ADEQ Arizona Department of Environmental Quality

MEETING SUMMARY

CWA 404 Program Assumption: Executive Work Group

Meeting: #5 **Date:** April 11, 2019 **Time:** 10:30 am – 12:15 pm

Attendees:

☒Arizona Chapter of Association General Contractors, Amanda McGennis
☒Arizona Department of Environmental Quality, Trevor Baggiore, Chair
☐Arizona Department of Transportation, Dallas Hammit
☐Arizona Game and Fish Department, Jim DeVos
☒Arizona Mining Association, Steve Trussell
☒Arizona State Historic Preservation Office, Christopher Cody
☒Arizona State Land Department, Mark Edelman for Lisa Atkins
☒City of Phoenix, Nancy Allen for Karen Peters
☒Environmental Protection Agency, Region IX, Tomas Torres
☒Home Builders Association of Central Arizona, Scott Thomas for Spencer Kamps
☒Flood Control District of Maricopa County, Mike Fulton
☒Pima County Flood Control, Suzanne Shields
☐Tucson Audubon Society, Jonathan Lutz
☐US Army Corps of Engineers, David Castanon
☒US Fish & Wildlife Services, Jeff Humphrey
☒City of Tucson, Albert Elias
☒Sierra Club, Sandy Bahr

Members' Support Staff

☐Arizona Game & Fish, Shawn Lowery
☐Arizona Game & Fish, Keith Knudson
☐Arizona Attorney General's Office, Adam Schwartz
☐Environmental Protection Agency, Region IX, Elizabeth Goldman
☐Environmental Protection Agency, Region IX, Rob Leidy
☐Environmental Protection Agency, Region IX, Melissa Scianni
☐Environmental Protection Agency, Region IX, Kathy Hurld
☒Environmental Protection Agency, Region IX, Joe Morgan
☒Environmental Protection Agency, Region IX, Sam Ziegler
☐Troutman Sanders, Angela Levine
☒US Army Corps of Engineers, Sallie Diebolt
☐US Fish & Wildlife Services, Beth Forbus

ADEQ Staff

☐Misael Cabrera
☒Heidi Welborn
☒David Lelsz
☒Jill Hankins
☒Mark Joyner
☐Leigh Padgett

Consultant Support

☒Brian Lindenlaub, WestLand Resources
☒Amanda Best, WestLand Resources
☐Jim Tress, WestLand Resources
☒Tom Klimas, WestLand Resources
☒Theresa Gunn, GCI
☒Kelly Cairo, GCI

Technical Work Group Chairs and Members

☒ Tricia Balluff, Chair, Permit Process TWG
☒ Carrie Marr, Chair, ESA TWG
☒ Betsi Phoebus, Permit Process TWG
☒ Karla Reeve-Wise, Permit Process TWG
☒ Duane Yantorno, Permit Process TWG

Review Agenda

Trevor Baggiore, Chair, reviewed the agenda and facilitated introductions. He thanked the group for their continued commitment to the Executive Work Group.

- WOTUS comments are due to EPA on Monday, April 15.
- ADEQ will share their comment letter after it is submitted to EPA.
- ADEQ will conduct a webinar on April 19 to review the ADEQ comment letter.

Follow-Up Questions Related to Assumption

There is a possibility that post assumption, in absence of a federal nexus, some projects might require a facility to apply under ESA Section 10 in order to obtain incidental take protection. While this is a small percentage of anticipated projects, what are your thoughts regarding the Section 10 process?

Trevor explained that ADEQ will meet on April 15 at a national level to discuss Section 10. He asked for input and experiences with the Section 10 process.

- City of Phoenix has some experience through restoration projects.
    - Phoenix has safe harbor agreements (an agreement between the land owner and Fish & Wildlife Service) that allows certain activities, covers species, and allows incidental take.
    - It takes years to get this type of permit. Section 7 is more streamlined.
- The Pima County process was very time consuming, since all species are covered for 30 years. May want to focus on areas likely to be developed.
    - The study process is time consuming, i.e. certain plants may only produce fruit in response to a rainfall. Can take a long time to determine which species are present.
    - The study piece of the process is the same for Section 7 or 10.
    - The Habitat Conservation Plan was awarded for robust and long-term monitoring. Monitoring makes it a stronger process, and more resistant to litigation.
- Section 10 requires NEPA compliance.
    - FWS is not prepared to be the lead agency and conduct an Environmental Assessment or provide an Environmental Impact Statement. This process is currently handled by the applicant.

Theresa Gunn facilitated questions. Highlights of discussion are included below.

Is there additional risk/burden to the applicant with Section 10?

- The more conservation built in, the less take potential. The more up-front work, the less that would be required toward the end.
- In order to get a no-effect, requirements from FWS might include no work occurring during the breeding session.

If an applicant needs to follow the Section 10 process, does it take away the value of state assumption?

- Very concerned about what happens relative to endangered species. However, the concern is not greater with Section 10 versus Section 7.
- Section 10 is a strong negative, compared to Section 7.

