

CWA 404 Program Assumption: Executive Work Group

Meeting: #6

Date: April 25, 2019

Time: 10:30 am – 12:15 pm

Attendees:

- Arizona Chapter of Association General Contractors, Amanda McGennis
- Arizona Department of Environmental Quality, Trevor Baggione, Chair
- Arizona Department of Transportation, Dallas Hammit
- Arizona Game and Fish Department, Keith Knudson for 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, Tricia Balluff for Karen Peters
- Environmental Protection Agency, Region IX, Tomas Torres
- Home Builders Association of Central Arizona, 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, Carrie Marr for Jeff Humphrey
- City of Tucson, Albert Elias
- Sierra Club, Sandy Bahr

Members' Support Staff

- Arizona State Historic Preservation Office, Mary-Ellen Walsh
- Arizona Chapter of Association General Contractors, Julia Fontana
- 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
- US Army Corps of Engineers, Sallie Diebolt

ADEQ Staff

- | | |
|---|--|
| <input type="checkbox"/> Misael Cabrera | <input checked="" type="checkbox"/> Jill Hankins |
| <input checked="" type="checkbox"/> Heidi Welborn | <input checked="" type="checkbox"/> Mark Joyner |
| <input checked="" type="checkbox"/> David Lelsz | <input type="checkbox"/> Leigh Padgett |

Consultant Support

- | | |
|--|---|
| <input checked="" type="checkbox"/> Brian Lindenlaub, WestLand Resources | |
| <input checked="" type="checkbox"/> Amanda Best, WestLand Resources | <input checked="" type="checkbox"/> Theresa Gunn, GCI |
| <input type="checkbox"/> Jim Tress, WestLand Resources | <input checked="" type="checkbox"/> Kelly Cairo, GCI |
| <input type="checkbox"/> Tom Klimas, WestLand Resources | |

Technical Work Group Chairs, Members, and Others

- Laura Berglan, Chair, Cultural and Historic Resources TWG
- Jerry D. Worsham II, Chair, Fees TWG
- Betsi Phoebus, Permit Process TWG

- ☒ Alana Hake, for Lee Decker, Cultural and Historic Resources TWG
- ☒ Duane Yantorno, Fees TWG
- ☒ Marina Estrella, Permit Process TWG
- ☒ Marcia Sorenson, Fees TWG
- ☒ Danny Court, Elliott D. Pollack & Co.
- ☒ Rick Merritt, Elliott D. Pollack & Co.

Review Agenda

Trevor Baggioire, Chair, reviewed the agenda and facilitated introductions. He thanked the group for their continued support. He explained that since there was only one additional scheduled meeting of the Executive Work Group there would not be a meeting evaluation.

Cultural and Historic Resources

Amanda Best, WestLand Resources Inc., provided an overview of TWG White Paper. Highlights of the presentation follow, including input from the TWG chair, Laura Berglan and other Cultural and Historic Resources TWG members.

- The TWG identified two main protection measures that differ between the federal program a potential state-assumed program.
 - Section 106: mitigation of adverse effects
 - Tribal consultation on a permit-by-permit basis
- Three assumption options include:
 - Option one: state to enact regulations; include language for EPA involvement in MOA between EPA and Arizona; ADEQ to enter in MOUs/IGAs with interested tribes to outline protocols for communication and resolution of disputes regarding identification, evaluation, and finding of effect, and resolving adverse effects
 - Option two: (determined not likely to occur) State Legislature would need to codify all current federal environmental laws into state law
 - Option three: existing state laws ensure protection of cultural resources.
- Trevor noted that public interest review is not part of the CWA, but is a requirement for the US Army Corps of Engineers.
- Laura said that the majority of the TWG did not favor ADEQ assumption due to concerns about protection. While the group would like to see the same protections at the state level (option 2), they did believe this would be likely to occur. Therefore, the majority of the TWG chose option one.

Trevor asked the Cultural and Historic Resources TWG to explain the value of the federal program.

