



TWG: ESA

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

Attendees (Conference call participants):

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

Staff Support:

- Heidi Welborn, ADEQ Kelly Cairo, GCI

Discussion Items:

- Recap of Oct. 2 meeting
 - Nichole explained that she presented ESA accomplishments and next steps.
 - An Executive Committee and Tribal TWG will be formed. There was a suggestion at the Oct. 2 meeting that the executive TWG include a member of each of the TWGs. Chair meetings will occur more frequently. Additionally, concern about the deadline was discussed.
 - Other states: MI requested that we organize questions to submit. FL has one point of contact.
- Sallie reviewed the current USACE 404 (Corps) permit process
 - The process is initiated by an application to dredge and fill material in a waterway. Nationwide permits may have regional conditions, such as wetlands, that require additional review. ADEQ adds its 401 certifications into the 404 permit. If a proposed discharge does not meet nationwide requirements, it must go to individual permit process with additional guidelines including a public process, alternatives analysis, and other requirements.
 - Both types of permits must comply with section 7 of the ESA, which considers whether there are any T&E species or endangered habitats present. This step occurs after public notice and helps to ensure that a complete application is received.
 - How many individual permits are “may affect”? Guessing 5-10 percent [*afterward, Carrie calculated <2% of permits had ESA concerns]. There were 28 Informal consultations during a ten-year span and 20 formals (may affect, likely to adversely affect). Jim noted that “may affect” is episodic, based on projects submitted, and when and where species are listed.

- Is there an exemption for less than a half-acre? Sallie said no, an exemption is a term that means no permit is required. Certain maintenance activities would be included. However, permit requests for areas under one-tenth of an acre, that meet various conditions, do not require *notification*. This depends on the nationwide permit. Terms for notification and non-notification are included in the permit language.
- How does the permittee know they must make the notification? This is included in the terms, and is part of the permittee's due diligence.
- General condition 18 will be of issue to the TWG.
- Nationwide permits are likely smaller. However, all of the steps in the section 7 process are followed.
- Do states have a "state-level" nationwide permit? MI has created their own set of essentially nationwide permits. AZ differs because we do not have Wetlands legislation.
- Does the Corps provide assistance to individuals or "small groups" who seek permits? Sallie explained that there is no threshold regarding the size of the permittee. It is the responsibility of the Corps to make jurisdictional determinations. However, larger companies often can provide this information, which in turn makes the process move faster.
- Anyone has access to tools such as IPAC.
- An individual permit has several requirements to be considered a complete application before it goes to a public process. For example, need to have a delineation.
- Heather recommended that due to the overlap of the various technical work groups, the ESA TWG should consider the biggest contribution/challenge regarding endangered species. Suggestions included:
 - Determine what is the nexus in triggering a federal program.
 - Who would ADEQ rely on (similar to the Corps) as the reviewing agency? Maybe it is FWS.
 - Heidi noted that ADEQ will need to determine what level they will authorize and what level will require additional review.
- Those that can't get to below the "take" level would be subject to section 10.
- There was interest in speeding up the denial process so that it could go to COE more quickly.
- In a take situation, the permit could be elevated to Corps to make the determination.
- There was discussion regarding a state issuance of a permit, and whether the state would in fact liable for a take, and would the state be subject to litigation. This would depend on the terms and conditions that were given by the State when issuing the permit. Liability could be on the applicant.
- Regarding scope, Rob explained that Section 7 is about a federal action, to ensure that a federal agency uses its discretion to benefit the species.
- Regarding the scope of the analysis, the Corps authorizes the fill material to be present in the water. They also look beyond this issue to the direct, indirect, interrelated, and interdependent effects of doing so, but each is considered on case-by-case basis.
- Corps has ultimate responsibility to make the determination. In practice, the Corps does not believe it is wise to ignore a biological opinion or disagree with a FWS determination.



- There are no statutory timeframes on delineation, or in assisting the applicant in submitting a complete permit. Once a complete permit is submitted and the permit process has begun, there are timeframes.
- Is the Corps prepared to assist ADEQ once a transition occurs? This would be established by MOA.
- Progress
 - Carrie asked if we are making progress toward the goal. Options include meeting more often or divvying up into smaller groups. Heather recommended using subgroups. May need to define tasks. Address several possible future states.
- Carrie provided ESA statute booklets
- Terry presented, Endangered Species Act Compliance/Current State. The presentation is posted in Google Docs. Highlights included:
 - Section 9 Prohibited Acts
 - “Threatened” is determined by FWS
 - Section 7 Interagency Cooperation
 - Rob noted that the federal gov’t holds itself to a higher standard than it does the public
 - Jeopardy refers to the species as a whole
 - Nichole said that once FWS receives an official notice, there is a timeframe.
 - Of 90,000 permits, only two fell into the jeopardy and/or adverse modification category and therefore had to select from the options list
 - Section 10 Exceptions
 - ESA compliance for actions with no federal nexus
 - Incidental take permit
 - Enhancement of survival permit
 - Time-consuming, NEPA
 - Required to have a NEPA process, but not required to have an EIS

Decisions:

- Group agreed that it would be helpful to create a bullet list of overarching goals that everyone agrees with. Additional detailed information regarding options can then be explored.

Potential Future Discussion:

- (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) 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) 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:

- (9/18) Kelly to email all docs to all members. *(Completed.) (Note: TWG members without access should contact Kelly for a link – which has been used successfully by others unable to access Google Docs.)*
- (10/3) Sallie will provide permits. Kelly will post these on the Google drive. *(Completed.)*
- (10/3) TWG members to suggest a list of tasks and options for future states by 10/10.
- (10/3) All TWG members should review the Oregon model *(Note: this assignment occurred shortly after the meeting adjourned.)*

Next Meeting Agenda

- Next meeting: Tues., Oct. 16, 1-3 p.m. at BLM
- Kris will report on TX HCPs.
- Create sub groups to address tasks and sections of the white paper.