



**TWG: Cultural and Historic**

**Meeting: #7 Date: Nov. 29, 2018 Time: 1-3 p.m.**

**Attendees:**

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|--|--|
| <input checked="" type="checkbox"/> Laura Berglan, Pascua Yaqui Tribe                                      | <input checked="" type="checkbox"/> Courtney Rose, Pima County                           |
| <input checked="" type="checkbox"/> Lee Decker, Gallagher & Kennedy  | <input checked="" type="checkbox"/> Peter Steere, Tohono O’odham Nation                  |
| <input checked="" type="checkbox"/> Mark Horlings, Maricopa Audubon Society                                | <input checked="" type="checkbox"/> Mary-Ellen Walsh, State Historic Preservation Office |
| <input type="checkbox"/> Kathryn Leonard, SHPO   | <input type="checkbox"/> JR Welch, Archaeology Southwest                                 |
| <input type="checkbox"/> Robert Linsell, Granite Construction Company, Inc.                                | <input checked="" type="checkbox"/> Chris Cody, State Historic Preservation Office       |
| <input checked="" type="checkbox"/> Ronald Maldonado, WestLand Resources, Inc                              | <input checked="" type="checkbox"/> Alana Hake, Gallagher & Kennedy                      |
| <input checked="" type="checkbox"/> Linda Mayro, Pima County   | <input checked="" type="checkbox"/> Sam Ziegler, EPA                                     |
| <input checked="" type="checkbox"/> Susan Montgomery, Attorney representing Inter-Tribal Assoc. of Arizona |  |

**Staff Support:**

- David Lelsz, ADEQ                       Kelly Cairo, GCI

**Discussion Items:**

Sam Ziegler, EPA Region 9 Wetlands Section Chief, joined the group via conference call. Sam answered the questions below with the caveat that he is providing the answers based on his current knowledge and that these answers do not reflect final official EPA answers because of limited advance information concerning the questions, the complexity of the issues and limited experience to-date with 404 assumption since only two states have assumed the program (none in R9).

- What is the role of EPA if the ADEQ assumes the 404 process?
  - EPA will review permit applications that, based on MOA, identifies what EPA hasn’t waived its right to review. The MOA is yet to be defined. He would assume that there could be some flags around permits involving cultural resources. EPA could object to a permit where the state has not adequately addressed EPA comments concerning compliance with the federal 404(b)(1) guidelines. EPA also would coordinate review with other federal programs. This may be another place where cultural resources could come into play.
  - The EPA role would be different than it is now. EPA would comment on applications and the state would work to address comments as appropriate. (This commenting function is the same as it is currently.)
  - In the future state, if EPA objects, the permit application goes to the Corps for consideration.
  - One other difference is the EPA would review the states’ performance. EPA does not review the Corps’ performance. EPA could revoke a state’s assumption.
- Can EPA object to a permit based on Section 106 not being met?
  - Sam did some checking and called later in the meeting with a reply to this question. He said the NHPA is part of the 404(b)(1) guidelines and failure to meet this guideline would be basis for denial. He said that if the Corps would deny the permit, the state needs to be able to

- deny the permit as well. The state should develop a program that would meet the same objectives. He believes this would also apply to ESA.
- Peter asked about applying this interpretation to federal orders regarding tribal consultation. Sue pointed out that under NHPA, tribal consultation is required.
  - Lee noted concerns about cultural resources not included in 404(b)(1) guidelines. He also questioned the application of the state following all federal regulations, and the NEPA implications.
  - Peter would like to see a requirement for ADEQ to comply with all federal laws related to the environment and cultural resources, and adequate staffing at ADEQ to support such a process.
    - Sam said that these aspects need to be addressed in the state's application for assumption to EPA, as well as MOUs with EPA, the Corps, and perhaps other federal agencies. When the assumption application is received, EPA engages in tribal consultation plus public meetings prior to action.
    - On tribal lands, the Corps will continue to hold permitting authority.
    - Peter said that he believes all tribes should be signatories on this agreement.
  - A TWG member said that EPA cannot waive oversight when cultural resources eligible for the national register would be affected.
    - Sam agreed that cultural resources would likely fall into the nonwaivable category.
  - Mark asked about remote oversight and the annual review.
    - Sam said that ADEQ should expect a similar type of oversight as that experienced in with the 402 program and other CWA programs that ADEQ implements with EPA oversight. A challenge of the 404 process is that ADEQ must implement EPA regulations, which are more specific than other programs. EPA does not currently have funds available to provide to states for implementation, so there may not be the same fiduciary oversight that exists with programs for which EPA provides ADEQ with implementation funding.
  - Can EPA turn the process back over to the Corps?
    - Yes. Legally, there is no prohibition on returning a 404 program to the Corps.
  - Can EPA require a state to add staffing?
    - EPA doesn't make staffing decisions, but sufficient staffing is a consideration in approving assumption and may be considered during routine program review and oversight. Sometimes in working with a state, suggestions are made to ensure adequate program implementation and if necessary a corrective action plan may be established.
  - The TWG agreed there was interest in exploring the EPA waiver further. Sue has added information to the white paper for review.