- Need to consider, especially with other states possibly pursuing assumption, whether USFWS would be able to act in the Section 10 role given the considerable burden of the Section 10 process.
- There is a time value. Faster and better ADEQ permits are a savings. The Section 10 process removes the timesaving portion of this equation. There is also a significant impact on licensing time frames.

Permit Process

Trevor acknowledged the scope work assigned to the Permit Process TWG and his appreciation for Tricia Balluff's leadership, chair of Permit Process TWG.

Tom Klimas, Westland Resources Inc., presented an overview of the Permit Process Technical Work Group White Paper. Highlights of the presentation follow, including and input from the TWG chair, Tricia, and other Permit Process TWG members.

- TWG white paper covered seven topics: permit transition, permit types, licensing time frames, forms and online tools, public process, federal nexus projects, and EPA's role.
- Challenges identified in the ideal future state included:
    - Administrative completeness definition
    - Licensing timeframes based on Arizona statute
    - Public notice process (when and how many?)
    - ADEQ process when there is a federal nexus and NEPA
    - Section 10 waters and tribal lands
- The state has the most flexibility in permit types.
- TWG public process included discussion about administrative completeness versus substantive completeness. The recommendation was for one notice, recognizing a different tier of review.
    - Public notice is for individual projects.
    - A public interest review is broader, and looks at issues besides the project.
- The TWG recommended that permits in process at the time of assumption would have to go to the state for completion. Prior agreements would be maintained.
- Handoff of ongoing and existing mitigation was a concern of the TWG.
- Reissuing or modifying a permit previously issued by the COE would become the responsibility of the state.

Theresa asked the group for input regarding one and two public notices. Highlights of comments included:

- The application stage must allow for public comment.
    - The Significant Degradation group felt bound by the rules of the notice at the application stage.
    - 40 CFR 233.32 states the director must give notice of an application.
- What process would the public like to see?
    - Want to know about a potential project immediately. Would want the opportunity to comment on something when it makes sense. Think that NEPA should apply, with a scoping process and draft permit. Would be helpful to have comments early on for issues prior to drafting the permit, and also at the draft permit stage.

    - Currently the Army Corps of Engineers sends out information about the project for review, not the permit draft itself. This allows the regulator to include public concerns in the permit requirements
    - Agree with commenting when there is substance to be reviewed. Seems the questions is whether the next step should include notice only, or notice and comment.
    - Once there is a draft permit, decisions have been made.
    - Would like to see alternatives analysis included for public comment.
- Can't control timeframes administered by others the more agencies/entities that are involved. This can be negotiated, but not necessarily controlled.

Is lack of public interest law applicable to the state a gap that must be filled for state assumption? Are there other programs that fill that group? Highlights of EWG comments included:

- Public interest review currently occurs on the more complex projects and can include a traffic issue, or noise. Only one case came to potential denial.
- Public interest review must occur on all COE projects. Issues come up through public comments.
- Some of these other issues, such as flood control factors, are addressed by other programs.
    - If you are amending a federal flood insurance map you have to show that you are meeting Section 404.
- Aesthetic concerns are addressed in significant degradation.
- There are not COE standards for truck traffic or noise; however, the COE most often refers to county ordinances.
- At this point in time, there are enough state requirements. Should consider meeting active management criteria for protection, ADOT standards for traffic.
- Like so many permits, a 404 is subject to other permits. Typical language might include, "you must comply with local floodplain ordinances."
- The TWG majority opinion was a partial replacement of public interest review. This included public interest review not covered by 404(b)(1) and areas relevant to Arizona, and would apply to waters more likely to have public interest considerations.
- If ADEQ incorporated a public interest review it would need to be flexible, and limited to areas relevant to Arizona and the effects of dredge and fill (not the overall project).
- EPA can't object to a permit based on public interest review currently, and don't think EPA can object to state permit program based on lack of public interest review
- In issuing a permit for affecting public health, safety and welfare, a state agency has the ability to act.
- Would ADEQ have the ability to address issues such as traffic or noise? This is not included as part of 404(b)(1) regulations.
- Regarding a potential statute change, a member said that the authority to adopt a program with some type of public interest may be consistent with AZ statute since section 404 is currently administered using public interest review.
- COE has promulgated public interest regulations to not only other Corps-issued permits, but also 404 permits.
- Need clear administrative procedures.
- Public interest question is not required in assumption regulations.

What would EWG want to see regarding types of permits? Highlights of EWG comments included:

- Carry through permits in process – have to carry through existing permits for a while due to practicality.
- What happens if the state creates its own permits? Consider NEPA-level protection. Is there an environmental process that would match NEPA in creating these permits?

