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*submitted via email*

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Re: Preliminary Decision to Issue a State (Clean Water Act Section 401) Water Quality Certification of a Federal Action for the Sunnyside Exploratory Drilling Project (USACE File No. SPL-2020-00103; ADEQ LTF No. 87599)

Dear ADEQ,

Together, Defenders of Wildlife, Patagonia Area Resource Alliance, and Tucson Audubon submit the following comments regarding the Arizona Department of Environmental Quality's ("ADEQ") preliminary decision to issue a State Water Quality Certification of a federal action for the Sunnyside exploratory drilling project ("SED Project" or "Project").<sup>1</sup>

Defenders of Wildlife is a nonprofit organization with nearly 2.2 million members and supporters nationwide that is dedicated to the protection of all native animals and plants in their natural communities. Defenders is committed to the protection of wildlife and natural habitat in the Southwest, and have worked for years on issues in the Patagonia Mountain area of Arizona. Our Southwest office is located in Santa Fe, New Mexico, with staff in Tucson, Arizona.

Patagonia Area Resource Alliance ("PARA") is a grassroots organization of volunteer community members committed to protecting and preserving the Patagonia, Arizona area. It is a watchdog organization that monitors the activities of industrial developers such as mining corporations, as well as government agencies, to make sure their actions have long-term, sustainable benefits to our public lands, our watershed, and our town.

Tucson Audubon is a nonprofit organization, founded in 1949, serving Southeast Arizona with a mission to *Inspire people to enjoy and protect birds*. Tucson Audubon actively advocates for the protection of natural landscapes, biodiversity, and water resources. The organization is invested in Patagonia and the Sonoita Creek watershed through its stewardship of 7 acres of riparian habitat and

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<sup>1</sup> Sunnyside Exploratory Drilling Project, USACE File No. SPL-2020-00103, ADEQ LTF No. 87599. See ADEQ, Public Notice Preliminary Decision to Issue a State Water Quality Certification of a Federal Action for the Sunnyside Exploratory Drilling Project, <https://azdeq.gov/notices/comment-period-ends-preliminary-decision-issue-state-water-quality-certification-federal-8> (last visited Mar. 21, 2021).

management of the Paton Center for Hummingbirds, which receives 15,000 visitors annually from across the United States and the world. Tucson Audubon is headquartered in Tucson.

We appreciate the opportunity to submit comments on ADEQ's intention to issue a State Water Quality Certification for the SED Project. There are fundamental flaws with the Draft Water Quality Certification, both procedurally and substantively. ADEQ did not properly analyze the Project as required under Arizona and federal law, and the Project as proposed will violate Arizona's surface water quality standards and violate the Clean Water Act. Accordingly, ADEQ must rescind the Draft Water Quality Certification and either deny certification for the Project, or, in the alternative, require submission of additional information and conduct further analysis of the proposed Project.

**1. The Draft Water Quality Certification fails to review and consider Arizona Standard's proposed plan of operations submitted to the U.S. Forest Service.**

The Draft Quality Certification ("Draft WQC") is inadequate and legally flawed as it purports to review (and then certify) only the discharges associated with the proposed Clean Water Act ("CWA") Section 404 permit. This is due to the mistaken view that the U.S. Army Corps of Engineers ("Army Corps") Section 404 permit is the only "federal license or permit" that has been proposed regarding the SED Project. Under the CWA, federal caselaw, and U.S. Forest Service ("USFS") policy, a proposed mining plan of operations, such as Arizona Standard's (the applicant) Plan of Operations for the SED Project, or any other requested approval of project operations by the USFS, is considered a "federal license or permit" triggering Section 401 Certification. *See Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554, at \*3-4 (D. Or. 2006) (Section 401 applies to mining plan of operations submitted to USFS). As stated by the USFS:

Pursuant to CWA § 401, both the Forest Service and the mining operator have CWA requirements to meet. If the mining activity "may result in any discharge into the navigable waters," (CWA, Title IV, § 401(a) (1), 33 U.S.C. 1341(a), 1972) the mining operator must obtain a 401 certification from the designated CWA federal, state or tribal entity, typically the state. This 401 certification from the designated entity certifies that the operator's mining activities and associated best management practices (BMPs), mitigation and/or reclamation are in compliance with applicable provisions of state, federal and/or tribal water quality requirements of the CWA. The mining operator must give a copy of this 401 certification to the Forest Service prior to the Agency approving the Plan of Operations. Pursuant to CWA, the Forest Service cannot authorize a Plan of Operations until the 401 certification has been obtained or waived by the designated entity. Finally, the Forest Service may not authorize a Plan of Operations if the designated entity denies the certification.

