



A REPORT
TO THE
ARIZONA LEGISLATURE

Performance Audit Division

Performance Audit

Department of Environmental Quality—

Sunset Factors

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Debra K. Davenport
Auditor General

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AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

WILLIAM THOMSON
DEPUTY AUDITOR GENERAL

September 27, 2004

Members of the Arizona Legislature

The Honorable Janet Napolitano, Governor

Mr. Stephen A. Owens, Director
Arizona Department of Environmental Quality

Transmitted herewith is a report of the Auditor General, A Sunset Review of the Department of Environmental Quality. This report is in response to a November 20, 2002, resolution of the Joint Legislative Audit Committee and was conducted as part of the sunset review process prescribed in Arizona Revised Statutes §41-2951 et seq. This is the fourth and final report to be issued on the Department.

Included with this report is a written response from the Department.

My staff and I will be pleased to discuss or clarify items in the report.

This report will be released to the public on September 28, 2004.

Sincerely,

Debbie Davenport
Auditor General

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INTRODUCTION & BACKGROUND

The Office of the Auditor General has prepared an evaluation of the Arizona Department of Environmental Quality (Department) using the 12 criteria in Arizona's sunset law. The analysis of the 12 sunset factors was conducted pursuant to a November 20, 2002, resolution of the Joint Legislative Audit Committee and prepared as part of the sunset review set forth in Arizona Revised Statutes (A.R.S.) §41-2951 et seq.

The sunset review of the Department also included a series of three performance audits. The audited areas covered the Department's Water Quality, Waste Programs, and Air Quality divisions. As of July 1, 2004, the Department was authorized 865.9 FTEs and was appropriated approximately \$89.7 million in fiscal year 2005. In addition, the Department's budget includes approximately \$272.2 million in nonappropriated funds, of which approximately \$192.6 million is bond funds from the Water Infrastructure Finance Authority (WIFA), and approximately \$17.8 million is federal funds to protect and enhance Arizona's public health and environment.

Department organization

The Department is divided into four divisions and three offices:¹

- **Water Quality Division (189 FTEs, 21 vacancies)**—The Water Quality Division has primary responsibility for enforcing water quality standards in Arizona. It accomplishes this by monitoring public drinking water systems, regulating wastewater discharge and treatment, issuing permits for the release of certain pollutants, analyzing water pollution problems and establishing standards to address them, and monitoring and assessing the State's surface and groundwater quality.
- **Waste Programs Division (253 FTEs, 81 vacancies)**—The Waste Programs Division protects public health and the environment by reducing risk associated with waste management, regulated substances, and contaminated sites. It

¹ After the completion of audit work the Department created a fifth division, the Tank Programs Division, which has 106 FTEs and 21 vacancies. This division was created to bring together programs related to underground storage tanks (USTs). Specifically, the UST—Program Support and UST—Corrective Action Sections, totaling 75 FTEs, were transferred from the Waste Programs Division. Also, the State Assurance Fund Section, totaling 31 FTEs, was transferred from the Administrative Services Division.

monitors waste storage and disposal, monitors underground storage tanks, promotes pollution prevention and recycling, responds to environmental emergencies, and reviews and approves operating plans for landfills and other waste facilities. In addition, it includes the Superfund section, which is responsible for identifying, assessing, and cleaning up sites on which the soil or groundwater has been contaminated with hazardous substances.

- **Air Quality Division (155 FTEs, 26 vacancies)**—The Air Quality Division ensures Arizona’s air safety and quality by monitoring and analyzing air quality data, regulating sources of air pollution, and working with other state, local, and federal agencies to plan and implement strategies to protect Arizona’s future air quality.

The Department’s remaining division and its three offices provide policy direction and administrative and programmatic support to the other three divisions as follows:

- **Administrative Services Division (170 FTEs, 33 vacancies)**—The Administrative Services Division provides financial, human resources, and information technology support to the rest of the Department. In addition, it also oversees management of the State Assurance Fund, which covers the cost of cleaning up leaking underground storage tanks.
- **Office of the Director (38 FTEs, 11 vacancies)**—The Office of the Director is responsible for establishing overall agency policy and direction, providing information to the public, and representing the Department at the Legislature. The Office of the Director contains the Legislative Liaison, the Department’s Administrative Counsel, and the Communications Director.
- **Northern and Southern Regional Offices (62 FTEs, 10 vacancies)**—The Department has established Northern and Southern Regional Offices to perform several functions, construction reviews, water quality assessment, and air quality compliance (including open-burn permits). The Northern Regional Office inspects and investigates regulated facilities involving drinking water and wastewater systems. The Southern Regional Office performs some emergency response work as necessary for the counties it serves.

Scope and methodology

The Department's performance was analyzed in accordance with the 12 statutory sunset factors. The following audits were completed:

- Water Quality Division (Report No. 04-05)
- Waste Programs Division (Report No. 04-06)
- Air Quality Division (Report No. 04-07)

This report also includes information obtained from department officials and the Governor's Regulatory Review Council.

