

CWA 404 Program Assumption: Executive Work Group

Meeting: #3

Date: March 14, 2019

Time: 10:30 am – 12:15 pm

Attendees:

- Arizona Chapter of Association General Contractors, Amanda McGennis
- Arizona Department of Environmental Quality, Trevor Baggio, Chair
- Arizona Department of Transportation, Julia Manfredi for 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, Mark Edelman for Lisa Atkins
- City of Phoenix, Nancy Allen for 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, Jennifer Martin for Sandy Bahr

Members' Support Staff

- Arizona Game & Fish, Shawn Lowery
- Arizona Game & Fish, Keith Knudson
- Environmental Protection Agency, Region IX, Elizabeth Goldman
- Environmental Protection Agency, Region IX, Rob Leidy
- Environmental Protection Agency, Region IX, Melissa Scianni
- 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 TWG
- Jeremy Casteel, Chair, Significant Degradation, Alternative Analysis, Minimization TWG
- David Kimball, Compensatory Mitigation TWG

Review Agenda

Trevor Baggiore, Chair, reviewed the agenda and introduced the members.

Compensatory Mitigation

Brian Lindenlaub provided an overview of compensatory mitigation issues. Highlights of the presentation are listed below.

- Guided by 2008 mitigation rule
- Objective to offset unavoidable impacts and compensation for impacted aquatic functions
- Rule clear that restoration is the preferred approach, followed by enhancement, establishment and then preservation which is less preferred
- Allowed for mitigation banks, in-lieu fee (ILF) programs, and permittee-responsible, preference in rule ranked in that order
- Emphasis on in-kind mitigation instead of out-of-kind mitigation
- Limited number of credits available and sold in Arizona, depending on ILF service areas
- No mitigation banks in AZ
- Mitigation may be sited on public or private lands
- May be opportunities to pair with other federal, state, tribal, local legal non-404 related requirements, as long as verifiable that there will be no 404 double dipping
- TWG discussed flexibility in determining mitigation areas outside of proximity to the project site, i.e. outside of immediate watershed but within same ecoregion
- Mitigation ratio checklist is used to determine how many mitigation credits are needed to offset impacts but is unclear and not always completed consistently because functional assessment methods are not fully defined

The following are the issues discussed by the EWG members.

Number of Credits Available and Sold

- In Pima County there are currently 20 credits available in the area discussed, but no credits are being purchased
- Credit availability depends on the watershed (HUC) area as mitigation is typically completed in the same HUC as the impact
- In-lieu fee programs are having a difficult time maintaining projects due to lack of credits purchased
- Mitigation banks and ILFs prefer to have a larger service area to increase the customer base, but mitigation should be somewhat near and similar to the impact
- If mitigation is further away from the impact area, then there could be higher ratios to require more mitigation
- Arizona Game and Fish have been working with ADOT and other partners to manage their project needs and had legislation passed for long-term financial assurances
- Takes a very long time to establish an in-lieu fee enabling agreements, involves the Inter-Agency Review Team (IRT), and the following requirements (not a complete list):
 - State laws different in Arizona
 - Requires real estate protections
 - Long-term financial assurances and bank account
 - Conceptual plan
 - Credit release schedule
 - Service area
- U.S Army Corps of Engineers (Corps) has more flexibility when working with governmental agencies on financial assurance requirements than when working with private entities

- Challenge in anticipating future credit demands of potential projects
- Regulated community has concern about the reliability of future ILF credit availability for project planning purposes
- IRT is looking at the issue of limitations for smaller ILFs and identifying where there is flexibility under the 2008 rule, on a case by case basis, to increase service areas

Double Dipping

- Double dipping is difficult to define; if site is being used for ESA and 404 mitigation at some point the project may not be able to meet the intent of mitigation for both purposes
- Projects can provide offsets for multiple projects but can be difficult to manage and could set the project up for failure
- Triple dipping: if a project is going to take of an endangered species and a modification of critical habitat, it requires consideration of both impacts and mitigation for both which is evaluated separately
- ADEQ will need to try to create clarity in a state 404 program
- The issue comes up often, and many times late in the mitigation planning process

