

## **TWG: PERMIT PROCESS**

**Meeting:** #7      **Date:** Nov. 29, 2018      **Time:** 9 a.m.-12 p.m.

### **Attendees (Conference call participants):**

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|--|--|
| <input type="checkbox"/> Sandy Bahr, Sierra Club - Grand Canyon Chapter                                    | <input checked="" type="checkbox"/> <i>Marinela Papa-Konomi, MCDOT</i>                 |
| <input checked="" type="checkbox"/> Tricia Balluff, City of Phoenix  | <input checked="" type="checkbox"/> <i>Betsi Phoebus, Jacobs</i>                       |
| <input type="checkbox"/> Rion Bowers, Bowers Environmental Consulting                                      | <input type="checkbox"/> Karla Reeve-Wise, PDEQ  |
| <input type="checkbox"/> Mike Cabrera, Pima County Flood Control   | <input type="checkbox"/> Suzanne Shields, Pima County Regional Flood Control District  |
| <input checked="" type="checkbox"/> <i>Tom Klimas, WestLand Resources, Inc.</i>                            | <input checked="" type="checkbox"/> Jennifer Simpkins, Kimley-Horn                     |
| <input type="checkbox"/> Theresa Knoblock, Tierra Right of Way Services                                    | <input type="checkbox"/> James Stewart, ASARCO   |
| <input checked="" type="checkbox"/> <i>Sheila Logan, HILGARTWILSON, LLC</i>                                | <input type="checkbox"/> Laura Stewart, ACS (Archaeological Consulting Services, Ltd.) |
| <input checked="" type="checkbox"/> <i>Amanda McGennis, Arizona Chapter Associated General Contractors</i> | <input checked="" type="checkbox"/> Scott Thomas, Fennemore Craig                      |
| <input type="checkbox"/> David McIntyre, McIntyre Environmental LLC  | <input type="checkbox"/> Marc Wicke, SRP   |
| <input checked="" type="checkbox"/> <i>Susan Montgomery, representing Inter-Tribal Assoc. of Arizona</i>   | <input checked="" type="checkbox"/> Duane Yantorno, ASARCO                             |

### **Staff Support:**

- Andy Koester, ADEQ       Kelly Cairo, GCI

### **Discussion Items:**

#### Administration

- Tricia reported that the general stakeholder meeting will be a webinar held Dec. 6, 1-3 p.m. She asked for suggestions on topics to present and questions that should be asked of the stakeholders.
- The chairs meeting will be held tomorrow.

#### NEPA

Tricia asked the group whether they could agree on the gaps, and to consider how the Corps addresses NEPA in the current state. She reviewed the NEPA comparison table (available on the Google Drive).

Highlights of discussion included:

- NEPA is a federal requirement for federal agencies, but is not required in 404(b)(1).
- A TWG member noted that the 404 program is protective of the environment without NEPA.
  - Our charter requires us to have this discussion. How we address it is up to the group.
- Flood hazards
  - Are there other state and local requirements that would be cover flood hazards as part of the permitting process?
  - It is the permittees' role, but who will have the oversight to make sure the permittee is meeting flood control requirements? Would this be the flood control district? How does the Corps do this now?
  - If the permittee doesn't meet flood plain requirements, would this be a violation of the 404 permit?
  - There was a concern about equal protection, in that the Corps currently asks how the permittee will meet flood plain requirements.

- The charter specifies equal protection of WOTUS.
  - There is still a requirement to comply with other laws. Seems an overreach to cover programs that are others' responsibility.
  - In the case of a Section 7 permit, it is incumbent upon the permittee to follow it, but the Corps does not enforce it. Likewise, the state should not be assumed to enforce non-404 regulations.
  - Individual permit does not include general conditions. Therefore, applicants for individual permits should not have to submit this information to ADEQ.
    - This information is factored into the permit decision-making process though the EA.
  - In the case of regional and nationwide permits, the applicant must comply with the general conditions. This is documented internally for the permittees' protection, should there be an issue.
  - Options considered, no consensus reached to date on preferred option:
    - permittee responsible for compliance with other laws, no 404 interaction
    - permit application to require statements about other resources/laws in the applicable to the project area and how permittee will address/comply
    - permit to include a general statement that it is the permittees' responsibility to comply with local, state and federal regulations
  - These options can be simply stated as:
    - Don't fill the gaps left by the absence of NEPA and public interest review
    - Fill the gaps
    - Don't fill the gaps but point out that the permittee should do so
  - Something enforceable outside of ADEQ should not create a separate 404 violation nor be enforceable by ADEQ.
  - The APP provides a list of other permits that are needed.
  - Action item: Tricia will circulate a reduced table that only includes those topics covered by NEPA and public interest review, but not covered by 404(b)(1) guidelines. Tricia will also circulate an example of a current general conditions table that is used as part of a PCN to show an example of how an applicant can simply identify resources present and how such will be addressed.
- Property: Can't do a JD on someone else's property.
  - The Corps provides a combined decision document that includes 404(b)(1), NEPA, and public interest review, which includes a wide range of regulations and resource considerations.
  - Should consider what MI and NJ include to address public interest.

