

TWG: JURISDICTION DETERMINATION

Meeting: #6

Date: November 7, 2018

Time: 1:00-3:00 p.m.

Attendees:

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| <input type="checkbox"/> Michael Bryce, Graham County, AZ | <input checked="" type="checkbox"/> Sheila Logan, Hilgart Wilson |
| <input checked="" type="checkbox"/> Mike Cabrera, Pima County Flood Control | <input type="checkbox"/> Robert Lynch, Robert S. Lynch & Associates |
| <input type="checkbox"/> Linda Cheney, El Dorado Holdings, Inc. | <input checked="" type="checkbox"/> Roger McManus |
| <input checked="" type="checkbox"/> Tricia Gerrodette | <input type="checkbox"/> Jack Moody, Slater Hanifan Group |
| <input type="checkbox"/> Ned Hall, Freeport-McMoRan Inc. | <input checked="" type="checkbox"/> Mark Murphy, NV5, Inc. |
| <input type="checkbox"/> Adam Hawkins, Global External Relations | <input checked="" type="checkbox"/> Leigh Padgitt, City of Phoenix |
| <input type="checkbox"/> Jill Himes, Himes Consulting, LLC | <input checked="" type="checkbox"/> Marinela Papa-Konomi, MCDOT |
| <input type="checkbox"/> Spencer Kamps, Home Builders Association of Central Arizona | <input checked="" type="checkbox"/> Betsi Phoebus, Jacobs |
| <input type="checkbox"/> Theresa Knoblock, Tierra Right of Way Services | <input type="checkbox"/> Jessica Rybczynski, Aztec |
| <input checked="" type="checkbox"/> Dennis Krahn, Eldorado Holdings | <input checked="" type="checkbox"/> Jennifer Simpkins, Kimley-Horn |
| <input checked="" type="checkbox"/> Brian Lindenlaub, Westland Resources, Inc. | <input checked="" type="checkbox"/> Scott Thomas, Fennemore Craig |

Staff Support:

- | | |
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| <input type="checkbox"/> David Lelsz, ADEQ | <input checked="" type="checkbox"/> Theresa Gunn, GCI |
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Approved Jurisdictional Determination Report

Closure Options

- Corps has identified some TNW segments through public process (stand-alone TNWs, consisting of 2 segments of the Gila and 2 segments of the Santa Cruz); others have been identified as part of individual permit processes that have not been widely publicized
- Recommend ADEQ maintain list of TNWs in the state and make available to the public
 - Reaching out to Corps for a list of all TNWs identified to date by the Corps (including those identified in individual permit processes) is a useful first step
 - If and as ADEQ identifies additional TNWs after assumption, they should be added to the list
- TNWs and non-assumable water are not the same
- Does the TNW go away when the state takes over? Will ADEQ stick with the TNWs that have been identified to date?
- Would be surprised if TNWs go away since they are critical to assessing jurisdiction under the 2009 Rapanos guidance
 - Will state identify additional TNWs and if so, to what extent will it coordinate with the Corps
 - Concerned we have not had briefings or discussions with Michigan and New Jersey as to how they have addressed this
 - Could be potential for conflict if the Corps is making a nexus call for a permit on tribal land and identifies a downstream TNW off tribal land and, and that TNW determination is not consistent with ADEQ identification of TNWs in the same watershed for purposes of assessing significant nexus with respect to activities on non-tribal land

- Where there is potential for ADEQ and the Corps making different decisions re: a TNW
 - Need to work together (ADEQ/Corps) on a watershed approach
 - MOA needs an approach for handling situations where Corps and ADEQ differ
 - Can ADEQ go back and revisit decisions re: Santa Cruz River?
 - Statute states ADEQ should have an agreement with Corps on a joint process
- Add to the closure bullet: Identify TNW authority and relevance to 404 permit program
- Group agreed the state should develop a list of TNWs and it be made publicly available
 - Need follow-up with other primacy states (Michigan, New Jersey) to see how they make TNW decisions and whether they involve the Corps (or EPA) in doing so. (note: TNW status may be clearer with respect to the flowing waters that are more prevalent in these states)
 - San Pedro water comes from Mexico but are augmented through private, state trust and federal lands; not designated as a TNW; would be advantage to maintain this system especially for security of drinking water
 - ADEQ/Corps - Need a watershed approach for waters that are in and out of tribal lands and how TNW applies on a watershed (address in a MOA/MOU) --- not a group consensus
 - Need some way to manage waters in Arizona to ensure we have water for the future
 - ADEQ/Corps needs to coordinate decisions on what are TNWs (MOA/MOU) - needed because Corps is keeping jurisdiction for permits on tribal land and so may be making TNW calls in same watersheds where ADEQ is making a similar call related to activities on private land.
- If you don't want to concede jurisdiction with PJD is there a way to simplify, at least in some cases, the significant nexus analysis in some areas
 - For example, if a project is in an area where lack of nexus has been determined, and the features in question are similar to those previously analyzed, a detailed nexus analysis would not be required
 - Something between PJD and AJD
 - Can there be a screening process to be used to determine whether or not a formal AJD would be required
 - Currently Corps has informal discussions with permittees on what might be considered jurisdictional but does not provide any official documentation
 - There are obvious calls which could be made earlier to streamline the JD process
 - Suggestions
 - Pre-identify areas where no significant nexus exists (e.g., closed basins), obviating need for project-specific analysis
 - Instead of doing every feature; first analysis on main feature and if it is determined to have a significant nexus to a TNW then move on to analyze smaller features; if the larger feature does not have a significant nexus to a TNW, then you could assume smaller features also lack a nexus and wouldn't have to do a detailed analysis of those features.
 - Watersheds flow through different areas (including Tribal lands); if there is no analysis of potential TNWs located on Tribal lands how does the applicant know how to assess existence of significant nexus (i.e., if Corps has not done an assessment of TNWs on tribal land, will ADEQ have to do it, and if they do will that assessment bind the Corps? Likewise,