SUNSET FACTORS

In accordance with A.R.S. §41-2954, the Legislature should consider the following 12 factors in determining whether the Department should be continued or terminated. The three performance audits identified areas that the Department has operated efficiently and effectively, as well as opportunities for the Department to improve operations. The evidence assembled under these 12 factors indicates the continued need for the Department.

1. The objective and purpose in establishing the agency.

The Arizona Environmental Quality Act of 1986 created the Department to protect human health and the environment. That act created a new agency from several programs and offices that had previously operated within the Department of Health Services.

The Department defines its mission as follows:

“To protect and enhance public health and the environment in Arizona.”

In support of this mission, three of the Department’s divisions—Water Quality, Waste Programs, and Air Quality—perform four central functions:¹

- **Monitoring and Assessment**—The Department collects air, water, and soil samples for laboratory analysis to monitor for the presence of contaminants. Department staff interpret data from field monitoring to draw conclusions about environmental indicators and trends to form the basis for future planning and policy decisions.
- **Pollution Control**—The Department issues permits, approvals, and certifications to ensure that facilities are legally constructed and operated and that any discharges to the air, water, and soil are within health standards established by law. Department planning specialists also develop management practices and control strategies in areas where standards are not being met.

¹ Effective August 2, 2004, the Department added the Tank Programs Division, which handles underground storage tank programs and the State Assurance Fund.

- **Compliance Management**—The Department offers guidance, assistance, and incentives to encourage the public to reduce waste and resulting pollution. As part of this effort, the agency conducts inspections of various regulated facilities on a regular basis and in response to citizen complaints. The Department also pursues both informal and formal enforcement actions against regulated facilities to ensure compliance with environmental laws.
- **Cleanups**—The Department investigates and oversees the removal and cleanup of contaminated soil and water to protect public health and the environment. The Department's emergency responders also provide technical assistance to local fire and police officials, as well as tribal governments upon request, to contain and clean up hazardous chemical releases.

2. **The effectiveness with which the agency has met its objective and purpose and the efficiency with which it has operated.**

The Department is generally effective in meeting its overall objective and purpose. For example, it has programs to monitor the quality of drinking water in the State, it monitors the storage and disposal of hazardous wastes, it cleans up sites contaminated by hazardous substances, and it regulates the release of pollutants into the air, land, and water. In addition, the Department generally has operated efficiently. For example, the Department has substantially eliminated backlogged claims for financial assistance to clean up leaking underground storage tanks. The audits of the Water Quality Division and the Air Quality Division highlighted two other ways that the Department has operated efficiently. Specifically:

- The Water Quality Division audit (see Auditor General Report 04-05, Finding 3) found that the Division has made significant progress in issuing Aquifer Protection Permits (APP), including successfully processing all but one of its nonmining applications, such as those from industrial sites and wastewater facilities.
- The Air Quality Division audit (see Auditor General Report 04-07, Finding 2) found that facilities that are the largest potential sources of air pollution are generally complying with air pollution standards, and when they are not, the Division generally takes timely enforcement action that soon corrects the problem.

However, the three audit reports also identified several ways the Department could improve its effectiveness and efficiency. For example:

- The Water Quality Division audit (see Auditor General Report 04-05, Finding 1) found that the Division could improve its oversight of drinking water quality monitoring. All public drinking water systems monitor their water quality and report specified contaminant levels to the Division at specific intervals, often monthly. However, division staff cannot address all facilities with drinking water violations at any one time. As a result, the Division is unable to immediately investigate every drinking water quality violation and, in turn, take enforcement action against violating facilities. This inability to take enforcement action against noncompliant drinking water systems potentially exposes people to contaminated water.

The Division has been working to address this problem by looking for new ways to encourage drinking water facilities to correct their violations with minimal enforcement staff involvement. The Division reports that it has begun to use automatically generated letters to notify facilities of any failure to meet monitoring and reporting requirements, which require a response within 10 days. If the facility fails to respond in a timely manner, the Division reports that it issues a series of escalating violations and orders, potentially including the imposition of fines. The report also found that the Division could potentially improve its oversight of drinking water quality monitoring by researching the costs and benefits of expanding its Monitoring Assistance Program (MAP) to include testing of contaminants such as lead, copper, and nitrates. The MAP program is a required water testing assistance for small drinking water facilities, which compose the majority of the Division's monitoring workload. After the Division decides whether to expand the MAP program, it should review its enforcement workload and staff levels to determine if additional staff are needed.

Additionally, the audit found that the Water Quality Division could benefit by charging fees for performing drinking water plan reviews and by recalculating the fees charged to process APP applications. Statute requires the Division to establish and charge fees to recover the costs of the drinking water plan reviews, which are for the planning and construction of facilities ranging from wells and water treatment plants to public swimming pools. However, the Division does not charge any such fees. Charging these fees would free up some General Fund monies and potentially free up some federal grant monies for other uses. Additionally, the Department should recalculate the fees it charges for processing APPs. Rather than setting fees based on the actual direct costs to perform the reviews, the Division has set them to recover only those costs not covered by General Fund monies. Recalculating the fees could ensure a more fair and accurate fee level. After it has adjusted its fees to recover its direct costs, the Division should ensure that its future General Fund appropriation requests to the Legislature reflect its full indirect costs.