Quantitative vs. Qualitative Assessment Methodology

- Arizona doesn't have a quantitative methodology for determining ratios
- The Corps MRSC checklist was developed to ensure project managers go through the same thought process but could still result in different ratios by different managers

Lack of Credit for Preservation

- Preservation is not preferred because of the permanence of project impacts and the goal no net loss
- With so much public and trust land in Arizona which is not developable, communities want to be able to make financial use of the land through mitigation preservation
- Arizona State Land Department has been looking for a mechanism for selling land for conservation to offset mitigation
- A barrier is the regulation that the people are unable to use mitigation areas for recreation, but other states are preserving land and allowing reasonable recreation
- The mitigation rule doesn't allow for preservation for resources that are not under threat of destruction or adverse modification (40 CFR 230.93(h))

Long-Term/Permanent Financial Assurance

- Corps sees mitigation as permanent; the loss of the aquatic resource is permanent
- When calculating costs need to have a target year for cost projection; can't project costs to infinity
- Are there other financial mechanisms which can be used to pay future costs
- 2008 rule provides more flexibility for public entities operating ILFs
- Arizona Game and Fish enablement agreement includes a definition of in perpetuity
- Agency needs to be protected if the project who purchased the credit no longer exists
- ADEQ should work to clearly define the long term in a state 404 program

Significant Degradation, Alternative Analysis, Minimization

Trevor introduced Jeremy Casteel, Chair, of the Significant Degradation Work Group. Brian Lindenlaub provided an overview of the key issues. Highlights of the presentation are listed below.

- Activities must not result in a significant and non-mitigatable impact to an aquatic resource
- Analysis to identify cumulative and secondary impacts

- Clean Water Act § 404(b)(1) Guidelines (Guidelines) establish the environmental guideless to be used in evaluating alternatives
- Analysis described in the Guidelines is used to determine and permit the alternative with the least environmentally damaging practicable alternative (LEDPA)
- Range of alternatives for LEDPA consideration must be reasonable and determined by project purpose
- LEDPA analysis process includes:
 - Develop a range of alternatives
 - Analysis for practicability, including consideration of: technology; logistics; and cost
 - Selection of LEDPA
- For a 404 permit, the scope of analysis should be restricted to the discharge area boundaries (when there is no NEPA obligation)
- Difference in level of analysis to vary based on the level of environmental impacts, according to Guidelines

The following are the issues discussed by the EWG members.

Project Purpose and Costs

- The Corps does not consider the project economics but just the costs incurred by the permit applicant
- Two project purposes; the overall project purpose is most important
 - Applicant has their project purpose
 - The Corps determines the overall project purpose for 404 analysis which can be controversial; applicants feel it is too broad and other agencies feel too narrow
- Costs are compared to those of a similar project

Scope of Analysis

- Corps scope is bound to NEPA; how does it vary absent NEPA requirements
- Corps has combined their permitting process for CWA § 404 and NEPA
- There is a difference of opinion between Corps and EPA on scope of analysis; this needs to be considered when applying for assumption
- A minority report is included in the Significant Degradation Technical Workgroup whitepaper concluding that due to a lack of the NEPA and Section 7, the state program can not be as protective of the environment as the Corps and Arizona should not assume
- EPA and Corps can disagree but meet to discuss the appropriate scope and address on a case by case basis; not a chronic issue
- MOA with the EPA should determine how ADEQ will work with the EPA to address differences of opinion
- Scope is somewhat determined by how much of the project area has the potential to impact WOTUS
- Corps does not make a scope determination on 404 only; but if you take away the NEPA it might be easier to make a scope decision based on discharge area only
- There is a difference in opinion between regulators and regulated community of what is a practicable alternative
- Local agencies tend to apply for a permit when the preferred alternative has been identified
- Scope of permit conditions typically focus on waters of the US
- Special permit conditions include requirements to satisfy ESA and NEPA requirements
- Corps permit decisions based on the LEDPA analysis process and a public interest review