Highlights of responses included:

- Tribal relationship is currently on a government-to-government level.
- There is an established trust relationship.
- There are a series of Supreme Court decisions that detail the “special relationship” with tribes and the U.S. federal government. This is beyond the state/U.S. government relationship.
- The Section 106 process includes tribes in all steps. The ADEQ process does not provide same level of protection, and does not offer remedies.
- MOAs and IGAs are a piecemeal solution and do not include remedies.
- Arizona consultation law is vague. SHPO doesn’t currently have an established, good relationship with ADEQ.
- An example of a trust relationship occurred with the South Mountain Freeway project and the Gila River Indian Reservation regarding drainage concerns. The COE was able to help facilitate

review of drainage information, and included special conditions in permit that gave GRIC leeway to review and provide input on approved plans. The COE district commander sat down face-to-face with the tribal leader.

- FHWA automatically becomes involved if a request for consultation is made – this may be a way to trigger government-to-government interface.
- The TWG minority opinion recommending option three set forth the belief that existing state laws ensure protection of cultural resources.

The group discussed the gaps of the potential options. Highlights included:

- The state act does not get to determination of effect and the Section 106 requirement for consultation is lost.
- Consultation at the state level is missing some important considerations such as resolution of adverse effects, and legal remedies.
- Modifying the state act to reflect the federal act shouldn't be too difficult, it seems a matter of housekeeping. This would be a legislative action, not a regulatory action.
- Currently, tribes are not limited by the potential for cultural or historical resources concerns. Sometimes tribes not comfortable sharing reasons or information about tribal cultural properties with a state, whereas that trust has been established with the COE.
- Under current state law, several classes of information are protected. However, there is not a codified state law that would protect tribal information to the extent of that by the federal government. Model language does exist. There is a provision under NHPA to allow the lead federal agency to withhold information.
- There are so many pieces to existing federal protections that tribes would not be comfortable unless all of the federal laws could be incorporated.
- The EWG recommended/noted the following:
 - Look at a gap analysis
 - Need a legal analysis
 - Gap and resolution issue is significant – if there is no way to address those impacts, need to have an option to resolve the impacts.
 - Consultation—can close gap with legislation and rulemaking
 - Tribal trust—no way for state to achieve current level of trust at the current federal level
 - Some options add additional steps that would cause concerns about time frames.
 - Important to understand the sensitivity of these matters.
 - Need more legal analysis of gaps between federal and state existing laws. This resolution is one item that will need to be addressed.
- The State Historic Preservation Act would need to be revised to include the state's responsibility for consultation for the protection of historic properties.
 - Actual permit decisions could still be denied by COE as part of the trust responsibility.
 - Tribes are not interested in only cultural resources.
 - An example includes the COE determination that an EIS would be required as part of the trust responsibility regarding a dam that would affect a sacred mountain.
- Area of potential affect and no action on private land are also concerns. The COE uses "permit area" which may differ from the NHP's "area of potential effect." However, the state cannot implement a more stringent law, and this is a gap.
- A Cultural and Historic TWG member noted that the work group did not consider statutory changes to be a reasonable expectation. Additionally, the TWG member had concerns about the

public interest review and the commitment of ADEQ director to protections beyond the requirements.

- Statutory changes are outside ADEQ's control; however, it is important to identify gaps outside of a state program. Need to make a policy decision based on what ADEQ and state would like to do.
- EPA has federal trust responsibility.
- There is not a requirement to make a binding MOA, and the disclosure aspect will need to be addressed.

Tribal Consultation

David Lelsz provided an overview of tribal consultation. Highlights include:

- There are 22 federally recognized tribes. ADEQ has met with six.
 - ADEQ's director reached out to each tribe. There have also been letters, phone calls, and contacts via others in each tribe in an attempt to consult with tribes.
- Communication with respect to unique nations at a director-to-director level are important considerations.
- Not all tribes want to communicate about this program. State departments don't understand the scope of tribal responsibilities and how each runs a sovereign nation.
- Need to make tribal consultation a cyclical affair. Should continue outreach and take advantage of ongoing opportunities at project milestones.
- Communication should occur early and often, with respect of sovereignty.
- An EWG member recommended continued participation in ITCA.

Fees

Trevor reviewed Fees TWG recommendations and considerations. Highlights of his presentation follow, including input from the TWG chair, Jerry Worsham, and other Fees TWG members.