## White Paper

Tricia noted areas of agreement on the live document. Highlights follow.

### Public process

- The group agreed to break out formal consultation and public interest as subheadings.
- Citizen suit information will be moved to enforcement section.

- Action item: Tricia to ask Sallie Diebolt about the NAS and GAO process.
- Some tribes have water quality standards.
  - Question for ADEQ and the Tribal TWG: When the project has the potential to impact waters on tribal lands, should tribes be treated as states regarding ability to comment and provide input on conditions?
  - Request ADEQ to ask MI:
    - What is the threshold for a discharge impacting tribal waters?
    - How often are comments received?
    - Is it there is a deadline after which the permit can move forward if no comments received?
    - How often EPA has become involved?

#### EPA Role

- The elevation process doesn't exist at the state level. The state can never issue a permit over EPA objection.
- JD information will reference the JD TWG.
- Enforcement section should be comprehensive, with EPA role regarding enforcement defined in this section.
- Action item: Tricia to send flow charts embedded in Google Docs to the group.
- MOA with FWS should include timeframes.
- There was a recommendation to make the enclosure or filling of a certain linear length of water applicable to perennial or intermittent, but not ephemeral.
  - Expect EPA would want review of a major impacts.
  - Agreed to recommend: Review based on size of project and class of the water. Group will not include specific numbers, which should be developed by ADEQ and EPA.
- Recognition of whether a tribe should be considered at the same level as a state will be addressed similar to the public process comment.

#### Assignments

- All subgroups to draft gaps and options sections. Once group agrees, send to Tricia for chair edits prior to Jan. 4, and she will put in white paper on Jan. 4
- Tricia will email assignments.

Next Meeting: Dec. 13, 9 a.m.-12 p.m. at ADEQ

- Agenda: continued NEPA discussion and review of draft sections of the white paper.

#### **Action Items:**

- (10/18) Emily to provide timeframes for ADOT individual permits (numbers and average processing time), noting extensive up-front coordination and ADOT WRDA program liaison. Also, information on the current state of regional general permits. (Completed via discussion.)
- (11/1) Scott to report on Michigan and New Jersey adoption of 404(B)(1).

- (11/1) Betsi to provide Tricia with state constitution language which prevents use of public lands for commercial profit.
- (11/1) Scott to draft NWP table. (Completed, in white paper.)
- (11/15) All to provide Tricia with any questions/input from broader group. (Completed.)
- (11/15) Tricia to send email reminder to TWG regarding questions/input from broader group. (Completed.)
- (11/15) Tricia to discuss options for longer term permits and LOP with Permits Types subgroup. (Completed.)
- (11/15) Tricia to remove ADOT references in forms/links. (Completed.)
- (11/15) Duane to follow up on how Michigan and New Jersey address nationwide permits triggering federal involvement.
- (11/15) Jennifer to report on how Michigan and New Jersey address MOAs with (all/some) federal agencies outside EPA, USACE, and USFWS. (Completed.)
- (11/15) Duane to document suggestion of ADEQ not issuing individual permits, but only issuing general permits in white paper, such as occurs in Utah (this is not considered state assumption).
- (11/15) Tricia to ask Corps:
  - Use of discretion regarding issuance of types of permits – IP and nationwide.
  - Does the Corp have a substantive review checklist?
  - Are there any critical resource waters in Arizona?
  - (Completed.)
- (11/29) Tricia to send an example of general conditions table as part of a PCN as an example of what a middle ground option could look like for general and individual permits.
- (11/29) Tricia to prepare a reduced table that only lists items not included in the 404(b)(1) analysis, but are currently part of NEPA or public interest review, for the review at the next meeting.
- (11/29) Tricia to ask Sallie Diebolt about the NAS and GAO process.
- (11/29) Tricia to send flow charts embedded in Google Docs to the group.

**Potential Future Discussion:**

- (9/5) White paper topics are to include methods for addressing NEPA considerations. Should also maintain the federal trust responsibility to engage tribes regarding activities occurring off tribal lands (which may ultimately affect the tribal land).
- (9/5) How will ADEQ and a federal authority work together? Could investigate how the 401 process works.
- (10/4) Mechanics of permit applications currently include staggered data submission. Will need to figure out how this will work with timeframes. Likely put this in the permit process or forms area.
- (11/15) What are the gaps when NEPA goes away? What should be done to address these gaps?

**Divisive Issues for Additional White Paper Discussion:**

- Activity-specific general permits
- Scope of analysis (when there is not a federal nexus) (Note: The Significant Degradation group will address this issue.)