

CWA 404 Program Assumption: Executive Work Group

Meeting: #2

Date: February 28, 2019

Time: 10:30 am – 12:15 pm

Attendees:

- Arizona Chapter of Association General Contractors, Amanda McGennis
- Arizona Department of Environmental Quality, Trevor Baggiore, Chair
- Arizona Department of Transportation, Dallas Hammit
- Arizona Game and Fish Department, Jim DeVos
- Arizona Mining Association, Steve Trussell
- Arizona State Historic Preservation Office, Christopher Cody
- Arizona State Land Department, Lisa Atkins
- City of Phoenix, Karen Peters
- Environmental Protection Agency, Region IX, Tomas Torres
- Home Builders Association of Central Arizona, Spencer Kamps
- Flood Control District of Maricopa County, Mike Fulton
- Pima County Flood Control, Suzanne Shields
- Tucson Audubon Society, Jonathan Lutz
- US Army Corps of Engineers, David Castanon
- US Fish & Wildlife Services, Jeff Humphrey
- City of Tucson, Albert Elias
- Sierra Club, Sandy Bahr

Members' Support Staff

- City of Phoenix, Nancy Allen
- Environmental Protection Agency, Region IX, Elizabeth Goldman
- Environmental Protection Agency, Region IX, Rob Leidy
- US Army Corps of Engineers, Sallie Diebolt
- US Fish & Wildlife Services, Beth Forbus
- US Fish & Wildlife Services, Carrie Marr

ADEQ Staff

- Misael Cabrera
- Andy Koester
- Heidi Welborn
- David Lelsz
- Jill Hankins
- Mark Joyner
- Leigh Padgett

Consultant Support

- Brian Lindenlaub, WestLand Resources
- Amanda Best, WestLand Resources
- Jim Tress, WestLand Resources
- Theresa Gunn, GCI

Technical Work Group Chairs and Members:

Mark Edelman, Chair, Compensatory Mitigation
Jack Moody, Chair, Jurisdictional Determinations
Scott Thomas

Review Agenda

Trevor Baggione, Chair, reviewed the agenda and asked members if they have any changes to the meeting notes. Mr. Baggione also reviewed the upcoming meeting schedule and scheduled topics.

The Current 404 Permitting Process

Amanda Best provided an overview of the current 404 permitting process. Highlights of the presentation are listed below.

- Regulatory definition of Waters of the United States
- Corps issued permit actions
- Elements of the Corps permit process
- Resource studies can be provided after the application and are needed for general permits
- 402 permits currently
- 106 and ES consultation must be completed before permit is issued

Jurisdictional Determinations (JDs)

Trevor introduced Jack Moody, Chair, of the Jurisdictional Determinations Work Group. Amanda Best provided an overview of the current Corps process in making a determination. Highlights of the presentation are listed below.

- Determination is an appealable decision
- Include significant nexus analysis to a downstream
- Preliminary determination is an option which allows landowners' permitting to move forward without a from approved determination
- Waters of the United States definition has been influx
- Erosional features are not considered jurisdictional

Ideal Future State of Arizona Program Recommended by TWG

- Have both PJD and AJD as options
- Online data and guidance
- Online map of existing JDs
- Provide an appeal for AJDs in case of disagreement
- Ensure AJDs valid for longer than 5 years
- Stipulate review and approval timelines
- Low or no-cost for JDs
- Training for staff and outreach

Work Group Discussion

The following are the issues discussed by the group.

- Are JD's subjective?
 - Corps has a technical manual and training to assist project managers in making consistent determinations
 - Sometimes the investigations in the field leads to some subjectivity in determining the ordinary high-water mark
 - Corps uses 5-6 indicators in the field; it is sometimes unclear how many indicators must be met to determine the ordinary high-water mark
 - Work group wants to ensure ADEQ staff has the training to have the same expertise as the existing Corps staff in Arizona and to ensure project managers' decisions are consistent.
- What is the risk associated with a PJD for the agency?
 - Corps and applicant agree, at this place and time, this area is jurisdictional but does not determine the upper limits.

- Encourages collaborative communication between agency and applicant
- Cost of a nationwide permit is much less cost than costs of doing an AJD
- Permittees may be required to do mitigation which may not be required if not jurisdictional
- Is the current guidance from the Corps clear?
 - Yes, for consultants who regularly prepares JD applications
 - However, for small projects the information is not readily available
 - Currently, landowners can call the Corps for guidance and assistance in determining whether they need to apply for a permit
- Is a JD a license or permit?
 - ADEQ is seeking legal advice to determine
 - If a license, ADEQ would then be allowed to charge fees, have license timeframes and appealable
 - AJD is a determination of applicability
 - After 5 years, an applicant can't rely on the AJD for future construction/activities
 - If conditions change on site, the AJD could expire earlier
 - It is on the burden of the applicant to resubmit for extension or if conditions change
- Should there be timelines for making determinations?
 - Great to have timelines for targets
 - Corps has timelines for permits but not for standalone JDs
 - If someone without a project wants to know if jurisdiction on their land lower priority are and don't have timelines
 - It generally takes 60 days to make a determination, but larger, complex projects may take longer
 - Entities can make their own determinations and can move forward without applying but is at their risk if they are wrong
 - Non-government entities can use the water resource development act (WRDA 214) which allows private sector to pay for expedited permitting
- How is the Corps funded?
 - The Corps is centrally funded from Washington, \$7 million for region IX
 - Nationwide permit has no fee; individual permit is \$100 which goes back to Treasury and not the Corps budget
- Is it appropriate to use the existing Corps process?
 - Work group members were mostly consultants who understand the current process
 - Considered the following: putting the burden of analysis on the agency instead of the applicant; small property owner without funds to hire consultant should continue to get help from ADEQ
 - Tools available today are very different and might simplify the process
 - Process stays the same, but tools have evolved and depends on the resources available to applicant
- Where's the map?
 - Can there be a map that defines those areas that are clearly jurisdictional and areas where it is not clear and need to apply?
 - The dynamic nature of the environment and the costs of developing the map may be expensive and difficult to keep current
 - Is it practical; would recommend not providing the map because of the resources needed to develop and maintain
 - Could be practical from a watershed perspective; determine which watersheds are not jurisdictional because no significant nexus to a TNW
 - There has been no comprehensive study of TNWs in Arizona