does a Corps determination of TNWs on tribal lands bind ADEQ with respect to permits issued off tribal land?

- Overlay Tribal lands over the Arizona rivers map to determine how often rivers cross
 - Does underlying land ownership matter to TNW determinations
- Encourage pre-application meetings – Group consensus
 - Perhaps similar to APP an AZPDES; first hour of ADEQ time is free, time charged after that.
 - ADEQ staff may be able to make administrative completeness determination on the spot (if applicant is prepared to make formal submission at the meeting); otherwise, ADEQ may be able to give initial impressions, suggestions, etc.
- Can land owner have the option to not allow posting jurisdictions for their property online?
- Create a short list of key characteristics for a SNA – tied to screening process

PJD vs AJD

Group agrees ADEQ needs both a PJD and AJD option (and this is required in the 404 assumption statute). Ultimate goal is an AJD process that is well understood enough and streamlined enough that applicants see no benefit to a PJD.

- What is EPA's role in JD determinations and can they reject ADEQ's determination (probably yes, based on their ability to object to issuance of a draft permit as being inconsistent with the Guidelines).
- How many JDs elevated in AZ by EPA

Timeframes for AJD/PJD

The group agreed to the following timeframes at this time. These are calendar days.

- Administrative review – 15 days for both
- Substantive review – 30 days for PJD and 60 days for AJD

Proposed Forms

- We need to determine what information we want on the forms
- Distribute PJD and AJD forms for markup
- Needs to start with the process flow chart and the concept of a preliminary screening
 - Start with the major feature(s) and relevant reaches and work on a simplified analysis by running through the screening tool
 - Need to look at cause and effects along the pathways
 - More clarity on what is being evaluated during analysis
 - Screening tool
 - Have high level of what information should be used for screening
- Proposed form for PJD will be included in the paper by Leigh

Significant Nexus Analysis

- Reviewed information provided by Jill/Jack
- Some focus on physical before biological/chemical
- No one will tell you have delineated too much but will tell you not enough

- Need to start focusing on the ideal state concepts
- CWA rule struck down by court because it was arbitrary – need to be able to base on scientific
- What is significant? Rule versus science

Future Discussion Needed: (This is a cumulative list. Items will remain until discussed.)

- (9/12) Does the EPA have the authority to veto Jurisdictional Determinations?
- (9/12) Does the Army Corps have a definition of ephemeral?
- (10/10) Three options for WOTUS
- (10/24) PJD may be able to determine nothing is jurisdiction (no ordinary high-water mark)
- (10/24) Significant Nexus Analysis – need to have separate conversation on the topic
- (10/24) State specific forms and guidance and methods to make the process more objective (AJD and PJD)
- (10/24) Licensing Time Frames recommendations to be discussed (can JD be submitted concurrently with a permit application)
- (10/24) Should there be a fee for AJD/PJD – free or reasonable fee
- (10/24) Is it possible to have a preliminary screening or letter if already a known JD
- (10/24) Which comes first connectivity or OHWA?
- (10/24) Identification of TNWs in Arizona (will Corps be providing the list)
- (10/24) Does the group need a time extension

Action Items:

- Number bullets on handouts for easier reference
- Tricia to send information received from Corps on permits organized by Hawks to Theresa who will add to Google docs and send link to members
- Distribute PJD and AJD forms for markup

Next Meeting

- Next meeting: November 20, 1-3 p.m. at ADEQ, rm. 6100B
- Agenda
 - Wetlands discussion
 - EPA role in JDs; when should they get involved; how to prevent EPA veto of a permit based on a JD
 - Talk about concepts of the ideal state