USFS Manual, § 2817.23a.<sup>2</sup>

There is no dispute that the SED Project "may result in any discharge into the navigable waters." *See id.*; *see also* Draft Sunnyside Exploration Drilling Project: Water Resource Analysis Technical Report (Feb. 4, 2021).<sup>3</sup> Thus, all aspects of the Project contained in the Plan of

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<sup>2</sup> Available at [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd533980.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd533980.pdf).

<sup>3</sup> Available at [https://www.fs.usda.gov/nfs/11558/www/nepa/111128\\_FSPLT3\\_5599118.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/111128_FSPLT3_5599118.pdf).

Operations that may result in point source discharges must be considered in the Section 401 certification review. Because ADEQ failed to consider the Plan of Operations as one of the federal licenses or permits that must be reviewed under Section 401, the WCQ cannot be issued as proposed. Nor can the USFS approve any Plan of Operations, or the Army Corps approve the Section 404 permit, for the Project.

**2. The Draft Water Quality Certification fails to review all potential water quality impacts from the Sunnyside Exploratory Drilling Project.**

As detailed above, the Draft WQC improperly limits its review to only those direct impacts from the Project's discharges directly associated with the Section 404 permit. In addition to improperly failing to consider the mining Plan of Operations as noted above, this self-imposed restriction violates the CWA. As held by the U.S. Supreme Court, the Section 401 certification is not limited to only direct impacts from the discharge, but rather, all impacts associated with a project once the threshold prerequisite of the potential for a discharge exists (which is not in dispute here):

Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law'. . . Section 401(a)(1) identifies the category of activities subject to certification--namely, those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

*PUB No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711–12 (1994); *see also* Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,221–22 (July 13, 2020) (codified as 40 C.F.R. pt. 121) (discussing *PUD No. 1 of Jefferson County* in the final rule). As the Court stated: "activities—not merely discharges—must comply with state water quality standards." *Id.*; *see also* Congressional Research Serv., Clean Water Act Section 401: Overview and Recent Developments, at 13–15 (Nov. 23, 2020) (discussing the scope of Section 401 certification and state law requirements, including compliance with state water quality standards, following the revisions the CWA in 2020).

Here, ADEQ's failure to consider the full adverse effects on water quality from the SED Project requires that the WQC (and the USFS Plan of Operations approval and Army Corps Section 404 permit) cannot be issued as proposed and must be revised accordingly.

**3. The Draft Water Quality Certification must protect all water quality standards, including designated and beneficial uses.**

In addition to improperly limiting its review to certain Section 404 discharges discussed above, all aspects of water quality protection must be considered and protected, including those related to use by wildlife species.

The CWA is primarily implemented through the establishment and maintenance of water quality standards, and the CWA directs each state to establish its own water quality standards. 33 U.S.C. § 1313(a) and (c)(2)(A). “A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” 40 C.F.R. § 131.2. The minimal designated use for a water body is the “fishable/swimmable” designation which “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). As the Supreme Court stated:

The text [of the CWA] makes it plain that water quality standards contain two components. We think the language of § 303 is most naturally read to require that a project be consistent with both components, namely, the designated uses and the water quality criteria. *Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.*

*PUD No. 1 of Jefferson County*, 511 U.S. at 714–15 (emphasis in original omitted) (emphasis added). Thus, the CWA prohibits any activity that will not fully protect all of the designated uses for that waterbody.

Similarly, the project also implicates the CWA’s “antidegradation” requirements. Antidegradation policies “shall, at a minimum, be consistent with . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. § 131.12(a), (a)(1). Under this regulation, “no activity is allowable . . . which could partially or completely eliminate any existing use.” *PUD No. 1 of Jefferson County*, 511 U.S. at 718–19 (*citing* EPA, Questions and Answers on Antidegradation 3 (Aug. 1985)).