- Scopes of analysis that include uplands could also result in permit conditions related to those uplands outside of the project area
- Litigation typically comes from disagreements on scope; ADEQ needs to consider the possibility of litigation and associated financial risk

Level of Analysis

- Stringency of review should be commiserate with the level (magnitude) of impact
- TWG recommended a less detailed analysis for ephemeral streams but did not make specific recommendations on what should be included in the analysis
- EPA feels analysis is case by case and should be careful not to put waters into a box; it depends on location, types of impacts, and secondary or cumulative impacts within the watershed e.g. one ephemeral wash may provide more aquatic functions than another ephemeral wash due to watershed location, and secondary and cumulative impacts within the watersheds
- Need to consider nature of resource and nature of the project when considering level of analysis
- The threshold of significant degradation is very high, and rarely reached
- The subject of the Significant Degradation whitepaper is more about how the Guidelines are implemented

Endangered Species Act

Jim Tress provided an overview of the key issues.

- Law to limit, reduce species going extinct
- Listing of species may change
- Listed species are either threatened (nearing extinction) or endangered (closer than threatened to extinction)
- Section 7 and Section 10 are two mechanisms to get a permit
 - Section 7 creates a framework for federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) when an agency action may harm a listed species or critical habitat. In response to consultation, USFWS issues a biological opinion defining what impacts would occur to listed species or critical habitat
 - Section 10 permits allow private entities harm an endangered species, after the development of a habitat conservation plan and approval from the USFWS
- Three elements of the ESA (all projects must meet)
 - Cannot harm or harass or take a listed species on any property (listed animal only)
 - Endangered plants are property of the landowner, and are not protected by the ESA, however, the ESA mandates that private landowners must follow state laws concerning
 - Take of designated listed species or adversely impact critical habitat (analysis under Section 7)
- Section 9 has a prohibition against take (animal species are treated differently than plant species)
- Section 7 is triggered for 404 permitted purposes when a project has a federal nexus i.e. is located on federal land, is permitted by the federal government, or receives federal funding
- Projects with no federal nexus, yet may affect a listed species on private land must consult directly with the USFWS to receive a Section 10
- Section 7 is a very finite process and short/reduced time for USFWS to respond
- Section 10 can take a long time to complete
- Scope of analysis may also impact Section 7 or Section 10 analysis

Other Issues

Trevor asked members to complete the meeting evaluation. He also asked members if the pace of the work and discussions is appropriate. He asked members to give ADEQ the brutal reality about the process.

Action Items

- Determine how the state will define and address double (triple) dipping for mitigation
 - What is it?
 - What is acceptable?
- EWG members who have comments/thoughts on white papers should forward to ADEQ

