 (Article 10).**

7 **As part of the court’s analysis of this question, it looked to regulations**
8 **promulgated pursuant to RCRA and, in particular at 40 CFR § 124.19(a). The court**
9 **pointed out that, under the cited RCRA regulation, “only persons or entities who first**
10 **filed comments on the initial draft permit may petition the Board for administrative**
11 **review.” *Phoenix* at 582. It then went on to say, when comparing the challenge**
12 **provisions under RCRA with those in Article 10:**

13 **Moreover, whereas federal regulation requires that only parties who filed**
14 **comments on, or participated in, the initial draft permit are allowed to petition for**
15 **administrative review and thus ultimately obtain judicial review, no such**
16 **qualifying preliminary objection is required under Article 10.**

17 ***Id.* Thus, for purposes of RCRA permit challenges and Article 10, the Division 1 court**
18 **equated “persons” with “parties.” There is no reason to believe a different interpretation**
19 **applies when a water quality certification is the underlying decision.**

20 **The broader interpretation of “party” is also supported when A.R.S. § 41-**
21 **1092.03(B) is read in conjunction with A.R.S. § 49-202(H). As discussed below, these**
22 **two statutes, when combined, provide appeal rights for all persons adversely impacted by**
23 **ADEQ’s issuance of § 401 water quality certifications. It is unreasonable to ascribe a**

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¹ RCRA is the 1976 amendment to the federal Solid Waste Disposal Act, 42 U.S.C. §§ 6901 to 6992k.

1 lesser standing standard to those appealing nationwide and general permit-related
2 certifications but a higher standard to those appealing individual permit certifications.

3 Given the lack of any guidance to the contrary in statute or case law, Appellants
4 must be considered Article 10 parties.

5
6 III. A.R.S. § 41-1092.03(B) Allows Appeals of § 401 Individual Permit
7 Certifications

8
9 The Arizona Administrative Procedure Act (“APA”), A.R.S. Title 41, Chapter 6,
10 grants persons the right of appeal “an appealable agency action.” A.R.S. § 41-
11 1092.03(B). An “appealable agency action” is defined under the APA as “an action that
12 determines the legal rights, duties or privileges of a party and that is not a contested
13 case.” ARS 41-1092(3). Appellants, in the Notice of Appeal, provided multiple claims
14 concerning ADEQ’s improper issuance of the Certification and the resulting impact on
15 Appellants’ legal rights as downstream property owners. Protection of those rights is the
16 very purpose of the APA.

17
18 IV. A.R.S. § 49-202(H) Does Not Preclude A.R.S. § 41-1092.03(B)-based Appeals
19 of § 401 Individual Permit Certifications

20
21 While A.R.S. § 49-202(H) allows both an “applicant” and “any person who is or
22 may be adversely affected by the denial or imposition of conditions on the certification of
23 a nationwide or general permit” to appeal the certification, there is nothing in that statute
24 precluding challenges to individual permit certifications under another statute. Indeed,
25 interpreting A.R.S. § 49-202(H) as a limitation would be in direct conflict with the
26 general right to appeal agency actions provided under A.R.S. § 41-1092.03(B).

1 Given this conflict, interpreting A.R.S. § 49-202(H) as a limitation on Appellants’
2 right to appeal the Certification is inconsistent with the state’s Administrative Procedure
3 Act (the “APA”). A.R.S. Title 41, Chapter 6. The APA, which includes A.R.S. § 41-
4 1092.03(B), provides the following explanation of statutory hierarchy: “[t]o the extent
5 that any other statute would diminish a right created or duty imposed by this chapter, the
6 other statute is superseded by this chapter, unless the other statute expressly provides
7 otherwise.” A.R.S. § 41-1002(B). Therefore, A.R.S. § 49-202(H) must be interpreted as
8 something other than a limitation on the APA-granted right to appeal.

9 Interpreting A.R.S. § 49-202(H) to preclude appeal of individual permit
10 certifications is also illogical in that the statute allows appeal of nationwide and general
11 permits but, for individual permits which often result in substantial impacts to waters of
12 the U.S., no appeal is allowed.