Finally, the audit found that the Water Quality Division still had a significant number of APPs for mining facilities that had yet to be issued. Specifically, as of December 2003, at least 34 mining APPs have not yet been issued. Before the 2006 statutory deadline for processing these permits, the Division will need to complete processing applications that it receives and refer those facilities that fail to submit the required APP applications to its compliance unit for appropriate enforcement action. The Division has developed a strategy to assist in resolving the remaining applications by the 2006 statutory deadline. For example, the Division has created a schedule to monitor each application's status through the permitting phases, including the percentage of work completed within each phase.

- The audit of the Waste Programs Division (see Auditor General Report 04-06, Finding 1) found that the Department could take steps to lower the amount it pays for the remediation of leaking underground storage tanks, and the Division could improve the degree of compliance with UST financial assurance requirements. The steps the Department should take include evaluating whether private contractors who bill the State Assurance Fund (Fund) for the costs of cleaning up leaking USTs are charging the maximum allowable costs, known as cost ceilings. If so, the Division should consider revising its cost ceilings, which could reduce costs to the Fund. Additionally, if the Department performs a new cost survey, which should help establish new cost ceilings, it should change the methods it uses to perform the survey. Further, the Department should explore the idea of using competitive bidding between contractors for cleanup work as a way to keep costs lower. The Department also needs to do a better job of ensuring that UST owners comply with state and federal insurance requirements. Federal and state regulations require that UST owners acquire at least \$500,000, and up to \$1 million, of financial assurance to cover costs associated with a UST leak. However, as of January 2004, only 62 percent of Arizona's UST owners met these requirements.

The audit also found that the Division's Hazardous Waste Section needs to improve the timeliness of issuing, escalating, and resolving enforcement actions (see Auditor General Report No. 04-06, Finding 2). The Hazardous Waste Section regulates hazardous waste facilities, including those that generate, store, or dispose of these types of materials. The Division regulates these facilities by issuing permits, conducting inspections, and taking enforcement action when a violation is identified. However, the Division sometimes takes several months to issue an enforcement action when it finds a violation and does not always escalate enforcement actions to the next level when facilities do not correct their violations and return to compliance. For example, of the three administrative orders reviewed by auditors (all issued in fiscal year 2003), the Division did not escalate one of them, as directed by policy. Instead, the Division continued to negotiate with the responsible parties to bring them into compliance.

3. The extent to which the agency had operated within the public interest.

The Department has operated in the public interest by administering a wide variety of regulatory programs that protect human health and the environment from excessive and harmful pollutants. For example, the Department has made substantial progress toward cleaner air in Arizona. Since the passage of the Clean Air Act in 1970, the EPA has designated 20 areas in Arizona as nonattainment areas, as air in these areas does not meet national air quality standards. However, the Department has instituted several programs to combat poor air quality. For example, the Cleaner Burning Gasoline Program was designed to reduce the quantities of several pollutants in vehicle emissions, and the Vehicle Emissions and Inspection Program was designed to reduce on-road vehicle emissions. Between 1999 and 2004, the EPA has redesignated 5 of the 20 nonattainment areas to attainment status. Further, 10 other areas are eligible for attainment status and are awaiting either the EPA or the Division to complete the redesignation process (see Auditor General Report No. 04-07, Finding 1).

The Department has also protected the public interest by taking emergency response actions to reduce the potential for exposure to hazardous substances. The Department reports that in February 2003, it used its administrative authority to order the suspension and revocation of the hazardous waste permit issued to a regulated facility for major violations of hazardous waste laws at the company's facility in Phoenix. Additionally, because the condition of several containers of waste had seriously degraded, the Department subsequently declared the site an imminent and substantial endangerment to the community in March, and the Department's Emergency Response Unit began an emergency removal action at the facility.

However, the Department should improve the timeliness of issuing enforcement actions to noncompliant hazardous waste facilities (Auditor General Report No. 04-06, Finding 2). The audit found that the Waste Programs Division failed to issue some enforcement actions within the time frames specified in policy. Finally, the Water Quality Division does not assign enforcement staff to every facility with drinking water violations, and as a result, violations can continue for a considerable amount of time (Auditor General Report No. 04-05, Finding 1). For example, some violations not yet assigned to enforcement staff had been considered significantly noncompliant by the EPA for approximately 3 years, with one system considered significantly noncompliant for almost 8 years.

The Department also reports that it works beyond the normal regulatory functions to help protect public health and the environment. For example, the agency reports that it has also worked to enhance children's health through its involvement in the Children's Environmental Health Project, which works on environmental issues affecting children's health. In November 2003, the Department joined the U.S. Environmental Protection Agency (EPA) and the

University of Arizona to launch a pilot integrated pest management project to reduce children's exposure to pesticides in schools.

The Department has also emphasized public participation and public information. It has encouraged public participation through community outreach and education as part of its compliance and enforcement efforts. For example, underground storage tank (UST) inspectors work with UST owners and operators during inspections to explain regulations and how to comply with them. The Department also has an ombudsman who works to obtain solutions to the public's problems. Further, the Department has improved public information through its Web site and through information provided to the public and the media regarding air quality. For example, according to the Department, in January 2004, it launched its redesigned Web site to improve public access to information about the agency and its programs, statutes, rules, and functions. The improved Web site provides the public with a user-friendly means of accessing various information, including a calendar of events and several e-mail notification lists. Additionally, the Department issues air quality forecasts for areas within and bordering Maricopa County and wind forecasts for Yuma County and the areas surrounding it.

