

**TWG:** ESA

**Meeting:** #9      **Date:** Dec. 11, 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 type="checkbox"/> Matthew Camba, Wood plc   | <input checked="" type="checkbox"/> Carrie Marr, U.S. Fish and Wildlife Service                                  |
| <input type="checkbox"/> Clay Crowder, Arizona Game and Fish Department                            | <input checked="" type="checkbox"/> <i>Jennifer Martin, Sierra Club</i>  |
| <input type="checkbox"/> Rafael de Grenade, HILGARTWILSON, LLC                                     | <input checked="" type="checkbox"/> <i>Jenny Neeley, Pima County Office of Sustainability &amp; 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"/> Terrence Enk, Freeport-McMoRan Inc.                            | <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 type="checkbox"/> Jim Tress, WestLand Resources, Inc.   |
| <input checked="" type="checkbox"/> <i>Jill Himes, Himes Consulting, LLC</i>                       | <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:**

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| <input type="checkbox"/> Heidi Welborn, ADEQ | <input type="checkbox"/> Mark Joyner, ADEQ | <input checked="" type="checkbox"/> Kelly Cairo, GCI |
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**Discussion Items:**

Welcome, Review Agenda

- Carrie requested comments on notes and the agenda.
- Carrie will be meeting with Trevor Baggio on Friday to formally request an extension. She plans to provide Trevor with the intro and the current state on Friday.
- Carrie reviewed an EPA Fact Sheet provided by Jim, Proposed Revised Definition of WOTUS.

Recap ADEQ Stakeholder Meeting

- Carrie noted that other TWGs are including recommendations for rulemaking as part of their ideal state. Jenny clarified that these work groups are referring to state legislation. Rob said that the groups were directed not to wait for EPA assumption regulatory changes.
  - Jenny noted that state legislation was briefly discussed, but dismissed, in part due to the unlikelihood of the change occurring.
  - The group agreed the white paper should include a few sentences about items that could be solved through state legislation.
- Terry said that when a state adopts a T&E species list, it differs from a Federal list. Where there is overlap, the Federal government retains authority. This is different than a state program for wetlands or even the 404 program, where the state takes over the responsibility from the Federal government.
- Carrie reported that Trevor recommended the EPA allow as much flexibility as possible regarding partial assumption.
- Rob noted that the states' program should be as protective of the CWA. Carrie said that ADEQ's goal is a program as protective of the environment as the Federal CWA program.

## Review/Consensus Draft Sections in Final Report

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

- Carrie requested comments on the current draft document within 48 hours.
- Two percent ESA – Carrie reviewed Jill’s update on two percent of applications included under “may affect.” Some issues are resolved through the Corps with what is essentially technical assistance prior to the formal process. These applicants are not considered part of the two percent.
  - Action item: Jill will include caveats to this information in the white paper.
- Terry was interested in the number of applicants that initially would be at a may affect level. Rob’s experience is that the number is probably 2-5 percent. Others may have experienced higher levels of permits with ESA concerns.
- Jenny noted that only two actions have resulted in a jeopardy call. (Note: Reference posted in Google Docs/references as: section-7-pnas.pdf.)
- There may be upcoming changes in ephemeral waters and JDs per EPA’s 2019 proposed regulatory change to the definition of WOTUS. Kelly reported that ADEQ typically suggests that TWGs consider only current EPA regulations.

## Future Programs

### Screening Analysis/Option 1 (from guidelines)

- Businesses will hire a biologist to determine whether a species is actually present. Smaller permit seekers will need to contact ADEQ to do so.
- Laura suggested beginning with: ADEQ determines “potential to affect.”
- Carrie noted that “presence” is considered a trigger.
- Currently, as the action agency, the Corps is responsible for all ESA effect determinations. The process the TWG is outlining seems to put a great deal of responsibility on the applicant. Carrie will clarify that responsibility would be with ADEQ, but applicants may choose to provide data to speed up the process.

### Option 2

- The group discussed “insignificant and discountable” effects.
- Laura said that the NJ flow chart differs from how Option 2 reads. However, the flow chart was updated to provide an Arizona option (modeled after NJ, but not exactly the same).
- Terry said that the language at the bottom of this chart should be changed to “potential for jeopardy/adverse mod” because this flow chart is adopted from language in 1970s regulations.
- Jenny said that benefits/challenges needs to include background information about NJ, in that there were significant programs and structures in place prior to NJ assumption.
- Terry noted that not everyone on the TWG believes Section 7 is the ideal process.
- Laura would prefer more review from FWS rather than less.
- Option 2 should be used as a template for the MOA option. Unique NJ steps should be updated to reflect the AZ option, or it should be noted how these recommendations may be unique.
- The flow chart needs a box: “if incidental take is identified.” Also, applicants can seek optional incidental take permit.

### Option 3/Off-Ramp

- Terry would like to see a quick method to allow applicants to move to the Section 7 process.

- Expediting the process can be addressed through MOA.
- Terry said that when EPA makes discretionary decisions, this is a Federal nexus. However, not all agreed with this interpretation.
- Off-ramp could be called: expedited review. An MOU could outline a process where the applicant and appropriate agencies meet to determine whether the applicant should follow the Section 7 pathway.
- There was a suggestion to replace “Section 7” with “Corps Expedited Permit” pathway.
- Option 2 covers a ‘no jeopardy/adverse effect’.
- There was discussion about the applicant requesting the application be sent to the Corps versus ADEQ as the decisionmaker determining whether an application should be sent to the Corps.
- Jenny: as the permit holder for a state-wide HCP, ADEQ would have to track the incidental take, acreage in an annual report as part of ADEQ’s Section 10 permit covering IT for the applicant.
- There was disagreement on whether adverse modification or jeopardy was allowed in the Section 10 permit.
- Action item: Terry and Carrie to update Option 3. (Done.)

#### Due Dates/Next Meeting

- Review intro and current state by COB Dec. 13. Changes should be “suggested” in the Google Document.
- Carrie will add revised flow charts as separate documents on the Google Drive.
- Project-specific HCP is ready for review.
- Next meeting: Jan. 8, 1-3 p.m.
  - Continue with future program flow charts

#### **Action Items:**

- (12/4) Carrie to request white paper extension. (Meeting scheduled for Dec. 14.)
- (12/11) Jill to include additional information on 2% in the white paper.