

**TWG:** ESA

**Meeting:** #2      **Date:** September 18, 2018      **Time:** 1-3 p.m.

**Attendees (Conference call participants):**

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|---|---|
| <input checked="" type="checkbox"/> Robert Anderson, Fennemore Craig                        | <input checked="" type="checkbox"/> Keith Knutson, Arizona Game and Fish Department                   |
| <input checked="" type="checkbox"/> Matthew Camba, Woodplc                                  | <input type="checkbox"/> Carrie Marr, U.S. Fish and Wildlife Service                                  |
| <input type="checkbox"/> Clay Crowder, Arizona Game and Fish Department                     | <input checked="" type="checkbox"/> Jennifer Martin, Sierra Club                                      |
| <input checked="" type="checkbox"/> Rafael de Grenade, HILGARTWILSON, LLC                   | <input checked="" type="checkbox"/> Jenny Neeley, Pima County Office of Sustainability & Conservation |
| <input checked="" type="checkbox"/> Nichole Engelmann, U.S. Fish and Wildlife Service       | <input checked="" type="checkbox"/> Kris Randall, U.S. Fish and Wildlife Service                      |
| <input checked="" type="checkbox"/> Terrence Enk, Freeport-McMoRan Inc.                     | <input checked="" type="checkbox"/> Laura Stewart, ACS (Archaeological Consulting Services, Ltd.)     |
| <input checked="" type="checkbox"/> Heather Finden, City of Phoenix Water Services Division | <input checked="" type="checkbox"/> Jim Tress, WestLand Resources, Inc.                               |
| <input checked="" type="checkbox"/> Jill Himes, Himes Consulting, LLC                       | <input checked="" type="checkbox"/> Russell Waldron, SWCA Environmental Consultants                   |
| <input checked="" type="checkbox"/> Mark Horlings, Maricopa Audubon Society                 |   |
| <input checked="" type="checkbox"/> Nancy Johannesmeyer, ASARCO                             |   |

**Staff Support:**

- Heidi Welborn, ADEQ       Kelly Cairo, GCI

**Discussion Items:**

- Difference between AZPDES primacy (CWA 402) and this 404 assumption process with regard to ESA
  - Heidi explained that CWA 402 prescribes exactly what is required from the state for EPA to approve the program; the Supreme Court decided that this did not include ESA review under section 7 because it was not listed in the 402 statute, therefore a section 7 analysis was not required and EPA could not require it
  - Likewise, 404 lists the requirements that EPA must consider to approve the program
  - The difference here is that 404 mandates a state's compliance with 404(b)(1) guidelines
  - The 404(b)(1) guidelines mandate that a permit may not be issued if it jeopardizes the continued existence of a threatened or endangered species or is likely to adversely modify or destroy a critical habitat
  - This does not bring in section 7, however, because it is still a state action, not a federal action
- Heidi drafted a document covering assumption requirements and the required EPA/FWS/Corps review, available in references. The document ties the requirements to the legal citations.
- Heidi also drafted an objection process flowchart showing a visual representation of 404(j) and the implementing regulations (objection for nonwaivable permits), with citations
- 404(B)(1) essentially imports standards into the 404 requirements.
  - EPA has a substantial oversight role and determines whether ADEQ is complying with the guidelines.
  - EPA cannot waive review of permits if threatened or endangered species may be affected. By rule, these permits are shared with FWS.

- The decision whether jeopardy occurs would rest first with ADEQ. EPA has authority to comment and object. EPA has the authority to object.
- This process is very different than section 7, and no incidental take is given.
- The jeopardy standards would be the same, and the opportunities to disapprove the permit exist. Jeopardy would be determined by FWS due to T&E species or critical habitat involved in proposed project.
- Can EPA enter into section 7 in a “may effect” situation? Section 7 applies only to federal actions.
- There are two steps: assumption and permits. Section 7 does not apply to either.
- P. 25 of the ASWM assumption handbook goes through T&E species as addressed by other states that have assumed the program.
- For our purposes a non-waivable permit application occurs because there is reasonable potential for affecting a threatened or endangered species. This is the objection process, not the screening process.
- Institutional capacity will be considered.
- Concern that an Arizona ESA would not be palatable to the Arizona Legislature.
- Question here is: Where do we want to trigger additional review? Legislation may not be required. Rules may be acceptable to comply with 404(B)(1) requirements.
- This group is charged with addressing resources needed in assuming the program regarding ESA issues.
- In the past, anyone could request consultation from the FWS, including ADEQ.
- IPAC database can tell you what species are in the area. However, this is not as detailed within a county as users would like it to be.