13 The logical, conflict free interpretation of the two provisions allows appeals of
14 individual permit certifications to proceed under A.R.S. § 49-1092.03(B), subject to the
15 requirement that the persons appealing participated in the certification process. A.R.S. §
16 49-202(H) provides a separate appeal pathway for persons challenging nationwide and
17 general permit certifications. Certifications for those types of permits are issued
18 generally and with little or no opportunity for review and input regarding specific
19 conditions imposed on permittees or those adversely impacted by the certifications. This
20 appears to be the gap the Legislature intended to close in enacting ARS 49-202(H).

21
22 V. CONCLUSION

23
24 As discussed above, Appellants properly pled their right to appeal pursuant to
25 ARS 41-1092.03(B). They were parties to the Certification process and therefore qualify
26 for standing to appeal under ARS 41-1092.03(B). Appeals of individual § 401 permit

BARBARA LA WALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

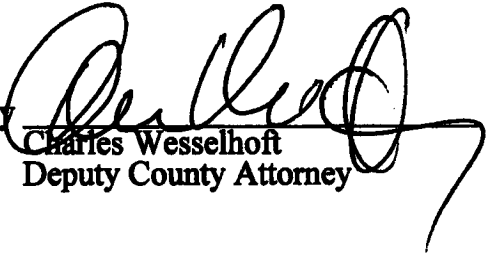
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certifications are properly brought under ARS 41-1092.03(B). Finally, ARS 49-202(H) does not preclude appellants from an appeal pursuant to ARS 41-1092.03(B).

For the above reasons, Appellants respectfully request reconsideration of ADEQ's decision to deny Appellants' appeal in this matter.

RESPECTFULLY SUBMITTED April 1, 2015.

BARBARA LA WALL
PIMA COUNTY ATTORNEY

By 
Charles Wesselhoft
Deputy County Attorney

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, a copy of the above Request for Reconsideration, was served on the persons listed below by depositing said document into the U.S. Mail, postage prepaid (certified mail, return receipt requested) prior to 11:59 p.m.

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

and

Hearing Administrator
ADEQ Office of Administrative Counsel
1110 West Washington Street
Phoenix, Arizona 85007

With a copy to:

Office of the Attorney General
Environmental Enforcement Section Administrative Appeals Desk
1275 West Washington Street
Phoenix, Arizona 85007

By: Stacey Bowman

Exhibit D

May 1, 2015 Letter from ADEQ



Douglas A. Ducey
Governor

ARIZONA DEPARTMENT
OF
ENVIRONMENTAL QUALITY



Henry R. Darwin
Director

May 1, 2015

Mr. Charles Wesselhoft
Deputy County Attorney
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701

RE: Request for Reconsideration (Water Quality Certification to Rosemont Copper Company)

Dear Mr. Wesselhoft:

The Arizona Department of Environmental Quality (ADEQ) has received and considered your April 1, 2015 request to reconsider its position regarding Pima County's appeal of the Section 401 Water Quality Certification to Rosemont Copper Company. ADEQ does not have the legal authority to expand the statutory jurisdiction authorizing administrative appeals in the State's administrative appeals process. Therefore, as previously stated in ADEQ's March 22, 2015 letter, ADEQ is unable to accept an appeal and agree to your request. ADEQ, however, does not take a position on the right to administratively appeal, through the federal administrative appeals process, the Army Corp of Engineers' Section 404 permit.

If you have any questions, feel free to contact me at (602) 771- 2242.

Sincerely,

Sherri L. Zendri
Administrative Counsel
Arizona Department of Environmental Quality

cc: Curtis Cox, Arizona Attorney General's Office

Exhibit E

Order dated July 14, 2016

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000243-001 DT

07/14/2016

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

PIMA COUNTY
PIMA COUNTY REGIONAL FLOOD
CONTROL DISTRICT

CHARLES WESSELHOFT

v.

HENRY DARWIN (001)

CURTIS A COX

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Appellants Pima County and Pima County Regional Flood Control District ask this Court to review actions taken by Appellee the Arizona Department of Environmental Quality (AzDEQ) refusing to allow Appellants to proceed with the appellate review process. For the following reasons, this Court orders AzDEQ to take some official action in this matter.