Under Arizona Administrative Code (“AAC”) R18-11-107.01(D)—“Antidegradation review of a § 404 permit”—ADEQ is required to conduct an antidegradation review of the Army Corps Section 404 permit if any of the impacted surface waters are listed as impaired under the State’s 303(d) list, such as Alum Gulch, Humboldt Canyon, and Harshaw Creek. This must be done on a pollutant-by-pollutant basis. *See* ACC R18-11-107(A). Specifically, R18-11-107.01(D) states:

Antidegradation review of a § 404 permit shall be conducted as follows:

1. For a Corps-issued § 404 permit. The 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.<sup>4</sup>

That did not happen here. Thus far, ADEQ, Army Corps, USFS, nor the company have shown that the project will protect all beneficial uses, comply with all numeric and narrative standards, and comply with all antidegradation requirements. As such the Draft WQC cannot be issued as proposed, nor the Plan of Operations or Section 404 permit be approved.<sup>5</sup>

State water quality regulations dictate numeric water quality standards both for surface waters and for groundwater. State regulations also identify a narrative water quality standard for surface water. The narrative water quality standards also state that a wadeable, perennial stream, such as those affected by the Project, shall support and maintain organism richness comparable to that of a stream with reference conditions in Arizona. According to state regulations, “A wadeable, perennial stream shall support and maintain a community of organisms having a taxa richness, species composition, tolerance, and functional organization comparable to that of a stream with reference conditions in Arizona.” R18-11-108.E. “The narrative biological criteria in this Section apply to a wadeable, perennial stream with either an aquatic and wildlife (cold water) or an aquatic and wildlife (warm water) designated use.” R-18-11-108.01.A. The waterbodies with such designated uses listed in the Draft WQC are Alum Gulch and Humboldt Canyon. ADEQ should ensure that these waterbodies continue to meet the biological criteria (based on Arizona’s water reference conditions) to maintain the biological integrity of the natural habitat.<sup>6</sup>

The Draft WQC lists the following water bodies that will be affected by the discharges:

Waterbody	Designated Uses	Impairments
Flux Canyon	Aquatic and Wildlife (ephemeral), Partial-body contact, Agricultural livestock watering	N/A

<sup>4</sup> Available at [https://apps.azsos.gov/public\\_services/Title\\_18/18-11.pdf](https://apps.azsos.gov/public_services/Title_18/18-11.pdf).

<sup>5</sup> Under the 1897 Organic Act and agency implementing regulations, the USFS cannot approve any activity or operation that may violate or not comply with all applicable water quality standards and requirements. Similarly, under the CWA and its implementing regulations, the Corps cannot issue a Section 404 permit that may violate or not comply with all applicable water quality standards and requirements.

<sup>6</sup> “Biological integrity is commonly defined as ‘the capability of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity and functional organization comparable to that of the natural habitat of the region’ (Karr and Dudley, 1981). This concept refers to the natural assemblage of indigenous organisms that would inhabit a particular area if it had not been affected by human activities.” EPA, Bioassessment and Biocriteria Program Status for Arizona: Streams and Wadeable Rivers, <https://www.epa.gov/wqc/bioassessment-and-biocriteria-program-status-arizona-streams-and-wadeable-rivers> (last visited Mar. 22, 2021). “ADEQ defines ‘reference condition’ in the surface water quality rules at A.A.C. R18-11-101(36) as ‘a set of abiotic physical stream habitat, water quality, and site selection criteria established by the Director that describe the typical characteristics of stream sites in a region that are least disturbed by environmental stressors. Reference biological assemblages of macroinvertebrates and algae are collected from these reference condition streams for calculating the Arizona Indexes of Biological Integrity thresholds.’” *Id.*

Alum Gulch	Aquatic and Wildlife (warm), Full-body contact, Fish consumption, Agricultural livestock watering	Low pH, zinc, copper, and cadmium (1996)
Humboldt Canyon	Aquatic and Wildlife (warm), Full-body contact, Fish Consumption	Low pH, zinc, copper, and cadmium (1996)
Harshaw Creek	Aquatic and Wildlife (ephemeral), Partial-body contact, Agricultural livestock watering	Copper and pH (1992)