Highlights of discussion regarding the white paper:

- NEPA was a significant discussion in the TWG. EWG member stated that ADEQ's director has gone on record stating there would be a process similar to NEPA.[1] The state should ask for a similar program.
- Joe Morgan, EPA, noted the approach outlined in option one regarding general permit impacts options may not be consistent with prohibition in 404(e). Joe said that the hybrid that includes this option may not necessarily be prohibited.
- If ADEQ assumes the nationwide permits, ADEQ will need to be able to consult for ESA related permit conditions with federal agencies. This issue would need to be addressed soon after assumption.
- If a general permit includes requirements outside of ADEQ's jurisdiction, these issues would need to be addressed.
- What will happen to current general permit conditions that ADEQ does not have the ability to address, such as to the general condition related to wild and scenic rivers, which currently requires consultation with appropriate the federal land manager?

Other Issues

Trevor asked members to complete the meeting evaluation, which was available online and included in the meeting packet.

Theresa said that the EWG would receive the Cultural and Historic TWG and Fees TWG white papers, as well as additional information.

A member asked for an update on the Tribal TWG. This group has met twice. The group has indicated that a charter and chair are not warranted. Discussion has included how tribes want to interface with ADEQ in the assumption process, outside of assumption, and how to utilize the TWG. Individual consultations with tribes have gone well.

Next Meeting

Thursday, April 25, 2019, ADEQ, 1110 W Washington, Phoenix

- Topics:
  - Discuss Cultural and Historical Resources
  - Discuss Economic Considerations and Fees
  - Discuss Tribal Consultation

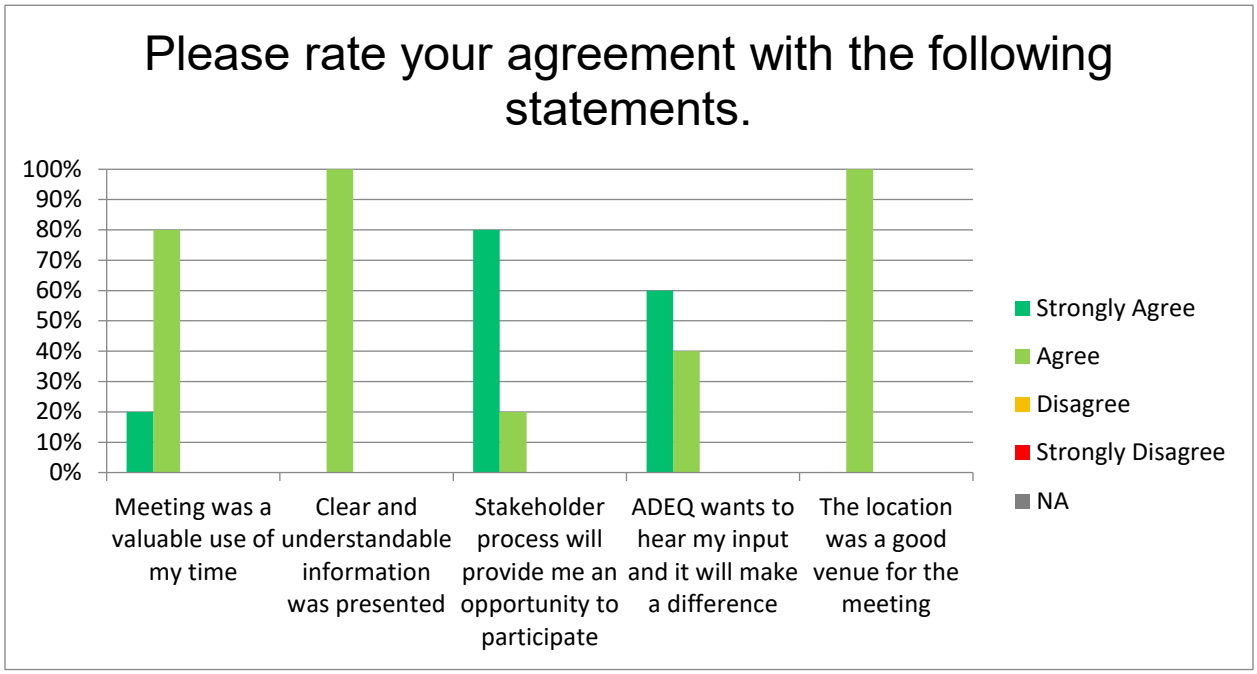
[1] ADEQ notes that the Director's statements indicated that ADEQ would adopt the substance of the CWA 404 program.

Evaluation Results

Five members returned meeting evaluation surveys. The evaluation was available online through April 15. Some stakeholders did not answer all questions.

Attendees were asked to rate their agreement (Strongly Agree, Agree, Disagree, Strongly Disagree, Not Apply) with the following statements:

- Meeting was a valuable use of my time
- Clear and understandable information was presented
- Stakeholder process will provide me an opportunity to participate
- ADEQ wants to hear my input and it will make a difference
- The location was a good venue for the meeting



What was the best thing about today?

- Information and dialogue.
- Tricia Balluff -- she helps with clarity. Did a great job.

What should be changed for future meetings?

- Even when prepared, the amount of material covered in our meetings is huge. More time to provide a "primer" on current state and the PURPOSE of its parts would be beneficial.
- Presentation today was mediocre compared to previous presenters. Not concise; hard to hear. Seemed unsure of some information.

Other:

- Clear and understandable information was presented: somewhat