I. FACTUAL BACKGROUND.

On October 11, 2011, Rosemont Copper Company (Rosemont) applied to the Army Corps of Engineers for a discharge permit (known as a § 404 permit), and on January 12, 2012, applied to Appellee the Arizona Department of Environmental Quality (AzDEQ) for a § 401 certification, which it needed in order to obtain the § 404 permit. AzDEQ issued a notice stating any comments were due by March 24, 2014. In response, Appellants filed an initial set of comments on March 21, 2014. AzDEQ extended the comment period to April 7, 2014, and Appellants filed a second set of comments on April 4, 2014.

On February 3, 2015, AzDEQ issued the final Certification. On March 5, 2015, Appellants filed an administrative appeal pursuant to the Arizona Administrative Procedure Act seeking to have this issue reviewed at an administrative hearing, such as one before the Office of Administrative Hearings. Mr. Charles Wesselhoft (Wesselhoft), Deputy (Pima) County Attorney, received a letter dated March 23, 2015, on Arizona Department of Environmental Quality letterhead, from Ms. Sherri L. Zendri (Zendri), who listed herself as Administrative Counsel, Arizona Department of Environmental Quality. In that letter, Zendri stated that Appellants did not qualify as entities that were permitted to file an administrative appeal, and thus "your appeal request is denied." (Zendri Letter, dated Mar. 23, 2015, at 1.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000243-001 DT

07/14/2016

In response to Zendri's letter, Appellants filed a Request for Reconsideration giving their reasons why they believed they did have the right to appeal AzDEQ's issuance of the final Certification. (Request for Reconsideration, dated Apr. 1, 2015.) In response, Wesselhoft received another letter, again on Arizona Department of Environmental Quality letterhead from Zendri, who again listed herself as Administrative Counsel, Arizona Department of Environmental Quality. In that letter, Zendri stated "ADEQ is unable to accept an appeal and agree to your request." It further stated "ADEQ, however, does not take a position on the right to administratively appeal, through the federal administrative appeals process, the Army Corp of Engineers' Section 404 permit." (Zendri Letter, dated May 1, 2015, at 1.)

On June 3, 2015, Appellants filed a Notice of Appeal for Judicial Review of Administrative Decision stating, "This action seeks judicial review of ADEQ's decision made by [Henry R.] Darwin, as Director of ADEQ." (Notice of Appeal at ¶ 9.) In its Answering Brief filed October 26, 2015, Appellees (which now included both AzDEQ and Rosemont) presented three arguments.

First, Appellees contended this Court did not have jurisdiction in this appeal because (1) the two letters from Zendri were not the actions of AzDEQ, (2) thus those letters did not constitute an administrative decision under A.R.S. § 12-901(2), and (3) thus those letters did not constitute a final administrative decision under A.R.S. § 12-902(A)(1) that would be subject to administrative review under A.R.S. § 12-904(A). Appellees stated "Zendri's letters are more properly viewed as advisory communications from agency counsel to counsel for the Appellants." (Appellees' Joint Answering Brief at 7, ll. 14-15.) They further stated "Zendri was not the Director of ADEQ and was not authorized to render decisions for the agency." (*Id.* at 7, ll. 25-26.)

Second, Appellee contended this Court did not have jurisdiction in this appeal because Appellants failed to seek a hearing of the agency decision in accordance with the Administrative Procedure Act. Appellees contend that, because Appellants had taken the position that the Zendri letters constituted an appealable agency action within the meaning of A.R.S. § 41-1092(3), "they had an obligation to request a hearing on that action pursuant to A.R.S. § 41-1092.03(B) and to complete the administrative appeal process *before* seeking judicial review under the Administrative Review Act." (Appellees' Joint Answering Brief at 9-10; emphasis original.)

Third, Appellees contended that "even if Ms. Zendri's advisory letters constitute a final administrative decision and Appellants' failure to exhaust administrative remedies is ignored, Appellants, as a matter of law, had no right to appeal the Certification." (Appellees' Joint Answering Brief at 10, ll. 15-17.)