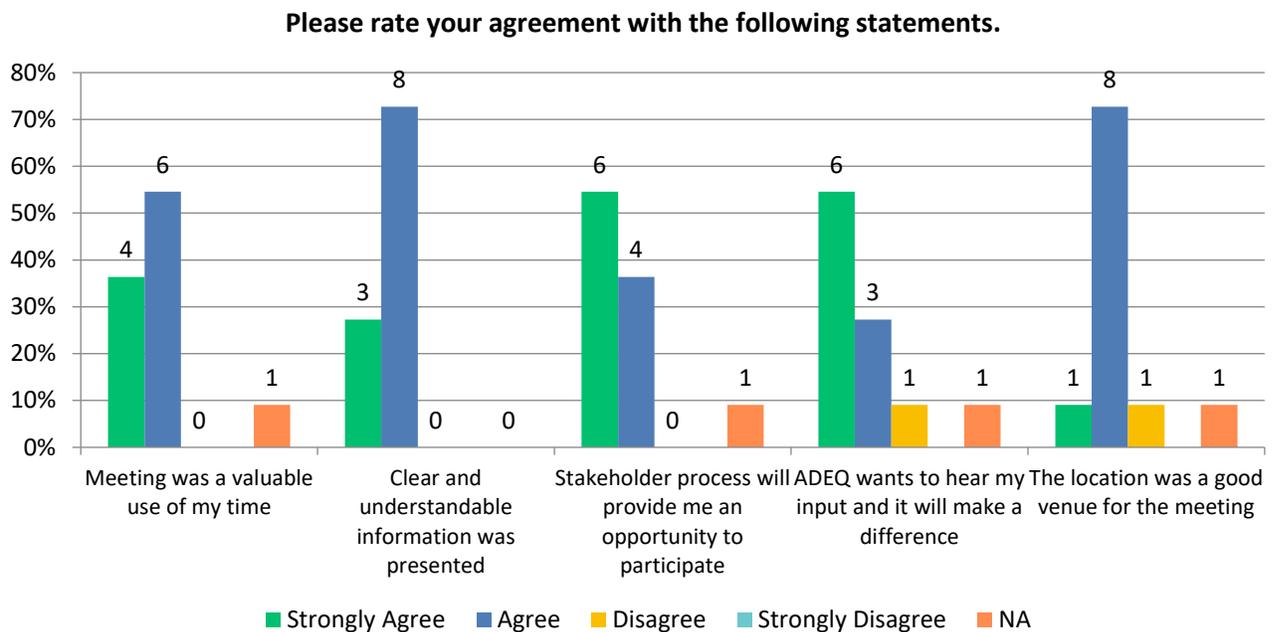
Next Meeting

Thursday, March 28, 2019, ADEQ, 1110 W Washington, Phoenix, Room 145

Topics:

- Discuss Endangered Species Act Issues

Meeting Evaluation



What was best thing about today?

- Good presentation by WestLand
- Having TWG chairs present to answer questions.
- Discussion was detailed, which will be required.
- Presentation by WestLand Resources
- Trevor's willingness to consider all. The exec summary is a great orientation.
- Information and discussion - also the variety of expertise in the room. Offer to accept additional comments in addition to the technical papers.
- Open and frank conversations
- Good discussion on Compensatory Mitigation

What should be changed for future meetings?

- Maybe change to only one topic per meeting - a lot to absorb
- Discussion would be better at the end of the presentation. Having discussion during the presentation can cause loss of momentum of presenter and loss of flow. Also, causes getting in the weeds.
- Larger meeting room (if everyone is attending in person)
- Get materials out to us early so we can best prepare. Perhaps too much information for this short time frame.
- Keep pushing for participation of EWG members who have not been attending
- The rhythm of review for the white papers is difficult to keep up with and thus may impact the quality of the EWG conversations. Digging more deeply into, and commenting on the white papers could provide more granular information that would be of value, but our EWG discussions aren't going into that level of detail. Also, though EWG members can send ADEQ comments on the white paper, other EWG members may not have an opportunity to see or discuss those comments.
- 1) Continue to encourage stakeholder participation - it seems to have waned a bit. But understand some of this is beyond your control. 2) The level of discussion has been rather superficial and general, which may be ok for the level of participants involved; however, it seems that in some areas more depth may be warranted. 3) Discussing more than two topics has proven difficult to keep up, given limited bandwidth between meetings. Consider discussing one topic and introducing the other as a possibility - may also help with #2. 4) It would be helpful to have a brief re-cap at the end of each meeting on areas/specific items that the workgroup discussed, where ADEQ may want to explore further, agree with, or otherwise incorporate into the 404 process. From a workgroup member perspective, it is difficult to assess whether the time invested in the discussions are having any impact one way or another. Thanks for all of your hard work in convening the Executive WG!