ADEQ Arizona Department of Environmental Quality MEETING SUMMARY

TWG: **ESA**

Meeting: #4 **Date:** Oct. 16, 2018 **Time:** 1-3 p.m.

Attendees *(Conference call participants)*:

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

Staff Support:

☒ *Heidi Welborn, ADEQ* ☒ Kelly Cairo, GCI

Discussion Items:

General discussion

- The scale and scope of project, and certain sectors, are likely indicators of the need for ESA consultation.
- Rob explained that a letter of permission is a category of general permit. It is an even lower of impact than nationwide permit and is typically used for boat docks. A letter of permission also may be applicable for up to five acres.
- Regardless of the level of permit, ESA compliance is required.
- Carrie noted that the Permits TWG asked about general conditions 18 and 20. How will the state provide for an equivalent? Kris discussed that there would be a range of effects. A state process would depend on the action and the range of effect.
    - The group agreed that the discussion was outside the purview of the ESA TWG.
- Florida documents (rules and MOAs) had almost nothing on ESA. There was not an MOA with FWS.
    - B. Waivers of Review – this shows the categories of permits EPA must review.

Oregon document review "Final Report: On the State of Oregon's Proposed Assumption of Clean Water Act §404 Permit Authority and Integration of Endangered Species Act Requirements"

- The Oregon program provides valid points on why DSL decided NOT to take assumption. Oregon took 3 or more years to reach their decision. Good reason not to reach a decision in a few months.
- Vision and goals – The group agreed that this may be similar to the anticipated gap closure section.
- Oregon differs from AZ in two big ways – 1) it has its own wetland legislation/program and 2) it has its own listed species program.

- Potential approaches
  - 1. Oregon Department of State Land (DSL) develops a coordination process via MOA, a coordination process that is similar to the inter-agency § 7 consultation
    - Consistent with the NJ approach.
    - Con: doesn't address incidental take. Permittees want certainty.
    - AZ would not need a state wetlands act to enact.
    - Pro: would provide a quick exit for jeopardy/adverse modification.
    - MOAs often set tight timeframes.
    - Would EPA be willing to provide consultation?
  - 2. DSL develops a state programmatic general permit which includes §7 consultation
    - Corps retains the program, but state administers the general permit program, which would cover the smaller, less controversial permits (Is this true?)
    - Potential benefit: streamline state and federal programs. Gives the state a chance to "try" the program without actually taking it.
    - Solves the incidental take issue.
    - Arizona doesn't have this type of program currently. Utah also has a Programmatic General Permit.
    - Requires state to develop a new regulatory program. This could be achieved by adopting the federal program at the state level, which is beyond our charge as ESA.
    - May mention this alternative as an option to consider in our final report.
    - May not fit with the issues other TWGs are addressing.
    - Doesn't streamline the process at all.
  - 3. EPA voluntary §7 consultation
    - Since it is not a discretionary action, EPA does not have to consult.
    - There is no consultation for assumption.
    - How far can partial assumption be pushed?
    - If lowering the threshold for objection, will EPA provide consultation? Could ask EPA how much discretion they would expect to use?
    - Is there a way for an applicant to do its due diligence and go directly to the federal process? Seems this process would need to come from ADEQ.
  - 4. §6 conservation agreement with the state
    - Full agreement: state takes over and no longer take prohibitions.
    - Would require changes in state law and more regulations. State would need its own "ESA" regulations.
  - 5. §4.d. protective regulations
    - Special rules that exclude take for specific actions for threatened species only (not endangered, not habitat) i.e. stockpond management for the Chiricahua leopard frog is not considered harm or harass for the frog.

- 6. Statewide Habitat Conservation Plan (HCP)
    - Took Pima County 20 years to achieve this. Arizona has 14 counties. Granted these were large programmatic level HCPs. How long does a project-specific HCP take? Texas does many of these because its mostly private land.

- State has more flexibility on innovating than a federal regulatory program regarding permit process time.
- Nichole summarized that options 1 and 6 are most viable, with highlighting benefits of 2.
    - MOA would be needed between ADEQ and FWS.
        - Should include whether incidental take is likely to occur
            - Who makes the call?
                - "May effect" must go to EPA, who solicits FWS opinion
                - No jeopardy or adverse mod – would cover majority of projects
                - Can there be an off-ramp or a roundabout (where EPA federalizes the permit early)?
    - MOAs provide timeframes for review

Current condition

- If permit follows the section 7 route, it becomes a Corps permit and subject to processes such as compensatory mitigation.

Extension

- Most believed that the charter goals could be accomplished in the given timeframe because the TWG has a narrow focus compared to the others. The ESA TWG will not provide detailed information that ADEQ will need to develop should they decide to continue forward – i.e. rules, regulations, MOAs, etc.
- Flow Diagram - Terry presented a simple flow chart he developed to describe the future state.

Decisions:

- Group agreed white paper should include rough percent of informals and formals processed by the Arizona Branch of the Corps per year.
- Group agreed that the final product would be short and simple, similar to the Oregon alternative's document, but also including a flow diagram. Russell's current state write-up is a good start and at an appropriate level of detail.
- Group agreed that interagency section 7 is the preferred method of handling ESA issues for 404 permits. However, our job is to identify the best method for ESA compliance when the state gets the 404 program. And since there's no federal nexus when the state administers the program, what's the best way to comply with the ESA? We have not developed what would need to be in place.

Potential Future Discussion:

- (9/18) NJ program looking at the state regulations 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?
- (9/18) 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) 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.
- (10/16) Section 10 options. Considerations include: Could streamline these options. Individual applicants get their own HCP. Could provide an option that if a take is a possibility, the permit undergoes a section 10 process. How does section 7 analysis relate to these issues?
- (10/16) FYI, there will be a Nov. 6 webinar with the chairs and EPA.

Action Items:

- (10/16) Jill to post pages for comment. Add pros and cons for each. 1)current state, 2) future state (i.e., Ideal Process, Gaps, and Closure Options) – An example for the Ideal Process is the MOU/NJ style program
- (10/16) Use the Google Drive to group edit. If Google Drive doesn't work for you ask Kelly to post a document for you or email it to the TWG. Check the Google Drive regularly for updates.

Next Meeting Agenda (Tues., Oct. 30, 1-3 p.m. at BLM)

- Homework:
    - Review FL documents
    - Review updates to Corps information that Carrie will provide
    - Review Russell's document on current process of the CWA
    - Populate lists that Jill will post
- Kris to provide Texas HCP information
- Identify ideal state
- Reassess use of subgroups/white paper progress