At the oral argument held January 27, 2016, Appellees again took the position that the Zendri letters were not the action of the administrative agency (AzDEQ), thus this Court did not have jurisdiction to review what had happened below. This Court raised the question whether this Court could treat the current action as a special action in the nature of mandamus and order the Director of AzDEQ to take some action as Director of, and on behalf of, AzDEQ. This Court ordered the parties to file supplemental briefs on that issue. The parties have now done so.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000243-001 DT

07/14/2016

II. DISCUSSION.

In their Joint Supplemental Brief, filed June 1, 2016, Appellees state the following:

Appellees acknowledge that Ms. Zendri was authorized to act on behalf of ADEQ (but as the agency's Administrative Counsel, and not as its Director) and that her correspondence is consistent with ADEQ's position in this case. But that does not mean Ms. Zendri is authorized to issue final administrative decisions on behalf of ADEQ or that her communications are appealable under the ARA.

As a result, there are two serious jurisdictional problems which affect the Court's interlocutory powers, including its authority to issue the contemplated order. First, as stated, the ARA provides for judicial review in the superior court of "a final decision of an administrative agency." A.R.S. § 12-902(A)(1). Ms. Zendri is not the ADEQ Director, and her letters do not constitute the final administrative decision of ADEQ. See Appellees' Ans. Br. At 6-8.

Second, Appellants failed to exhaust their administrative remedies. Under the Administrative Procedure Act ("APA"), A.R.S. §§ 41-1092 to 41-1092.12, a party who is adversely affected by an "appealable agency action" is required to request a hearing and complete the administrative appeal process. At the end of that process, a final administrative decision is issued by the agency head or board. See A.R.S. § 41-1092.08. Even if Ms. Zendri's letters were an appealable agency action—as Appellants must contend—they did not seek a hearing and obtain a final administrative decision. Consequently, their appeal is barred by A.R.S. § 41-1092.08(H) and by the doctrine of exhaustion of administrative remedies. See Appellees' Ans. Br. At 8-10.

(Joint Supp. Brief, filed Jun. 1, 2016, at 3-4.) This Court accepts Appellees' position that "Ms. Zendri is [not] authorized to issue final administrative decisions on behalf of ADEQ" even though "her correspondence is consistent with ADEQ's position in this case." (Joint Supp. Brief, filed Jun. 1, 2016, at 3, ll. 15-17.) Zendri's letters indicated that AzDEQ had adopted a position on Appellants' right to appeal that was contrary to Appellants' position, but AzDEQ chose to express that position, not by the issuance of an administrative decision by the Director of AzDEQ, but by means of "advisory communications from agency counsel to counsel for the Appellants." (Appellees' Joint Answering Brief at 7, ll. 14-15.) AzDEQ's position is that, because Ms. Zendri's letters are only "advisory communications" and not final administrative decisions by the agency, Appellants have no right to appeal to this Court. That would also mean Appellants had no right to seek review by means of a hearing by the Office of Administrative Hearings, which is what Appellants tried to do. Although AzDEQ is entitled to take any position it wishes on Appellants' contention that they have the right to appeal AzDEQ's issuance of the final Certification to Rosemont, this Court is of the opinion that AzDEQ is not entitled to insulate itself from judicial review by having its Administrative Counsel issue "advisory communications," rather than having its Director issue an administrative decision.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000243-001 DT

07/14/2016

On the issue of jurisdiction, this Court is of the opinion that, if it does not have jurisdiction because AzDEQ has not issued a final administrative decision, this Court has the jurisdiction to treat these proceedings as a special action in the nature of mandamus. This Court will therefore order the Director of AzDEQ to issue an administrative decision on Appellants' request to appeal AzDEQ's issuance of the final Certification to Rosemont. In making this order, this Court is aware that it has no authority to order the Director of AzDEQ to decide this matter in any particular way. Thus, AzDEQ and its Director have complete discretion to decide in any way they deem appropriate on Appellants' request to appeal AzDEQ's issuance of the final Certification to Rosemont. Under this Court's order, the only thing AzDEQ and its Director must do is reduce that decision to writing in such a manner that it becomes an administrative decision, so that Appellants may pursue further administrative remedies if they choose to do so.