## Administration

- Laura and Mary-Ellen met with Trevor Baggiore regarding an extension on the white paper. Trevor agreed that this TWG should produce a draft paper by Dec. 20 to include the current process, future process and identification of gaps. The draft will be subject to revision after discussion with the Tribal TWG.
  - Peter cautioned that the work of the Tribal TWG could continue for 3-4 months and involve tribal legislative bodies and significant alteration.



- David reported that only one of the 22 tribal consultation meetings with tribal leaders is scheduled. ADEQ does not anticipate scheduling meetings for the Tribal TWG until at least half have agreed to participate.
- Mark Horling noted that his edits appear in Google Docs as Ginny Kennedy.
- Action items: Sue will look at interpretations of 40 CFR 233.51; Lee will look at whether there is preamble language from EPA.

## White Paper

- Laura noted areas of agreement on the live document. Additional discussion highlights follow.
- The group agreed that changes should be in the form of suggestions and show up on the right.
- David said that headings which do not apply to the work of this TWG should be removed.
- The group agreed to present multiple visions of a future state.
  - Once the options are specified, we can determine whether there is consensus.
- Local jurisdictional protections will need to be followed. The current state should include this information and equivalent protection should be noted as well.
  - Action item: Linda agreed to draft this information.
- The group agreed that Laura will provide the white paper in Word and others will submit changes with track changes function to her.
  - Action item: Laura to distribute paper and update draft.
- The group discussed adding the charter to the white paper.
- The group agreed to white paper headings as noted in the live document.
- There was a recommendation to include in vision/option/future state: ADEQ should explore x, y, and z to bridge the gap.
- Will there be a public hearing? There will be public process on ADEQ assumption.

## Other

- Peter noted that ESA should forward information to the cultural group. For example, plants that are significant to a tribe also appear on the T&E list. This TWG is interested in ideal process, gaps and closure options.
  - Action item: Kelly to invite Cultural TWG members to view ESA. (Done.)
  - Action item: David will obtain current draft from the ESA chair and share with this TWG. (Outlined shared.)

## **Action Items/Assignments**

- (10/18) Pending approval, Lee to provide consultation research documents to Laura, Susan, Mary- Ellen; then TWG members.
- (11/1) Peter to review the current consultation process document from a tribal point of view and his work on 404 issues for the nation.
- (11/1) Kathryn to report on 106 relationship to permitting process on private land.
- (11/1) Mary-Ellen to forward 40 CFR 233.52d6 to Kathryn for additional review from SHPO Advisory Office.
- (11/1) Kathryn (and staff members) and Courtney to coordinate on permitting actions on private land.

- (11/15) Courtney to post current state by COB Nov 16.
- (11/15) All to review updated current state by COB Nov 19.
- (11/15) Courtney to post updated current state, including current definitions of cultural and historic resources by COB Nov 27.
- (11/15) All to review updated current state by COB Nov 28.
- (11/29) All to provide any comments on the previous meeting notes by COB Dec. 3.
- (11/29) Sue to look at interpretations of 40 CFR 233.51
- (11/29) Lee to look at whether there is preamble language from EPA.
- (11/29) Linda to draft local jurisdictional protection information.
- (11/29) Laura to distribute draft white paper as a Word document and update the draft.
- (11/29) David to distribute current draft of ESA white paper.

#### 11/29 Assignments

- Lee: Follow existing state law as an option
- Lee and Sue?: EPA Role
- Mary-Ellen: Federal nexus
- Tom and Peter: Equivalency option
- All: Review updated draft from Laura
- Sue recommended using the ADOT process “ADOT Section 106 flowchart” as a basis to develop the cultural and historic flowchart. She will provide a draft for review.
- Mary-Ellen will provide the state flow chart as well.

#### **Future Discussion Needed:**

- (11/1) How would local jurisdiction interface with state level cultural/historic regulations?
- (11/29) How will an animal or plant significant to a tribe be protected outside of the state’s official T&E list?

#### **Next meeting**

- Friday, Dec. 14, 10:30 a.m.-12:30 p.m., ADEQ, 1110 W. Washington St., Room 3100B.