4. The extent to which rules adopted by the agency are consistent with legislative mandate.

According to the staff of the Governor's Regulatory Review Council (GRRC) and Office of the Auditor General legal counsel, the Department has promulgated some, but not all, of the rules mandated by statute. According to the Department, it initiates an average of 11 rulemaking procedures each year.

Although GRRC reports that the Department has promulgated some rules required by legislative mandate, there are some areas where rules are required but have not yet been implemented. For example, the Department has not adopted rules to address priorities for using Water Quality Assurance Revolving Fund (WQARF) monies. WQARF is a fund created under the State's Environmental Quality Act of 1986 to support cleanup efforts at sites that have soil or water contaminated with hazardous substances. The Department reports that it has sought assistance from the WQARF Advisory Board to develop criteria for this rule. Additionally, according to GRRC, the Department lacks rules related to providing a simplified administrative procedure for approving modifications for small public water systems. According to the Department, it plans to initiate rulemaking in this topic in 2004.

There are also several statutes relating to the Waste Programs Division that lack rules. Most of these statutes involve the Solid Waste Section. For example, the Department has not adopted rules regarding the implementation of the Arizona Recycling Program and has not adopted rules to determine if a site is a recycling

facility. Additionally, in the area of hazardous waste, the Department has not adopted rules regarding the time and manner of annual registration for hazardous waste treatment, storage and disposal facilities, hazardous waste transporters, hazardous waste generators, and hazardous waste resource recovery facilities. According to the Department, it has begun the rulemaking process for some but not all of the areas lacking rules.

The Department has adopted most of the required rules related to air quality. However, according to GRRC, the Department has not adopted rules regarding the emission of hazardous air pollutants (HAPs). According to the Department, it has begun the process of gaining stakeholder input relating to potential HAPs rules, and will begin the rulemaking process in September 2004.

5. The extent to which the agency has encouraged input from the public before adopting its rules and the extent to which it has informed the public as to its actions and their expected impact on the public.

The Department reports that it solicits and considers comments that it receives during the rules promulgation process. The Department's environmental program divisions each maintain a database of stakeholders who are notified of proposed rule changes. Among those included in the database are environmental and community advocates, tribal officials, legislators, federal and state agencies, municipal governments, attorneys, lobbyists, and industry representatives. Proposed rules also are published in the Arizona Administrative Register and posted on the Department's Web site. According to the Department, when a proposed rule could potentially impact many stakeholders or the public at large, it also conducts informal state-wide meetings to inform citizens about the proposal and to solicit their comments. An example of this process is the Water Quality Division's APP rule revision, which has been sent to the public for two informal review and comment periods in 2004. The Department reports that this rule revision will undergo a formal review and comment period before it is sent to GRRC for final review and approval.

6. The extent to which the agency has been able to investigate and resolve complaints that are within its jurisdiction.

ADEQ's waste, water, and air divisions all have inspection units that conduct inspections of regulated facilities in response to the public's complaints. Regarding the Air Quality Division, the Department generally addresses in a timely manner violations involving facilities that emit pollutants into the air (see Auditor General Report No. 04-07, Finding 2). Specifically, the Air Quality Division generally issues enforcement actions to facilities that may emit the

largest level of air pollutants within the time frames specified by its policies. The Department's strategic plan calls for the Air Quality Division to respond to complaints within 5 days. The Department reports that it has also imposed a 5-day time frame for complaint response in the Water Quality Division, and in the Hazardous Waste and Solid Waste Sections of the Waste Programs Division.

Additionally, according to the Department, it reestablished an ombudsman position within its director's office in 2003 to oversee and track the agency's response to complaints. The Department also reports that it is in the process of developing an automated complaint-tracking system within its Web site to ensure that complaints are resolved in a timely manner. Further, the Department has completed installation of a citizen complaint feature on its Web site, which it reports will allow citizen complaints to reach the appropriate division for investigation.

7. The extent to which the Attorney General or any other applicable agency of state government has authority to prosecute actions under the enabling statutes.

According to statute, the Attorney General is the Department's legal adviser and prosecutes certain enforcement actions for the Department. While the Department handles internally the informal enforcement actions taken against facilities that commit minor violations and formal enforcement actions that result in an administrative order, the Attorney General's Office handles the formal enforcement actions resulting in a civil or criminal referral. For example, in fiscal year 2003, the Department reports having assessed, with the Attorney General's assistance, \$253,580 in civil penalties in nine separate cases.

8. The extent to which the agency has addressed the deficiencies in its enabling statutes that prevent it from fulfilling its statutory mandate.