III. CONCLUSION.

Based on the foregoing, this Court concludes AzDEQ does not have the authority to reject a permissible request (for further review) by Appellants, and then insulate itself from judicial review by having its Administrative Counsel issue "advisory communications," rather than having its Director issue an administrative decision. This Court further determines there is no just reason to delay entry of judgment and no further matters remain pending, and thus this judgment is entered pursuant to Rule 54(c).

IT IS THEREFORE ORDERED treating these proceedings as a Special Action in the nature of mandamus.

IT IS FURTHER ORDERED that the Director of AzDEQ to issue an administrative decision on Appellants' request to appeal AzDEQ's issuance of the final Certification to Rosemont.

IT IS FURTHER ORDERED entering this judgment pursuant to Rule 54(c).

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

071520161150•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

Exhibit F

Administrative Law Judge Decision

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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:

No. 16A-P33-DEQ

ROSEMONT COPPER 401
CERTIFICATION

ADMINISTRATIVE LAW JUDGE

Appellants: Pima County and Pima County
Flood Control District

DECISION

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HEARING: Oral argument held on February 7, 2017

APPEARANCES: Andrew Flagg, Esq. and Charles Wesselhoft, Esq. for
Appellants; Norman James, Esq. for Rosemont Copper Company; Curtis Cox, Esq. and
Bradley Pollock, Esq. for the Arizona Department of Environmental Quality

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

FINDINGS OF FACT

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1. On November 1, 2016, the Arizona Department of Environmental Quality (“ADEQ”) issued a Notice of Hearing setting the above-captioned matter for hearing on December 20, 2016, at the Office of Administrative Hearings in Phoenix, Arizona.

2. The Appellants are Pima County and Pima County Flood Control District (referred to collectively as “Pima County” or the “County”). Rosemont Copper Company was also a party in the matter.

3. The basic issue is whether Pima County meets the statutory requirements to file an administrative appeal of ADEQ’s issuance to Rosemont of a Clean Water Act section 401 certification.

4. The parties agreed that the issue could be resolved as a matter of law, but ADEQ’s administrative record, consisting of twelve exhibits, was taken into evidence.

5. Rosemont plans to build and operate an open pit copper mine in Pima County and it has applied to the Army Corp of Engineers for a section 404 (dredge and fill) permit under the Clean Water Act.

6. There are two types of section 404 permits, individual and general permits. Rosemont has applied for an individual permit.

30

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 7. A section 404 permit cannot be issued to Rosemont unless ADEQ first
2 issues a section 401 certification.

3 8. On February 3, 2015, ADEQ issued to Rosemont the required section 401
4 certification. The section 401 certification provides that ADEQ has determined that
5 Rosemont's proposed activities will not violate the applicable surface water quality
6 standards. The certification is exhibit 6 in the Administrative Record ("A.R." 6).

7 9. Pima County filed with ADEQ a Notice of Appeal arguing that ADEQ's
8 decision to issue the certification should be reversed. A.R.7.

9 10. Through a letter dated March 23, 2015, ADEQ informed Pima County that
10 its appeal was being rejected because Pima County was not authorized under ARIZ.
11 REV. STAT. section 49-202(H) to bring such an appeal.¹ A.R. 8.

12 11. Pima County filed with ADEQ a request for reconsideration, in which it
13 asserted that its appeal was also proper under ARIZ. REV. STAT. section 41-1092.03(B),
14 and that it had properly raised that point in its appeal. A.R. 9.

15 12. Through a letter dated May 1, 2015, ADEQ affirmed its position that it was
16 unable to accept an appeal from Pima County. A.R. 10.

17 13. Pima County filed an action in Maricopa County Superior Court requesting
18 the Court to review the Decision of ADEQ's Director, by which it meant ADEQ's March
19 23 and May 1, 2015 letters.² See A.R. 11 (Minute Entry July 14, 2016).

20 14. At the Superior Court, ADEQ took the position that ADEQ's Director had
21 not taken any action, and that the letters were advisory communications. In the
22 alternative, ADEQ asserted that if its letters were a Director's Decision, Pima County
23 had failed to exhaust its administrative remedies. ADEQ argued that the Court had no
24 jurisdiction in either scenario. Id.