#### New Jersey and Michigan

- Approximately 2% of permits went to review at the federal level. This may be because MI and NJ have separate laws that protect T&E species.
- These states had funding and staffing in place with these other protections that would assist in this process.

#### Michigan assumption

- MI passed a wetlands statute in preparation for assumption.
- Streamlined permitting was put in place prior to assumption.
- 2011 MOA with EPA also explains coordination with F&W.
- Authority was challenged and put new revisions in place to address areas where Michigan was not as stringent as the federal program.
- See “Does my project require a land and water interface permit?”
- May want to define a buffer area around riparian waterways and ephemeral waters to provide a threshold for more in-depth review. This may be an issue the JD group should consider.
- There are two issues: species that depend on riparian habitats, and those that do not. However, even species that are not riparian may rely on riparian habitats for food or water.



- Heather wants to see MI Farm Bureau and Chamber of Commerce requests for review of Michigan's 404 assumption. May be added issues in the future.

## New Jersey assumption

- The state does an evaluation and if there is a likely effect, it would go to F&W.
- NJ has only elevated a permit four times per conversation with FWS.
- State does review, if potential for species to be there it is forwarded to FWS, which goes through a four-step process which mimics a section 7 process.
- How do they get liability coverage without a section 7 or 10 process? (NJ reports they very rarely have this situation occur. However, NJ has far fewer species.)
- A section 9 record does not differentiate between a take and an unintentional accident.
- Estimates for NJ include: 134 FTE, with budgets of \$2M enforcement and \$12M permitting.
- NJ does not differentiate between their 404 program and other programs.

## Other states

- Virginia: 2011 feasibility study recommended not to assume the program.
- Oregon: issues included the definition of adjacent waters, ESA, tribal; considered looking at a statewide multi-species HCP. A lot of issues, including with anadromous fish.
- Florida: Heather Mason, Florida, is willing to be contacted regarding these issues. They hope to create a section 7 process, but legal questions remain. Options will be to either identify early on and work to fast track with the Corps, or work through the process and wait for the objection.

## Section 7

- Don't see how you get to an incidental take program without section 7.
- What if there was a heavy screening process that triggered a federal action and therefore a section 7? Still does not make it a federal action.

## **Critical Information Resources:**

- See the COE to determine the number of 404 permits that currently include endangered species present.

## **Decisions:**

- Next meeting: Wednesday, Oct. 3, 1-3 p.m. at BLM

## **Potential Future Discussion:**

- (9/6) Would be helpful to look at why states that have considered assumption ultimately did not pursue it. May be helpful to have a Q&A session with states that have or have not assumed primacy.
- (9/6) Bullet list that describes TWG concerns in creating the white paper.
- (9/18) NJ program looking at the state regs to define habitat areas that trigger additional review – may be an important consideration, also in triggering incidental take on section 10. Is there a parallel with the Corps that could be used in Arizona? Perhaps using an EA or EIS? The EA biological report includes this information.
- (9/18) What did each of the other states do to address ESA issues.

- (9/18) 402 process includes a screening mechanism for areas within three miles of a waterway (New Jersey's wetland protection program classifies wetlands and sets buffers around certain wetlands – intermediate 50 ft and exceptional has a 150 ft buffer.)
- (9/18) Seems that multiple options could be presented in the white paper
- (9/18) Necessity of T&E statutes is a question: May be incumbent upon ESA TWG to make this recommendation, which would be consistent with the process. The statutes helped convince EPA that (other) states could assume the program in light of the 404(B)(1) requirements.

### **Action Items:**

- (9/6) Kelly will compile the matrix document.
- (9/18) Kelly to email all docs to all members.
- (9/18) Kris will report out to the Oct. 2 stakeholder meeting
- (9/18) Heidi to post citation regarding preclusion of reviewing package under ESA section 7 (National Association of Homebuilders)

### **Next Meeting Agenda**

- Review biological opinions on incidental take
- Input from Oct. 2 stakeholder meeting
- Future meeting: Sallie Diebolt to discuss current program
- *(Note: following the meeting this potential agenda item was suggested)* Rob to discuss Section 7 current state from a legal perspective