



TWG: ESA

Meeting: #8

Date: Dec. 4, 2018

Time: 12-3 p.m.

Attendees (Conference call participants):

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

Staff Support:

- Heidi Welborn, ADEQ Kelly Cairo, GCI

Discussion Items:

Welcome and Action Items

- Carrie requested any comments on the previous notes. She noted the importance of following the agenda timeline and being inclusive of all those who want to participate.

White Paper Review

In addition to consensus comments and questions noted on the live draft document, highlights of discussion are included below.

Minority Opinion Regarding Loss of NEPA Nexus

- Mark explained that loss of NEPA is a concern due to the political climate of the state, as well as ADEQ current expertise and staffing levels.
- Would a statewide habitat conservation plan would address these concerns?
 - HCP would address a lot of these issues, but not sure how, functionally, HCP could be implemented and the timeline.
 - Could do a project-specific HCPs, which would also protect permit holders.
- The obligation is that a state program provide the same protections as the federal program for WOTUS. NEPA information may become an additional minority opinion.
- Carrie noted the TWG is not using "ideal" in the white paper, but rather to propose options.

40 CFR Part 233.50 Federal Oversight of State 404 Program

Option 2: Required Federal Review

- There was a question about discretionary authority at the permit approval stage. This is addressed in 40 CFR Part 233.50.
- “Assumption, New Jersey Style” document says that EPA agreed to enter into Section 7 over the approval of the state program; however, this was written prior to the National Homebuilders Association case.
- Carrie recommended that the text be used as an introduction to Part C. It could be included in pros/cons. Rob said that there is a significant legal question that EPA should clarify, including whether EPA could send a permit to the Corps for Section 7.

Review/Consensus Draft Sections in Final Report

Screening Analysis

- The screening process outlined is not automatic. It would need to be the recommendation.
- State determines “reasonable potential to affect.”
- There are two outcomes of the NJ process. If a project is further developed, eliminate effect; If the effect cannot be eliminated, the project mitigates the effect.
- FWS has a right to comment in general, and is not limited to endangered species. FWS sees everything that goes to the EPA.
- There was discussion about whether the state has authority to make the jeopardy call. Because the state would be the permitting authority, they would provide a draft permit but can’t issue it until EPA approves. 40 CFR Part 233.20 prohibitions cover this information, but there was disagreement on the interpretation. 40 CFR Part 233.34(a) says the state director will review the permit. If there is a potential to affect, application goes to EPA.
 - Carrie asked Jenny to summarize the concerns. Jenny asked TWG to provide legal framework.
- EPA reviews for many considerations. Their basis to object is with 404(b)(1) guidelines, which includes ESA and other issues.

Option B-MOA

- Flowchart needs to move to a separate section.

Option C-Off-ramp

- Think we need consensus on how the first option would work before other options can be defined.
 - Will we recommend a process for coordinating with FWS and EPA in advance to eliminate a jeopardy situation? This would occur through an MOA.
 - Option A is step one and two.
 - Will the applicant ask ADEQ to screen the project, or will the applicant provide the analysis?
 - Option may need to outline that ADEQ requires screening.
 - Smaller applicants will have difficulty providing the screening. There could be a different process based on project size to address this issue.
 - There was a recommendation to put the burden on ADEQ to make the call, similar to the current process in which the Corps does so. If ADEQ does this, the TWG should recommend ADEQ hire a biologist or similar.
 - Believe that Screening and Option A are the same.

- If an applicant goes directly to the Corps, it seems like this is partial assumption. There were differing points of view on this process.
 - Sounds like we would be asking EPA to make a programmatic decision on moving the project over to the Corps.
 - Once the state assumes the program, the state retains some authority. This may be how to address the off-ramp process.
- The group agreed to provide this information in narrative, and eliminate the flow chart.
- Could also suggest that ADEQ pursue a rule change since these regs are a problem nationwide.
- There was some agreement on recommending the offramp option. This would require a rule change. Perhaps rename “offramp option” as “non-HCP incidental take option,” or other

The state cannot take over ESA enforcement. Option D-Statewide HCP

- Jenny reviewed the HCP option. She believes this would be very beneficial, but would take a long time to implement. Impacts and take would need to be determined.
 - How would a 30-year permit be handled?
 - Carrie suggested that the group review the HCP section prior to the next meeting.
 - Terry asked if the applicant would need mitigation funding prior to getting the permit. FWS doesn't currently require funding in place for the mitigation. States can apply for funding to develop the HCP under Section 6.
 - May want to consider project scale outside of project-specific HCP.
 - Decision will have to be made as to what species and activities would be covered.
 - Pima County would likely pursue an MOA with ADEQ.
 - A con would be the (lack) of ability to provide for the mitigation.

Carrie tabled the remaining items on the review/consensus draft.

White Paper Extension

- Terry suggested extending the deadline in order to get consensus on the first option, and to communicate how it might work.
- There was discussion about the workgroup volunteers' recent increased participation (through weekly and extended meetings) and the impact on overall workload and personal time. The group recently identified additional issues and needs additional time to determine consensus.
- Kelly recommended providing a timeline with items to be covered at meetings.
- The group agreed that Carrie should pursue an extension with an end of February deadline.

ADEQ Stakeholder Meeting

Carrie reviewed her bullet points for the stakeholder webinar on Thursday. Suggested changes included:

- Potential to retain a federal nexus for the 2% of projects
- Unclear whether retaining section 7 is allowable under the current regulatory framework
- Off-ramp option could be called early return of jurisdiction to Corps

Next Steps

- Next meeting: Dec. 11, noon-3 p.m.
 - Kelly to send out updated invitations (Done.)
 - Kelly to schedule meetings (1-3 p.m.) Jan. 8, Jan. 22, Feb. 5, Feb. 19. 1-3 p.m. (Done.)
- 12/6, 1-3 p.m.: ADEQ 404 Stakeholder Update Webinar (Done)
- Assignments: Review existing completed sections of white paper.

Action Items:

- (12/3) Carrie and Jenny to discuss options offline and send out to the group.
- (12/3) Carrie to request white paper extension.