25 15. The Superior Court did not accept ADEQ's position, finding that ADEQ had
26 impermissibly "insulate[d] itself from judicial review." The Court ordered that the matter
27 should be treated as a special action (mandamus) and it ordered ADEQ to issue an
28 administrative decision on Pima County's request to appeal ADEQ's issuance of the
29 section 401 certification. A.R. 11.

30 ¹ Prior to an amendment in 1998, the applicable provision was found in subsection 49-202(G).

² Rosemont was also a party in that matter.

1 16. Through a letter dated September 26, 2016, ADEQ provided that:
2 “Pursuant to [the Superior Court’s order] ADEQ is granting appeal rights to Pima County
3 for ADEQ’s March 23, 2015 letter.” In its letter, ADEQ reiterated its position that Pima
4 County did not meet the requirements of ARIZ. REV. STAT. section 49-202(H) and
5 consequently, that ADEQ was unable to accept the appeal. A.R. 12.

6 17. On November 1, 2016, ADEQ issued the Notice of Hearing. The scope of
7 this matter is limited to whether Pima County has a right to appeal ADEQ’s decision.

8 18. On December 13, 2016, Pima County filed an Opening Brief; ADEQ and
9 Rosemont file a Joint Response on January 13, 2017; Pima County a Reply on January
10 25, 2017; and oral argument was held on February 7, 2017.

11 19. ADEQ and Rosemont argue that the right to appeal a 401 certification is
12 governed exclusively by ARIZ. REV. STAT. section 49-202(H) and that because Pima
13 County does not meet those requirements, ADEQ properly rejected the County’s
14 appeal.

15 20. ADEQ and Rosemont also argue that the issuance of a section 401
16 certification is not an appealable agency action and that ARIZ. REV. STAT. section 41-
17 1092.03 does not apply.

18 21. Pima County argues to the effect that ADEQ’s issuance of a section 401
19 certification is an appealable agency action subject to appeals under ARIZ. REV. STAT.
20 section 41-1092.03 and that subsection 49-202(H) added to, rather than limited, those
21 who can appeal by allowing appeals of certifications of general permits.

22 22. Pima County argues that ADEQ’s interpretation of the statutes is not
23 logical because under ADEQ’s interpretation, a person who is adversely affected by the
24 certification of a general or nationwide 404 permit can appeal, but the same is not true
25 for persons adversely affected by the certification of individual permits and individual
26 404 permits will have a more substantial impact.

27 23. Pima County acknowledges that the first sentence of subsection 49-202(H)
28 is redundant to subsection 41-1092.03(B), but, citing ARIZ. REV. STAT. section 41-
29 1002(B), it argues that the legislature did not expressly eliminate appeals under 41-
30 1092.03 when it modified ARIZ. REV. STAT. section 49-202.

1 24. Pima County argues it meets the requirements of 41-1092.03(B) because
2 it will be adversely affected by the certification and it exercised its right to comment.

3 25. Through Laws 1996, Chapter 2, Article 1, the legislature clarified ADEQ's
4 authority to issue section 401 certifications by modifying and expanding ARIZ. REV. STAT.
5 section 49-202, which statute was modified again in 1998. Pima County's Opening Brief
6 at Appendix A provides a copy Laws 1996, Ch. 2, Art. 1 and its legislative history.

7 26. Pima County argues that nothing in the legislative history indicates an
8 intent to preclude a non-applicant from appealing the certification of an individual
9 section 404 permit because there is no discussion of appeal rights in that history other
10 than a summary of the bill's language. ADEQ and Rosemont argue to the effect that the
11 legislative history does show an intent to limit appeals because the history shows that
12 the legislation was intended to create "a specific procedure" using "specific criteria."

13 **CONCLUSIONS OF LAW**

14 1. The burden of proof at an administrative hearing falls to the party asserting
15 a claim, right or entitlement, and the standard of proof on all issues in this matter is that
16 of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

17 2. A preponderance of the evidence is:

18 The greater weight of the evidence, not necessarily established by the
19 greater number of witnesses testifying to a fact but by evidence that has
20 the most convincing force; superior evidentiary weight that, though not
21 sufficient to free the mind wholly from all reasonable doubt, is still sufficient
22 to incline a fair and impartial mind to one side of the issue rather than the
23 other.