The Department has been involved in recommending legislative changes where they are appropriate and reports working with diverse stakeholders to develop recommendations for new legislation. Several pieces of legislation affecting the Department's programs were enacted in the 2004 regular legislative session:

- **Laws 2004, Chapter 146**—Made changes to the WQARF program by giving the Department's director authority to suspend a preliminary investigation at a possible WQARF site and then reopen the investigation if necessary. Additionally, this legislation gives the director authority to remove a site from the WQARF registry if necessary, as well as the authority to restore a site that has been removed from the registry (see Auditor General Report No. 04-06, Other Pertinent Information).
- **Laws 2004, Chapter 247**—Increases the cap on APP application processing fees from \$75,000 to \$100,000 (see Auditor General Report No.

04-06, Finding 4). This legislation also increased the annual APP fees for facilities whose daily discharge under the permit is at least 1 million gallons.

- **Laws 2004, Chapter 273**—Set June 30, 2006, as the final date that UST owners can report leaks to the Department and still be eligible for cleanup coverage from the State Assurance Fund. The legislation also created a Regulated Substance Fund, which is intended to succeed the State Assurance Fund and provide funding for cleaning up leaking USTs whose owners cannot be located or who are not financially viable. Finally, the legislation allows owners or operators of leaking USTs to file a claim under \$500,000 per occurrence with the State Assurance Fund before accessing their UST insurance (see Auditor General Report No. 04-06, Finding 1).
 - **Laws 2004, Chapter 303**—Changes how the solid waste disposal fee is distributed among the Solid Waste Fee Fund and the Recycling Fund. From June 30, 2004 to June 30, 2005, half of the disposal fees collected at landfills will be deposited in the Solid Waste Fee Fund, and the other half will be deposited into the Recycling Fund. On and after June 30, 2005, all the disposal fees will once again go into the Recycling Fund.
9. **The extent to which changes are necessary in the laws of the agency to adequately comply with the factors in the Sunset Laws.**

Audit work identified two areas where changes may be needed to department statutes, as follows:

- First, the Department may not receive any funding to clean up orphan tanks, whose owners cannot be located when the Regulated Substance Fund begins operation, and may need legislation to ensure that the funding exists. Laws 2004, Chapter 273 requires the department director to transfer funds from the State Assurance Fund to the Regulated Substance Fund on July 1, 2011, but only if all eligible claims to the State Assurance Fund have been paid. If additional time is needed to pay these claims, the State Assurance Fund will continue to receive monies from the \$0.01 per gallon excise tax on USTs until all of its claims are paid. As a result, this would limit the amount of excise tax revenues the Regulated Substance Fund would receive, and could potentially result in the Regulated Substance Fund receiving no funding at all for the cleanup of sites whose owners cannot be located or are not financially viable. However, the Department has an opportunity to report on the liabilities of the State Assurance Fund in September 2009 and can advise the Senate President and House Speaker regarding the need for additional funding. If this report finds that the liabilities to the Fund will likely prevent the director from transferring monies to the Regulated Substance Fund in July 2011, the Legislature could

consider making a statutory change to extend the excise tax beyond December 31, 2013, so that the Regulated Substance Fund revenues could reach \$60 million for orphan tank cleanup (see Auditor General Report No. 04-06, Finding 1).

- Second, audit work indicated that the Department could potentially benefit from legislation to grant it administrative penalty authority with respect to air pollution control. This authority would allow the Department to unilaterally issue administrative penalties to noncompliant facilities. Administrative penalty authority is already possessed by the EPA, the air quality programs in at least 26 other jurisdictions, and the Department's Drinking Water and Hazardous Waste programs. According to a department representative, without administrative penalty authority, the Department must complete a lengthy legal process, requiring the involvement of the Arizona Attorney General's Office, to issue even a minor financial penalty for air quality violations. However, the limitations on the availability of the Attorney General's resources, and the additional time required to pursue an action in court, restrict the number of cases that can be filed. Consequently, administrative penalty authority could benefit the Department by allowing it to pursue enforcement actions more quickly.

10. The extent to which the termination of the agency would significantly harm the public's health, safety, or welfare.

Terminating the Department would significantly harm the public's health, safety, and welfare, since it is the Department's responsibility to protect human health and the environment. If the Department were terminated, federal environmental standards, such as those set out under the Clean Water Act and the Clean Air Act, would still remain, and authority for enforcing these standards would revert to the federal government. Additionally, terminating the Department could result in shifting responsibility for state environmental programs to local governments, creating the possibility of a patchwork of regulatory approaches by numerous local governments.

The Department oversees monitoring of the State's drinking water systems, takes enforcement action when drinking water regulations are violated, and supports the cleanup of water contamination when it occurs. If drinking water contamination occurs at high levels, short-term health risks and even death may occur. Similarly, the Department protects human health, safety, and welfare by regulating hazardous waste treatment, storage, and disposal. The Department oversees the cleanup of leaking USTs and state Superfund sites, at which soil or water may be contaminated. Additionally, the Department regulates disposals of

waste products at landfills. Finally, the Department regulates all sources of air pollution in most parts of the State. In the State's three most populous counties—Maricopa, Pima, and Pinal—the Department shares air pollution regulation with county authorities, but retains authority to regulate large facilities, such as copper smelters and cement plants. Further, the Department administers several programs, such as the vehicle emissions inspection and maintenance program, which are designed to reduce the level of air pollution.