- Corps has not said anything is not a TNW but haven't gone through the process to determine if Verde River and others are TNWs
- What is the effort needed to do a comprehensive TNW determination in AZ? It would require a lot of research into court cases, historical information, and field investigations
- Map could be scaled to only what is known
- Some work group members felt strongly there needed to be a statewide map while others felt it wasn't feasible
- A central location of previous AJDs in a GIS database which can be used to research previous decisions (including actual line work of the AJD) is need in a GIS format
- This information is available through public record but not as easy as going to a map to see the information
- Are there implications for a regional map that indicates state/private land may be subject to regulation by Clean Water Act?
 - Could be like the floodplain and wetland mapping of private property
 - Would need detailed disclaimers which may distract from the usefulness of the map
 - People may make financial decisions based on the map which could put ADEQ at legal risk
- Is it possible to have a screening tool to streamline the process?
 - It would be a huge upfront cost to develop
 - Practicability for the screening tool may change based on the pending WOTUS definition
 - The Streamflow Duration Work is a national work group charged to determine differences between intermittent and ephemeral streams but have found it isn't an easy task
- What is the EPA involvement in JDs?
 - EPA currently reviews JDs (15/21-day review) with escalation if disagreement; EPA does not review PJDs
 - Work group members were concerned if ADEQ made a determination, EPA could overturn several months or a year later
 - Work Group felt ADEQ/EPA should have agreement on review and approval of AJDs, so landowners can know their determination is final
 - EPA review period does not mean concurrence of the determination, and is a right EPA would not be interested in giving up this authority
 - EPA's role would need to be defined in the MOA
 - MOA between EPA/Corps gives the EPA some primacy over Corps in determining what is jurisdictional

Compensatory Mitigation

Amanda Best provided an overview of compensatory mitigation as background information for the next executive work group meeting.

Current State

- Looked to guidance in 2008 rule
- Group felt there is flexibility in some of the policies and procedures and still be in compliance with the rule
- In rule, mitigation bank is preferred but none exist in Arizona
- Arizona has a few in-lieu fee projects but struggling due to a lack of demand for credits
- Permittee mitigation is least favored by the rule

Challenges

- In kind mitigation is difficult in Arizona without relying on preservation
- Preservation is a low priority in the rule

- For ephemeral streams it is difficult to establish or restore and mitigation is cost prohibitive
- Question regarding current Corps covenant instruments and if ADEQ needed to assume them
- ADEQ enabling instruments with ILF sponsors – do they need to be new
- Mitigation ratio procedure – multi step process is cumbersome and could be simplified and give more benefit to preservation

Ideal State

- Define long term management to provide clarity to the in-lieu fee sponsors
- Opposition from EPA from using out of kind – need to understand what type of mitigation would be acceptable
- State owned and state trust lands to combine ESA and 404 mitigation needs

Other Issues

Trevor asked the group if they had any other topics they would like to bring up.

- Question: After primacy, does ADEQ have a responsibility to keep pace with all the national rule and law changes in ESA, etc. and if so, what is the time allowed to make the changes?
 - Yes, this is living program. ADEQ would have to modify and submit an amendment to the primacy package as done today for other water act programs. Will need to research if the regulations have a specific timeline for making those changes.
- When EPA makes decision if program is good enough for assumption, does it only focus only on aquatic resources
 - Yes, but the EPA has only approved two assumption programs many years ago.
- Federal law requires the state program be as protective or better; however, state statutes require no more protective than Federal program which seems like a tall order to balance both requirements.
 - It is difficult, but ADEQ has successfully found the right balance for other water programs.
- Structure of these meetings
 - Went well today; good discussions
 - Concern about a lot of voices missing – need more voices at the table
 - When on the phone lose connections will try to attend in person
 - Documents should be available for those not in the room physically ahead of time

Action Items

- Discuss the project scope for analysis during significant degradation discussion
- Distribute white papers on the March topics to the group as attachments
- Determine the timeline requirements for amended primacy packages and provide information to the work group
- Send full packet (all handouts) to all members

Next Meeting

Thursday, March 14, 2019, ADEQ, 1110 W Washington, Phoenix, Room 145

Topics:

- Input on Compensatory Mitigation
- Discuss Significant Degradation, Alternative Analysis, Minimization Issues
- Introduction to Endangered Species Act