24 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

25 3. Because Rosemont cannot be issued a section 404 permit unless ADEQ
26 issues the section 401 certification, the certification determines Rosemont's legal rights
27 or privileges within the meaning of ARIZ. REV. STAT. section 41-1092(3). As such
28 ADEQ's issuance of the certification meets the definition of an appealable agency
29 action. ARIZ. REV. STAT. § 41-1092(3) ("Appealable agency action' means an action
30 that determines the legal rights, duties or privileges of a party and that is not a
contested case.")

1 4. A statute is to be construed to “avoid ... render[ing] any of its language
2 mere surplusage, and instead give meaning to each word, phrase, clause, and
3 sentence so that no part of the statute will be void, inert, redundant, or trivial.” *City of*
4 *Phoenix v. Phoenix Emp’t Relations Bd.*, 207 Ariz. 337, 340-41 ¶ 11, 86 P.3d 917, 920-
5 21 (App. 2004)

6 5. ADEQ’s interpretation of the applicable statutes should be given
7 considerable weight unless there is clear statutory guidance contrary to ADEQ’s
8 interpretation. *Arizona Water Co. v. Arizona Department of Water Resources*, 208 Ariz.
9 147, 91 P.3d 990 (2004).

10 6. As pertinent to this matter, ARIZ. REV. STAT. section 49-202(A) provides
11 that ADEQ “is designated as the agency for this state for all purposes of the clean water
12 act [and] may take all actions necessary to administer and enforce [the act] as
13 provided in this section....”

14 7. As pertinent to this matter, ARIZ. REV. STAT. section 49-202(B) provides
15 that ADEQ “shall process requests under section 401 of the clean water act for
16 certification of permits required by section 404 of the clean water act in accordance with
17 subsections C through H of this section.”

18 8. ARIZ. REV. STAT. section 49-202(H) provides:

19 Pursuant to title 41, chapter 6, article 10 an applicant for
20 certification may appeal a denial of certification or any
21 conditions imposed on certification. Any person who is or may
22 be adversely affected by the denial of or imposition of
23 conditions on the certification of a nationwide or general permit
24 may appeal that decision pursuant to title 41, chapter 6, article
25 10.

26 9. Because Pima County is not the applicant for certification in this matter, it
27 has no authority under ARIZ. REV. STAT. section 49-202(H) to appeal ADEQ’s decision
28 to issue the 401 certification.

29 10. Pima County argues that the appeal rights found in ARIZ. REV. STAT.
30 section 41-1092.03(B) also apply to section 401 certifications. As pertinent to this
matter, ARIZ. REV. STAT. section 41-1092.03(B) provides:

1 A notice of appeal or request for a hearing also may be filed
2 by a party who will be adversely affected by the appealable
3 agency action or contested case and who exercised any right
4 provided by law to comment on the action being appealed or
5 contested, provided that the grounds for the notice of appeal
6 or request for a hearing are limited to issues raised in that
7 party's comments.

8 11. Pima County's position is not consistent with the principals set out in *City*
9 *of Phoenix* because the first sentence of ARIZ. REV. STAT. section 49-202(H) is
10 redundant to appeal rights that applicants for individual permits would already have had
11 under section 41-1092.03(B). Pima County acknowledges as much, but argues to the
12 effect that *City of Phoenix* does not apply based on ARIZ. REV. STAT. section 41-
13 1002(B), which provides:

14 This chapter creates only procedural rights and imposes only
15 procedural duties. They are in addition to those created and
16 imposed by other statutes. To the extent that any other statute
17 would diminish a right created or duty imposed by this chapter,
18 the other statute is superseded by this chapter, unless the other
19 statute expressly provides otherwise.

20 12. Pima County's argument is not persuasive because when the legislature
21 amended ARIZ. REV. STAT. section 49-202, it limited ADEQ's authority by including the
22 phrase "as provided in this section" and by directing ADEQ to process certifications "in
23 accordance with subsections C through H of this section." ARIZ. REV. STAT. §§ 49-
24 202(A) and (B).