- ADEQ is a fee-based agency and receives no/very little from the general fund. ADOT collects the air quality fee. This structure is the intent of a state 404 permit program as well.
- Currently, approximately \$2M would be required for a state program. However, Arizona Game & Fish and SHPO may require additional funds.
- ADEQ heard that there is a need to conduct a deeper economic analysis. Therefore, ADEQ is working with an economist to understand the risk to Arizona's economy.
- The COE would retain certain permits (Section 10) and authority would not include tribal waters. Only permits that remain outside of the COE and tribal jurisdictions were included in fee consideration.
- There is a value to a jurisdictional permit. The Fees TWG did not know whether ADEQ would be willing to do JDs.
- The dissenting view was the preference for using general funds or other funding.
- Hiring staff would be critical.
- Historically, significant legal costs have been associated with this program.
- The city of Phoenix wrote a dissenting opinion concerning the wide range of potential permittees – from large corporations to very small businesses and individuals. There is risk of noncompliance by those who cannot afford a permit. Use of general funds also would be of benefit during years with economic downturns, and in helping those who can't afford a permit.
 - Home builders and road builders are subject to economic fluctuations, and constitute a large number of permit seekers.
 - In looking at other states, there may be a benefit in the early program stages to use general revenue to get the program started on sound footing.

- ADOT and Pima County have paid employees at the COE.
- There are nuances of the program that the TWG didn't understand at the outset.
- Some permits take years to complete. These were considered outliers, but ADEQ will have to accommodate these permits as well.
 - If this program utilizes fee caps, as other similar programs do, the outliers will reach that cap and these long-term permits would not collect revenue.
- If \$1M is paid for a permit, there is no longer an economic benefit for the customer.
- Complex elements of consultations will affect timeframes.
- Existing statute neither authorizes nor precludes a cap on fees in the rules.
- If stakeholders identify that ADEQ will not bring value to the process, ADEQ will not pursue the program.

Highlights of EWG discussion included:

- An EWG member expressed support for use of general funds for a year or two to begin the process and stabilize a fee process.
- Timeframes will be critical – this is a big unknown on big projects.
- If the program is fee-based, everybody should pay. Regulatory approvals and meeting legal standards are part of doing business.
 - Other ADEQ programs have a permit fee and an annual fee. A 404 permit probably wouldn't have an annual fee associated with it. (The exception would be 404 mitigation.)
 - If "everybody pays," and ADOT and Pima County continue to pay for a staff position, this would total more payment than that indicated on fee schedule. Don't know if federal funds (used to pay for staffing through the current process) would allow for funding at a state level.
 - If ADOT was not part of program, could they opt out and go to the COE?
 - The benefit of a dedicated, funded staff person is the ability to move to the front of the line.
 - If an ADOT staff person was not charged to overall program, this would be acceptable.
- The economic impact of the transition is a concern. If ADOT was put in a position to pay claims to the contractor due to delays, this could be an issue.
- Statutes in a rulemaking process require an economic analysis. Fees would be part of the rulemaking.
 - The proposed WOTUS definition would significantly change the number of permits.
 - This analysis is not part of the scope, since so much is unknown.
 - There was a recommendation to run a few future permit scenarios.
- Regional General Permit fee estimates are created by the district. The state would have to do so each five years. There is an incentive issue to be aware of – the result could be an incentive to devote the bulk ADEQ's work to those who are paying.
- An ADEQ-adopted program today would be the full program. We have talked about offramps, but those are not viable yet.
- There was a recommendation to run the program for two to three years using general funds in order for the state to understand the program and what is needed. There could be an initial fee rule subject to modification after further research.
- A lot of Nationwide Permits are non-notification. Will these become notifications so a fee can be collected?

Other Issues

Trevor noted his sincere appreciation of the chairs, who conducted this work in addition to their daily workloads. He also noted his appreciation for the work of all of the TWG members, and the Executive Work Group members.

Other:

- Will there be a summative piece on the EWG with remaining issues that need to be addressed?
 - Yes, a roadmap will be developed. The roadmap is path forward and recommendations. It analyzes whether the process adds value for stakeholders. It is high-level and does not propose rules. There is also a public process associated with the roadmap.
- EWG members were asked to provide input on additional issues not yet addressed by May 2 in order to add these items to the next agenda.

Next Meeting

Thursday, May 9, 2019, ADEQ, 1110 W Washington, Phoenix

- Discuss Roadmap and Remaining Issues
- Evaluate whether additional meetings are required