11. The extent to which the level of regulation exercised by the agency is appropriate and whether less or more stringent levels of regulation would be appropriate.

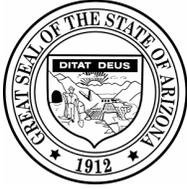
The Department's statutes and rules allow it an appropriate amount of regulatory authority over facilities that emit or potentially emit waste, water, and air pollutants into the environment.

The Department exercises significant regulatory power over the disposal of waste and the release of pollutants into the air, water, and soil. The Department's regulation in these areas seems mostly appropriate. However, the Department could do more when it identifies those violating environmental laws. Specifically, the Department often takes longer than its own guidelines recommend to bring those facilities back into compliance. For example, the Hazardous Waste Program sometimes takes several months to issue an enforcement action when it finds a violation (see Auditor General Report No. 04-06, Finding 2). In addition, Water Quality Division staff cannot address every drinking water violation occurring at any one time, and therefore they prioritize the violations. However, some violations continue for a considerable amount of time, with some facilities remaining out of compliance for years at a time (see Auditor General Report No. 04-05, Finding 1).

12. The extent to which the agency has used private contractors in the performance of its duties and how effective use of private contractors could be accomplished.

The Department uses private contractors to accomplish some of its duties, and the audits did not identify any additional opportunities for the Department to use them. For example, the Water Quality Division's Monitoring Assistance Program hires a private contractor to conduct some water quality tests and report the results to the Division. In addition, the Department's state-lead program uses contractors to clean up leaking USTs whose owners either cannot be located or are not financially viable. Finally, the Department uses a contractor to administer its vehicle emissions inspection and maintenance program in Maricopa and Pima Counties. The contractor performs the general public's emissions testing, and department staff oversee the contractor and inspect all public and private fleet inspection sites.

AGENCY RESPONSE



Janet Napolitano
Governor

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Stephen A. Owens
Director

September 24, 2004

Ms. Debra K. Davenport, CPA
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Re: Sunset Review and Sunset Factors Report

Dear Ms. Davenport:

The Arizona Department of Environmental Quality appreciates the opportunity to respond to the Sunset Factors report prepared by the Office of the Auditor General. The Sunset Factors report addresses the Department's Sunset review and includes discussion of the Auditor General's three performance audits of the Water Quality, Waste Programs, and Air Quality Divisions of the Department. We greatly appreciate the conclusion in this report that the Sunset Factors analysis "indicates the continued need for the Department." There is no doubt that the efforts and achievements of this Department improve the environment and quality of life for the citizens of Arizona.

As the Sunset Factors report reflects, the Department successfully achieves its mission "to protect and enhance public health and the environment in Arizona." The Department achieves this mission through the performance of several central functions—policy development, outreach, monitoring and assessment, compliance management, clean ups, and pollution control. The Department's primary goal is to improve the quality of Arizona's air, land and water through the prevention and reduction of unhealthful levels of air pollution, reducing pollution to and the risk associated with contaminated land and water, and ensuring safe drinking water. The Department also engages in numerous initiatives and outreach efforts to further its mission, including the Children's Environmental Health Project, under the leadership of Governor Napolitano. This letter outlines some of the Department's environmental quality efforts to effectively reach out to stakeholders, control pollution, and enforce the environmental laws.

Initiatives and Outreach

The Department takes pride in its efforts to improve public health and the environment. For example, the Department recently has made significant achievements in air quality. In 2003, the Department received the annual Clean Air Award from the American Lung Association of Arizona in recognition of the Department's successes in improving air quality in Arizona. Additionally, throughout 2003, the Department worked constructively with stakeholders and the

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U.S. Environmental Protection Agency (EPA) to designate the boundaries for the Phoenix area eight hour ground-level ozone nonattainment area within the northeastern portion of Maricopa County and a very small portion of northern Pinal County. The Department's effective effort avoided imposition of EPA's presumptive boundary, which would have placed the entirety of both Maricopa County and Pinal County in the new non-attainment area.

Moreover, just recently EPA has proposed to redesignate the Phoenix Metropolitan area as being in attainment for the federal carbon monoxide standard. This is an important achievement that recognizes the significant improvements that have been made in the Valley's air quality.

In addition, much has been written about the new, more stringent, federal standard for arsenic in drinking water and the difficulties Arizona water supplies may have meeting that standard. Arsenic occurs naturally in many parts of our state, and some of the most affected communities are those least able to afford the costs of treatment. Knowing this, the Department constructed Arizona's Arsenic Master Plan—a guide for small water systems for identifying the most effective and least costly method to ensure compliance with the new drinking water standard. The Arsenic Master Plan assists the Arizona Corporation Commission in its efforts to approve appropriate rates for private water systems; it enables community leaders to understand the decision process that must occur before a treatment technology is selected; and it helps small water systems find the right sources of funding and technical expertise. Even more, ADEQ's Arsenic Master Plan has served as a model for similar efforts in other states.

Over the last three years, the Department's Water Quality Improvement Grant Program has provided more than \$6.9 million to both public and private entities throughout Arizona to help reduce the impact of non-point sources of water pollution in the state's watersheds. These grant recipients, who provide their own matching funds, implement projects that have addressed erosion control, aquatic wildlife restoration and wetlands mitigation. Non-point source pollution is considered the most significant threat to water quality, and ADEQ will continue its efforts to protect the quality Arizona's water resources.