25 13. In addition, as ADEQ interprets the applicable statutes, these limitations
26 mean that ARIZ. REV. STAT. section 41-1092.03(B) does not apply. ADEQ's position is
27 supported by the legislative history showing that the legislation was intended to create
28 "a specific procedure" using "specific criteria," Ariz. State Sen., Final Revised Fact
29 Sheet for S.B. 1290, and there is no clear statutory guidance contrary to ADEQ's
30 interpretation of the statutes.

14. As such, Pima County has not shown that ADEQ's decision to reject the
County's appeal should be reversed.

ORDER

IT IS ORDERED that Pima County's and Pima County Flood Control District's appeals are dismissed.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order is five days after the date of that certification.

Done this day, March 2, 2017.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted electronically to:

Misael Cabrera, PE, Director
Department of Environmental Quality

Exhibit G

Final Administrative Decision

1 E. The Court determined the March 23 and May 1, 2015 letter were final agency
2 actions and ordered ADEQ to reissue the determination including administrative
3 appeal language as required by A.R.S. §41-1092.03.
4

5 ADEQ SUMMARY OF CONCLUSIONS OF LAW

6 A. The ALJ found Pima County is not the applicant for certification in this matter,
7 therefore it has no authority under A.R.S. §49-202(H) to appeal ADEQ's decision
8 to issue the section 401 certification.

9 B. The ALJ found how ADEQ interprets A.R.S. §49-202(H) is appropriate; therefore,
10 A.R.S. §41-1092.03(B) does not apply to Pima County.

11 C. Pima County has not shown ADEQ's decision to reject the County's appeal should
12 be reversed.
13

14 Pursuant to Arizona Revised Statute (ARS) §41-1092.08(B), for the rationale above, the
15 Director of ADEQ accepts the ALJ Decision and Order based upon the finding that the
16 appellant's failed to show by a preponderance of the evidence that ADEQ's decision to
17 reject the County's appeal should be reversed. The matter is therefore dismissed
18 accordingly.
19

20 **ORDER**

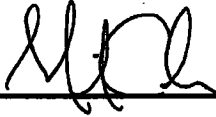
21 IT IS ORDERED that Pima County's and Pima's County Flood Control District appeal in
22 Docket No. 16A-P33-DEQ is dismissed. This is the Final Decision of the Director of
23 ADEQ.
24

25 **Notice of Right to Request a Rehearing or Review**

26 A party to this matter may file a Motion for Rehearing or Review within thirty (30) days
27 after service of this Final Decision and Order pursuant to A.R.S. § 41-1092.09. A party
28

1 is not required to file a Motion for Rehearing or Review to seek judicial review of this
2 Final Decision and Order. A.R.S. § 41-1092.09(A)(3).

3
4 DATED this 31st day of March, 2017.

5 
6 _____

7 Misael Cabrera, Director
8 Arizona Department of Environmental Quality

9
10 **ORIGINAL** filed this 31st day of March, 2017, with:

11 Anakaren Lemus, Hearing Administrator
12 Office of Administrative Counsel
13 Arizona Department of Environmental Quality
14 1110 W. Washington Street, #6135C
15 Phoenix, AZ 85007

16 Copy of the forgoing sent certified mail this 31st day of March, 2017, to:

17 Pima County
18 130 W. Congress, 10th Floor
19 Tucson, AZ 85701

20 Pima County Flood Control District
21 201 N. Stone 9th Floor
22 Tucson, AZ 85701

23 Copy of the foregoing sent via email this 31st day of March, 2017, to:

24 Thomas Shedden
25 Administrative Law Judge
26 Office of Administrative Hearings
27 1400 W. Washington, Suite 101
28 Phoenix, AZ 85007

29 Sherri Zendri, Administrative Counsel
30 Arizona Department of Environmental Quality
31 1110 W. Washington Street
32 Phoenix, AZ 85007

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4 **1275 W. Washington**
5 **Phoenix, AZ 85007**

6 **Carol Gilbert, Administrative Assistant**
7 **Administrative Appeals Desk**
8 **Environmental Enforcement Section**
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10 **1275 W. Washington**
11 **Phoenix, AZ 85007**

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