Draft WQC, at 3.<sup>7</sup>

State regulations define the following designated uses: “Aquatic and wildlife (ephemeral) (A&We)’ means the use of an ephemeral water by animals, plants, or other organisms, excluding fish, for habitation, growth, or propagation.” R18-11-101.7 (definitions). “Aquatic and wildlife (warm water) (A&Ww)’ means the use of a surface water by animals, plants, or other warmwater organisms, generally occurring at an elevation less than 5000 feet, for habitation, growth, or propagation.” R18-11-101.8. “Full-body contact (FBC)’ means the use of a surface water for swimming or other recreational activity that causes the human body to come into direct contact with the water to the point of complete submergence. The use is such that ingestion of the water is likely and sensitive body organs, such as the eyes, ears, or nose, may be exposed to direct contact with the water.” R18-11-101.21. “Partial-body contact (PBC)’ means the recreational use of a surface water that may cause the human body to come into direct contact with the water, but normally not to the point of complete submergence (for example, wading or boating). The use is such that ingestion of the water is not likely and sensitive body organs, such as the eyes, ears, or nose, will not normally be exposed to direct contact with the water.” R18-11- 101.29. “Fish consumption (FC)’ means the use of a surface water by humans for harvesting aquatic organisms for consumption. Harvestable aquatic organisms include, but are not limited to, fish, clams, turtles, crayfish, and frogs.” R18-11- 101.20. “Agricultural livestock watering (AgL)’ means the use of a surface water as a water supply for consumption by livestock.” R18-11- 101.3.

The standards associated with these designated uses for the ephemeral washes and wetlands that will be impacted by the SED Project cannot be overlooked. Within this, we raise particular concerns regarding the impaired use of these waters by animals, plants, and other organisms for habitation, growth, or propagation (i.e., A&We and A&Ww).

- a. Potential impacts to wildlife, in particular threatened and endangered species and their habitat, must be considered.

The proposed improvements to and construction of access roads, along with other exploratory drilling activities, will cause harm to wildlife, habitat, and water resources within and near the Project area. In particular, the access points that run within the ephemeral channels are

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<sup>7</sup> Available at [https://static.azdeq.gov/pn/210218\\_azstandard\\_c.pdf](https://static.azdeq.gov/pn/210218_azstandard_c.pdf). This list does not include all of the water bodies potentially affected by the Project (such as those affected by the approval of the Plan of Operations but not necessarily the discharges of dredged or fill material under the Section 404 permit).

liberally characterized as existing roads. *See, e.g.*, Attachment A. (Photographs of ephemeral washes characterized as “access roads” in Humboldt Canyon). To make these access points usable roads, there will need to be significant improvements that will alter the riparian habitat, ephemeral waterbeds, and wetland areas. Due to the nature of the region (as water is the most valuable resource in Arizona), the ephemeral washes and wetlands are of critical importance to wildlife and habitat.

The SED Project (and nearby Hermosa and San Antonio projects) will physically alter the riparian and ephemeral habitat and create significant noise, light, traffic, and other forms of human disturbance round-the-clock in a remote area where these things are otherwise absent. The SED Project area provides habitat, including designated critical habitat, and is occupied or potentially occupied by four threatened or endangered wildlife species protected under the Endangered Species Act (“ESA”). 16 U.S.C. §§ 1531–1544. The ephemeral washes and wetlands are important facets of this habitat. The Draft Environmental Assessment (“Draft EA”)<sup>8</sup> specifically states that the Project “may affect, and is likely to adversely affect,” the Mexican spotted owl and its designated critical habitat, the yellow-billed cuckoo, the jaguar and its designated critical habitat, and the ocelot. Draft EA, at 54–55. ESA consultation between USFS and the U.S. Fish and Wildlife Service is still ongoing and therefore the affects road improvements, construction, as well as other mining activities will have on these species and their habitat has not been fully assessed. *See generally* 16 U.S.C. § 1536 (Section 7 consultation). Once these impacts are better understood, mitigation measures will need to be implemented to prevent take of species or habitat degradation. ADEQ should at least condition their certification of the federal action to require adequate mitigation is implemented to limit the impacts to aquatic and wildlife waters.

i. Mexican spotted owl

The Mexican spotted owl is listed under the ESA as a threatened species. The entire project area is inside of the designated critical habitat for the species. Draft EA, at 48. The Draft EA specifically states that the “Project would occur in areas that are known to be used by the Mexican spotted owls for breeding, roosting, foraging, and dispersal.” Draft EA, at 52. Further, road and other construction and drilling would occur within and adjacent to three Protected Activity Centers (“PACs”) for the Mexican spotted owl (PAC # 03-020; PAC # 03-024; PAC # 03-025) and vehicle and equipment travel would occur along Harshaw Road within two PACs for the species (PAC # 03-018; PAC # 03-008). Draft EA, at 52. PACs are sub-designations of Mexican spotted owl habitat that are heavily used by owls and therefore designated to protect core nesting areas, major roost areas, and the most proximal and heavily used foraging areas.<sup>9</sup>

The affects the SED Project will have on ephemeral washes and wetlands within the Mexican spotted owl’s critical habitat and PACs will directly affect the species. Clearing and grubbing of vegetation along, filling in, and pollution to surface water will alter the habitat and water resources upon which the species relies. Further, road improvement and construction, other clearing and grubbing, drill pad construction, and drilling operations (which will occur 24 hours a day, seven days a week, and use lighting at night) will directly affect Mexican spotted owls in the Project area.