Also, the Department has placed a high priority on initiating early response actions, through the WQARF (State Superfund) Program, at contaminated sites where human health is threatened or where sources of contamination can cause significant environmental impact if not contained. In January 2003, ADEQ initiated an early response action to control contaminated groundwater at the intersection of Central Avenue and Camelback Road in Phoenix when contamination was found in a parking garage. In March 2003, the Department initiated an early response action to address contaminated groundwater at a site in Quartzite when water supply wells were found to be contaminated. ADEQ provided residents with bottled water until they could be connected to the public drinking water system, and designed a treatment system to control the spread of contamination. In May 2003, ADEQ initiated operation of a groundwater containment system in Tucson to prevent contamination from spreading toward active municipal drinking water wells. During 2004, ADEQ added three new sites to the state's WQARF registry, bringing the total number of sites on the list to thirty-six.

The Department continually examines ways to improve the administration of its programs. For example, as the report recognizes, the Department took the initiative to make substantial improvements to the administration of the State Assurance Fund (SAF). When the Napolitano Administration took office in January 2003, the Department faced a backlog of over 1,100 unpaid SAF applications. In early 2003, an internal working group was established by the Director to determine the reasons for this enormous backlog. In May 2003, the Department made key administrative changes to the SAF, and, as the audit recognizes, since that time, the Department has eliminated this backlog. SAF applicants no longer must wait years for payment. The SAF is operating on a cash basis and, as applications are processed and approved, they are paid. The Department thanks the Auditor General for noting this dramatic improvement to SAF claims processing in the audit.

Additionally, in January 2004, ADEQ launched its redesigned, user-friendly web site to better serve the citizens of Arizona and the regulated community. The improved web site is loaded with information about the Department and its programs, includes calendaring and LISTSERV functions, and ultimately will allow access to integrated Geographic Information System (GIS) information. Also, the Department used a federal grant, one of only three innovation grants awarded nationally by the EPA, to develop its "Smart NOI," web-based water quality permit processing tool. This online function allows the Department to receive an application, sort the information into the proper databases, and apply a decision-making matrix to the application to rapidly distinguish those applications for immediate approval from those that require more detailed attention. Under the Smart NOI program, ADEQ timely processes thousands of these permits a year. The improved web site will enable us to provide more "e government" functions to the regulated community.

To further increase the efficiency of services provided by the Department to rural communities in the state, since 2001, ADEQ has employed community liaisons in each of the state's "four corners." These environmental program specialists are based in Kingman, St. Johns, Yuma and Sierra Vista. They provide local communities, businesses and other stakeholders with a wide range of permitting, compliance and outreach assistance, including the resolution of complaints against the Department.

Children's Environmental Health

In addition to these and other pollution control and customer service initiatives, the Department is proud of its work on the Children's Environmental Health Project (Project), which focuses on reducing environmental risks to children's health in Arizona, including particularly the effect of air quality on childhood asthma and other respiratory illnesses. In the summer of 2003, nearly a year in advance of the federal imposition of the new, eight-hour ozone standard, the Department began forecasting and widely reporting the ground-level ozone standard, which is more protective of children's health. Children are at risk from exposure to harmful ozone because they are active outside, playing and exercising, and the Department's ozone forecasts allow parents and caregivers to adjust outdoor activities accordingly. The Department, in cooperation with Maricopa County, provides daily forecasts of ozone, particulate matter, and carbon monoxide levels, and announces appropriate health advisories on our web site.

Further, as part of the Project, in August of this year, the Department, in cooperation with several school districts in Arizona, launched an innovative pilot program to reduce children's exposure to harmful diesel emissions from buses idling near schools. Key elements of the pilot program include having drivers turn off buses upon arrival at a school and not restart the engine until the bus is ready to depart. Diesel emissions can aggravate respiratory illnesses, such as asthma, and have been linked to lung and heart disease. One of the components of diesel emissions, carbon monoxide, also can reduce alertness and learning capacity in children.

Also, ADEQ's pollution prevention program, within the Waste Programs Division, recently received a grant from the EPA to educate and encourage school districts to construct or retrofit schools to be more environmentally friendly. This "Green Schools" initiative will develop design, construction and operational practices that will reduce children's exposure to potentially harmful chemicals typically found in school settings. Additionally, the Department has surveyed Arizona schools on the use of chromated copper arsenic wood-coated playground equipment to assess children's potential exposure to this substance. Finally, when TCE-contaminated water was being used for irrigation in a northern Arizona elementary school, the Department quickly stepped in and conducted sampling of the water supply to ensure that children were being protected. The Department is conducting further investigation of the cause of contamination in the irrigation water and options for correcting the problem.

