ADEQ Arizona Department of Environmental Quality MEETING SUMMARY

TWG: **Significant Degradation**

Meeting: #6 **Date:** November 6, 2018 **Time:** 10-11:30 a.m.

Attendees:

☒Nancy Allen, City of Phoenix

☒Rion Bowers, Bowers Environmental Consulting

☒Jeremy Casteel, HilgartWilson

☒Lee Decker, Gallagher & Kennedy

☐Angela Garcia, Salt River Pima-Maricopa Indian Community

☒Stanley Hart, Save the Scenic Santa Ritas

☐Robert Kellock, USAF Retired

☒Bruce Larson, Bowman Consulting

☒Brian Lindenlaub, WestLand Resources, Inc.

☒Jennifer Martin, Sierra Club

☒Karla Reeve Wise, PDEQ

☐Monica Salguero, ASARCO

☐Myron Smith, KGHM

☒Van Wolf, Salmon, Lewis & Weldon, P.L.C.

Staff Support:

☒Heidi Welborn, ADEQ ☒Theresa Gunn, GCI ☐Kelly Cairo, GCI

EPA Staff:

☒ Elizabeth Goldman ☒ Rob Leidy

Discussion Items:

- USACE Meeting
  - How USACE views 404(b)(1) versus NEPA? EA is typically done through an individual permit. USACE believes there may have been a conflation (mix up) of the 404(b)(1)guidelines.
- Scope of Analysis
  - Permit TWG is struggling with ADEQ jurisdiction for a State assumed program permit
  - Options
    - WOTUS only that are impacted/affected by the project
    - 404(b)(1) guidelines covers larger scope analysis as part of analysis
  - As part of the alternatives analysis section, **SigDeg TWG need to make a recommendation** on an approach to scope of analysis
    - What is extent of federal authority (USACE permit) and their NEPA obligation results in disclosure well beyond impact to the WOTUS (direct/indirect)
    - Do the affects or the jurisdiction drive the analysis?
    - SigDeg is tied to aquatic resources, but the alternative analysis of the project purpose would lead to the LEDPA
    - May be exceptional projects that have higher impacts to non-aquatic; in most cases will be water specific except for some allocation for the human environment
    - SigDeg and Alternative Analysis – are they the same? No.
    - Alternative analysis should be based on the project purpose
  - State assumption could provide an opportunity to implement with a state lens and encompass waters that are ecologically sensitive, but not WOTUS

        - May require a statutory change as it currently only covers WOTUS
- <u>EPA Conference Call</u>
- Scope of Analysis
    - Given ADEQ is not required to carry forward USACE NEPA requirements how should analysis be addressed?
    - Proposed projects; characteristics of site; connectivity; direct/indirect impacts
    - EPA views scope 404 broader than USACE for secondary and cumulative impacts; Corps has a narrower view of secondary impacts than EPA
    - Legal Case Save our Sonoran vs. Flowers USACE (NEPA case); 31 acres (5% of site) were washes; USACE only reviewed impact to washes/WOTUS; 5% was not separated from site (tissue/capillaries). Court stated USACE analysis should have been the whole project
    - What makes sense from hydrological/ecological perspective?
    - Multi scales coordinated to different functions
        - Scale the analysis to the functions/resources impacted
    - What is scope under 404(b)(1) guidelines and under jurisdictional authority of the regulatory body and obligation to disclose impacts?
        - Need to ensure you are considering direct, secondary and cumulative impacts to the environment
        - Transparency and full disclosure of potential impacts of the project
        - Severity deals with functional loss (rapid assessments/modeling)
    - Fundamental to the 404(b)(1) guidelines is disclosure and the analysis of the impacts of the entire project
    - 404(b)(1) Guidelines definition of Sig Deg, no discharge of dredge or fill material to a WOTUS
        - Yes, but then need to consider the impacts
        - Don't see the scope as limited to where the dredge or fill occurs (important point)
        - 230.11g and h do address cumulative and secondary affects
        - Most try to do 404 and NEPA analysis on parallel tracks; try to have NEPA do the detailed analysis for the 404, but it often does not occur due to timing differences in the project
        - Do you think Individual 404 permits are not based on a broad scope analysis?
            - NEPA has a broader scope
            - Reasonable range of alternatives and analysis typically more stringent under 404 due to practicability measure
            - Somewhat different analysis
    - Cumulative and Secondary affects analysis limited to only aquatic or resources in the sub parts (C through F)
        - For sig deg analysis they need focus on aquatic resources
        - But also consider economic and recreation impacts from impacts on the aquatic environment
        - USACE analysis of the aquatic environment is greater than typically disclosed in a NEPA process to adequately address all of the guidelines

- Project Purpose and Need
    - Needs to be well crafted
    - What is lacking to cause applicants to have issues?
        - Purpose and Need is very important
        - Identify basic purpose and overall project purpose
        - USACE considers the applicants' needs more
        - Restricted Purpose and Need will narrow the range of alternatives
        - If too restrictive won't result in adequate range of alternatives
        - Some discussion about putting a boundary on the project
        - Don't see projects very often denied due to project need
        - How is project purpose defined with housing development
            - Overall project purpose plus cost, technical and feasibility considerations
            - Would not look at project amenities; ROI; highest and best use of land; restrictions of uses (market)
            - Water front housing; rail served housing; narrow geography too much
            - Do agree on a geographic area to establish a range of alternatives – defined in purpose
            - Landfill project had an analysis which determined there were other landfill options and not needed due to the significant impact (was not used to deny/permit was withdrawn)
            - EPA does not make a public interest determination – that is the USACE alone
            - Purpose and need is easier to determine for public infrastructure than projects such as housing developments and commercial
- USACE Alternatives Analysis
    - Guidelines require to look at both on-site and off-site alternatives
    - Key is reasonable range of alternatives
        - If you can avoid you must
        - Need to avoid or minimize discharge into WOTUS
        - How far does off-site alternatives reach
            - Project dependent
            - Usually based on practibility factors
            - If the project owner doesn't own the off-site land then look if land can be reasonably attained; not owning doesn't determine an alternative isn't feasible
            - Degree of analysis based on project complexity or severity of impacts (size of acreage)
            - Often project can be reconfigured on site to reduce impacts without extensive analysis of off-site alternatives
- EPA 1993 memo re: flexibility under the 404 guidelines

  - Type of aquatic resource may provide flexibility
  - Are there cases where the analysis can be streamlined due to limited impacts?
    - It is considered, but EPA often encourages a broader range of alternatives
    - Concern about cost of alternative analysis (surveying; sampling; etc.)
      - If not practable, demonstrate and well document up front to avoid the more detailed analysis
  - Obstacles or Roadblocks
- Screen for LEDPA and mitigation to offset the impacts and if significant can propose mitigation to bring below threshold then permit must be denied
- Wetland protection document (Elizabeth will send to Heidi) A basic read and still holds true.

Future Discussion Needed:

- (8/30) Need to determine if limits can be changed and specific to the state
- (8/30) The criteria established to determine significant degradation are subjective and murky
- (8/30) Can you apply the AA process and adapt to streamline, considering guidance and case law?
- (8/30) Need to standardize the data to be used, where acceptable (i.e., watershed, durations, etc.)
- (8/30) Ensure the process allows for public involvement
- (8/30) In at least one jurisdiction, about 60-70% of permits are declined due to poor project purpose; could requirements be put in rule or guidance
- (8/30) Public Interest regulation is currently not in the CWA, how will AZ maintain those interests?
- (11/6) Need to understand how to determine project scope for analysis

Next Meeting Agenda:

- Review draft document