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<sup>8</sup> Available at [https://www.fs.usda.gov/nfs/11558/www/nepa/111128\\_FSPLT3\\_5599122.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/111128_FSPLT3_5599122.pdf).

<sup>9</sup> Please see following documents for more information, which have been submitted as attachments along with this comment letter: U.S. Fish and Wildlife Service 1995. *Recovery plan for the Mexican Spotted Owl (Strix occidentalis lucida)*. Fish and Wildlife Service, Albuquerque, NM.; Ganey, J. L. et al. 2014. “Use Of Protected Activity Centers by Mexican Spotted Owls In the Sacramento Mountains, New Mexico.” *J. Raptor Res.* 48(3):210–218.

Such activities have a high potential to delay the onset of breeding (even if drilling activities only occur in the “non-breeding season”), flush the owls from trees and their nests, or result in territory abandonment.

ii. Yellow-billed cuckoo

The western distinct population segment of the yellow-billed cuckoo is listed under the ESA as a threatened species. The project would occur in areas that may be used by yellow-billed cuckoos for breeding, foraging, and migrating. Draft EA, at 53. The species is a relatively common summer resident in the Patagonia Mountains, are often seen or heard along Harshaw Road, and are known to breed in Hermosa, Goldbaum, and Corral Canyons. Although usually considered a riparian habitat specialist, yellow-billed cuckoos also regularly visit and forage in oak and mesquite woodlands adjacent to riparian areas dominated by willows and cottonwoods. Yellow-billed cuckoos are more often heard than seen and they appear to avoid areas frequented by people. The filling-in of the ephemeral washes, road construction, increased traffic, and drilling activities proposed by the SED Project would occur in good yellow-billed cuckoo habitat and would very likely result in reduced use of those areas, fewer nesting attempts, and possible nest abandonment.

iii. Jaguar and Ocelot

The jaguar and the ocelot are both listed under the ESA as endangered species. The Project area is inside the designated critical habitat for the jaguar. Draft EA, at 48. And though critical habitat has not been formally designated for the ocelot in the Patagonia Mountains, the Project area similarly serves as habitat for the ocelot. An important function of the habitat in the Patagonia Mountains, including the project area, including the designated critical habitat, is to serve as a corridor linking occupied jaguar and ocelot habitat to the north and south allowing both species to move between Mexico and the United States. Specifically, the most likely route for jaguar and ocelot travelling from northern Mexico to the Santa Rita Mountains is through the Patagonia Mountains. Thus, the Project area provides potential habitat connectivity for both jaguar and ocelots.

Substantial portions of the south-facing slopes, including areas within meters of proposed drilling sites, appear to have the characteristics of good ocelot foraging habitat, meeting the published criteria for canopy height, visual obscurity, ground cover, and coarse woody debris. There is growing evidence that ocelot populations in northern Mexico are increasing and expanding into the United States. Several ocelots have been sighted or photographed in the borderlands region in the past two years. Studies of the movements of other native cat species have documented the impact of noise from roads and road-building on movement patterns, and the proposed exploratory drilling has the potential to interfere with the movements of both ocelots and jaguar as they attempt to move north from Mexico into southern Arizona. The construction as well as the noise from the drilling operations has significant potential to slow the recovery of both ocelot and jaguar in southern Arizona. Further, construction of roads and any mining equipment and facilities could cause physical obstacles for both jaguar and ocelot movement throughout the area.

**4. The Draft Water Quality Certification fails to consider an adequate surface water mitigation plan.**

As ADEQ knows, the Army Corps may not issue a CWA Section 404 permit unless and until ADEQ certifies that the proposed project will not violate Arizona’s surface water quality

standards. 33 U.S.C. § 1341. Section 401 gives Arizona the ability to play a vital role in preventing pollution of the nation's and the state's waters. *See* 33 U.S.C. § 1251 (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .”). Here, instead of fulfilling that role, ADEQ has impermissibly proposed to issue a WQC before it has even seen information (in the form of an adequate mitigation plan) necessary to determine that the project will not violate the state's surface water standards. Moreover, ADEQ has deprived the public of its ability to fully participate in the Section 401 WQC process.