Permitting and Enforcement

The Department achieves its primary goal to improve the quality of Arizona's air, water and land, in part, through the issuance of permits and appropriate enforcement actions. For example, as noted in the audit report, the Water Quality Division has made significant progress toward meeting the requirement to issue aquifer protection permits, or APPs, on the schedule mandated by the Legislature. Further, the Auditor General recognized the achievements of the Air Quality Division in meeting federal air quality standards and taking appropriate, timely and effective enforcement actions against major sources of air pollution. As suggested in the report, because this Department has won program delegation from EPA over the last 18 years, if the Department were terminated, EPA would assume responsibility to implement and enforce environmental laws in Arizona. The regulated community would answer to EPA's Region 9 office in San Francisco, which divides its time among a number of states and tribes. The federal government would not be held to licensing time frames and would not be accountable to the Governor, the Legislature, or Arizona's citizens.

Compliance with and enforcement of Arizona's environmental laws is a high priority for the Department, and these efforts are recognized as important by the Office of the Auditor General. The Department takes enforcement actions in a variety of forms. The Department may take an informal action, such as issuing a notice of opportunity to correct, or NOC, if the violation is minor, or a notice of violation, or NOV, if the violation otherwise does not merit formal action. Formal enforcement actions include compliance orders and civil lawsuits. The Department may issue compliance orders and civil lawsuits for major violations, repeat violations, and to impose appropriate penalties.

Among its many efforts, ADEQ continues to pursue enforcement against Innovative Waste Utilization (IWU) for actions related to the company's operations and its hazardous waste permit at its south Phoenix facility. The facility and its employees were the subject of a lengthy investigation by a coalition of federal, state, and local law enforcement agencies. When the investigation lead to a raid and the arrest of several key employees at the facility for selling hazardous waste to make methamphetamine in early 2003, ADEQ suspended IWU's license to operate the facility, issued a compliance order, and permanently revoked the facility's license. The Department then hired and oversaw the work of a contractor to properly handle, remove and dispose of the waste at the facility.

Additionally, ADEQ continues to pursue enforcement action against Kinder Morgan for soil and groundwater contamination caused when Kinder Morgan's fuel pipeline ruptured near Tucson and released tens of thousands of gallons of fuel into the environment in July 2003.

Audit Findings

In addition to the numerous and significant achievements of the Department highlighted in this letter and in the Sunset Factors report, the report includes findings from the three Division performance audits. The Department has agreed with all the findings in the audits and has agreed to implement all the recommendations. For example, through the Water Quality Division, the Department will review the potential to expand the drinking water Monitor Assistance Program to improve the Department's oversight of drinking water quality monitoring by public water systems. Further, the Department will institute fees for engineering reviews performed by the Water Quality Division and already has begun the recalculation of APP fees, as recommended by the Office of the Auditor General.

Additionally, the Department, through the new Tank Programs Division, will increase compliance and enforcement efforts of the financial responsibility requirements for owners and operators of underground storage tanks. Likewise, the Department will review the State Assurance Fund cost ceilings to ensure they represent the true costs of cleaning up leaking USTs. The Department, through the Waste Programs Division, also will consider steps to issue enforcement actions more quickly with the goal of returning facilities to compliance more quickly, as suggested by the audit. Finally, through the Air Quality Division, the Department will continue to improve the air quality in Arizona and to issue timely and appropriate enforcement actions when the Department discovers violations of the air quality laws.

We thank the Office of the Auditor General both for its effective communication throughout the audit and Sunset review process and for this opportunity to respond to the Sunset Factors report.

Sincerely,

Stephen A. Owens
Director

Performance Audit Division reports issued within the last 24 months

02-09	Arizona Health Care Cost Containment System—Sunset Factors	03-08	Arizona Department of Commerce
02-10	Department of Economic Security—Division of Children, Youth and Families, Child Protective Services	03-09	Department of Economic Security—Division of Children, Youth and Families Child Protective Services—Caseloads and Training
02-11	Department of Health Services—Health Start Program	04-L1	Letter Report—Arizona Board of Medical Examiners
02-12	HB2003 Children’s Behavioral Health Services Monies	04-L2	Letter Report—Gila County Transportation Excise Tax
02-13	Department of Health Services—Office of Long Term Care	04-01	Arizona Tourism and Sports Authority
		04-02	Department of Economic Security—Welfare Programs
03-L1	Competitive Electric Metering, Meter Reading, and Billing and Collections	04-03	Behavioral Health Services’ HB2003 Funding for Adults with Serious Mental Illness
03-01	Government Information Technology Agency—State-wide Technology Contracting Issues	04-04	Department of Emergency and Military Affairs and State Emergency Council
03-02	Registrar of Contractors	04-05	Department of Environmental Quality—Water Quality Division
03-03	Water Infrastructure Finance Authority	04-06	Department of Environmental Quality—Waste Programs Division
03-04	State Board of Funeral Directors and Embalmers	04-07	Department of Environmental Quality—Air Quality Division
03-05	Department of Economic Security—Child Protective Services—Foster Care Placement Stability and Foster Parent Communication		
03-06	Arizona Board of Appraisal		
03-07	Arizona Board for Charter Schools		

Future Performance Audit Division reports

Arizona Department of Transportation, Motor Vehicle Division—
State Revenue Collection Functions

Arizona Department of Transportation, Motor Vehicle Division—Information
Security and E-government Services

Arizona Department of Transportation, Motor Vehicle Division—Sunset Factors