Instead of giving Arizona Standard a “pass” and granting Section 401 certification based on a list of best management practices without the submission of an adequate mitigation plan, ADEQ must rescind its draft WQC, require Arizona Standard to submit a fully workable mitigation plan, and only then evaluate the WQC application and mitigation plan for compliance with Arizona's surface water quality standards. Only if Arizona Standard's plan properly mitigates for all quality and quantity water impacts (which based on the Draft EA, Plan of Operations, and Section 404 permit application is not the case) should ADEQ consider granting certification.

The Draft WQC proposes to certify the project without an adequate surface water mitigation plan and instead is conditional upon the implementation of best management practices listed in the Draft WQC. The evidence available for public comment to date does not show that these best management practices or mitigation will be adequate to compensate for the adverse water impacts that will be caused by this Project. Without adequate mitigation, the project as proposed is sure to violate state surface water quality standards. In sum, ADEQ should not certify that the Project meets state water quality standards (nor can USFS or the Army Corps approve any activities) until Arizona Standard submits an adequate mitigation plan and ADEQ can adequately determine whether the project will violate state surface water quality standards.

#### **5. The Draft Water Quality Certification relies on a deficient Draft Environmental Assessment.**

The Draft WQC relies in large part on the USFS's Draft EA for the proposed SED Project. But the Draft EA is inadequate and violates the National Environmental Policy Act and federal law. As the comment deadline on the Draft EA has been extended to April 5, 2021, after the Section 401 certification (and Section 404 permit)<sup>10</sup> comment deadline, we will send our comments on the Draft EA detailing significant inadequacies in the assessment to ADEQ as soon as they have been submitted to USFS. Thus, for the purposes of these comments, due to the ADEQ's reliance on the Draft EA and other project documents, any comment noting a deficiency in the Draft EA (or the Section 404 permit) applies equally to the Draft WQC.

#### **6. Additional failures to comply with all applicable water quality requirements.**

In addition to the inadequacies of the Draft WQC noted herein, there are additional water quality concerns that have not been adequately addressed. For example, the Draft WQC does not

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<sup>10</sup> As the comment deadline on the Section 404 permit is also after the WQC comment deadline, we will also send our comments on this matter to ADEQ with our comments on the Draft EA.

adequately discuss Arizona Standard's release of sediment and other pollutants discharged from the road culverts and other water management structures. As the Ninth Circuit has stated:

Further, the term man-made "conveyance," the essential trigger for finding a "point source" under the CWA, is broadly defined. [W]hen stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

*Nw. Evtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070–71 (9th Cir. 2011) (culverts directing stormwater flows are point sources subject to NPDES permitting) *overturned on other grounds Decker v. Nw. Evtl. Def. Ctr.*, 568 U.S. 597 (2013). The Ninth Circuit reiterated, in light of the Supreme Court's and its previous decision in those cases, that:

The Court left intact our holding that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source" within the meaning of the Clean Water Act's basic definition of a point source in 33 U.S.C. § 1362(14).

*Nw. Evtl. Def. Ctr. v. Decker*, 728 F.3d 1085–86 (9th Cir. 2013). Discharges from drilling diversion channels must be covered by a permit and be considered when determining whether a project meets all water quality requirements. *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1015-16 (9th Cir. 2007).

Further, at this stage, the Draft EA fails to adequately address the cumulative impacts the SED Project will have in conjunction with the adjacent Hermosa and San Antonio mining projects in the Patagonia Mountain region (particularly on wildlife, habitat, and water resources). Because the projects are located in close proximity to one another, their impacts cannot be assessed in isolation. For example, Arizona Standard proposes to improve roadways along Harshaw Creek, but it is unclear if the Hermosa Project's dewatering plan—which proposes to dump excessive amounts of water into the creek—has been taken into consideration. ADEQ should consider the cumulative impacts to waters of the United States within the Sonoita and Harshaw watersheds in making its decision to certify any action in the area.

## **Conclusion**

For the above reasons, the Draft WQC for the SED Project cannot be issued as proposed. The Section 401 certification, as well as the Section 404 permit and Draft EA, must adequately consider and address all discharge impacts to waters of the United States (and associated wildlife impacts) of the SED Project before granting approval.

We appreciate the opportunity to comment on this proposed action. Please continue to include the signatory organizations as interested parties and direct all future public notices and documents to us at the addresses below.

Sincerely,



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Attachment A

Photographs of ephemeral washes characterized as “access roads” in Humboldt Canyon.  
(taken by Carolyn Shafer, Patagonia Area Resource Alliance)

