

TWG: PERMIT PROCESS

Meeting: #9 **Date:** Jan. 10, 2019 **Time:** 9 a.m.-12 p.m.

Attendees (Conference call participants):

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

Staff Support:

- Andy Koester, ADEQ Jill Hankins, ADEQ Mark Joyner, ADEQ Kelly Cairo, GCI

Discussion Items:

Welcome and Administration

- All future Permit Process TWG meetings will be held at ADEQ in room 3100B.
- The group has meetings scheduled through the end of March, but is not obligated to continue through that time if the white paper is completed earlier.
- Tricia said that the question of whether tribes should be treated as neighboring states for the Section 404 program has been provided to ADEQ for the Tribal TWG to address.
- In early December, Michigan DEQ was asked a variety of questions, arising from the permit process TWG's discussion about Section 404 program interactions with neighboring states. Questions and responses follow.
 - How is it determined that an activity could have the potential to affect another state's waters? What is the threshold there? Response: We negotiated the threshold with our EPA regional office. The threshold is basically major discharges that are near the state border.
 - How often, when the potential to affect is determined, are comments from the other state received? Response: Sometimes but not every time.
 - Do the states have to follow the public comment period? Meaning, if another state's comments are not received within the public comment period, is the permit free to move forward without their comments? Response: We try to coordinate with the other state to make sure that we give them a reasonable amount of time to comment, but yes if they don't comment during that time we move forward.
 - How frequently has EPA been involved because MI did not take another state's recommendations? Response: I am not aware of us doing that and I have worked over 20 years.

- The TWG group agreed to add this information to the white paper under current state.
- Sandy previously provided the TWG with a New Jersey executive order and a video link of Director Cabrera addressing the legislative subcommittee.

Finish NEPA/Public Interest Review Discussion

Public Interest Review

Highlights of discussion regarding inclusion of a public interest review included:

- Scott suggested describing all three options in the white paper, and indicating the majority vote.
- The public interested review was adopted in 1968, prior to NEPA, as part of the Rivers and Harbors Act.
- Many TWG members have experienced that the public interest review tends not to play a large role in permitting (i.e., rarely does consideration of a public interest review item result in major changes or delays in project permitting).
 - Often, the public interest review is blurred with the NEPA process.
- Sandy was concerned that it's not necessarily known how important a public interest review is until it is lost. She believes it is very important.
- Option 2 should not state "there is no legal obligation" until a legal opinion is provided.
- EPA's review of Michigan's program stated that public interest review was taking too much precedence over the 404(b)(1) guidelines and ESA considerations.
 - Tricia suggested a hierarchy of requirements, with 404(b)(1) superseding the public interest review.
- Because it's not part of the guidelines or assumption regs, don't think EPA can object to a permit on a public interest basis through the Section 404 objection/veto process. But public interest can be included as a state requirement. Michigan has public interest review in the Wetlands program statute.
- Does ADEQ have a public interest review process for 402? No, they have a public comment period.
 - Would have to be clear that this recommendation is only for the 404 program.
- In order to have equal protection, seems we need at least partial replacement of the public interest review so that it would be similar to the current state.
- May want to call out this discussion in general for consideration by ADEQ.
- From a private permittee point of view, there are a lot of gray areas in the permit process, including public interest review.
- Would like to see language in options 2 and 3 that limits the public interest review as "consistent with current practices."
- The group agreed to modify options 2 and 3 as "topics applicable to Arizona," and "topics not otherwise covered in 404(b)(1)."
- TWG members indicated their preference for each of the potential options for public interest review as follows
 - Option 1: do not replace the Corps' public interest review (1 vote)

- Option 2: replace it with a similar process as USACE (3 votes)
- Option 3: partially replace it with a similar process, but only applicable to certain waters (9 votes)
- The group agreed to provide all options in the white paper.

NEPA

Highlights of discussion regarding inclusion of a public interest review included:

- ADEQ can't provide a NEPA program at this time. This TWG could recommend that ADEQ pursue a recommendation to the legislature to enact a NEPA-like requirement.
- Action item: Tricia to add a statement in the introduction that the recommendations in the white paper are limited to the 404 program only.
- What is the difference between NEPA and public interest review? Some differences include that NEPA is broader and includes cumulative impacts, offers no action alternative and other alternatives for consideration, and public comment is required.
- Based on the video of Director Cabrera, it seems there should be some level of NEPA.
- Sandy said that she reads NEPA documents and learns quite a bit of new information about a project. Thinks that the state must have a comparable program, which seems consistent with the director's statement to the Legislature.
- Scott explained that citizen suit appeals are based on comments received, are part of the Clean Water Act, and apply to an unauthorized discharge. Citizen suit appeals do not specify 404.
 - Action item: Tricia to ensure that citizen suit information is properly represented.
- Sandy said that an appeal to the water appeals board can be difficult both in substance and in process. If NEPA occurs correctly, there is no need to go to court.
- TWG members indicated their preference for recommending a NEPA process as follows:
 - Option 1: Yes (6 votes)
 - Option 2: No (6 votes)
- The group agreed to present both options and explain that TWG members were evenly split.
 - Action item: Scott to develop the "no" discussion.
 - Action item: Tricia to adapt language from Sandy's paper for the "yes" discussion.

Gaps/Options Discussion

- Group discussed the gaps/options sections for Permit Types, Forms and Online Tools, and EPA Role. Changes agreed to by group are noted in the white paper.
- Action item: Duane to send gaps and options information for LTF to Tricia by COB Jan. 14.
- Action item: Marinela to check on whether public process state regulations cover EPA requirements in 40 CFR 233 and provide to Tricia by Jan. 18.
- Federal nexus – Duane explained that once the state receives delegation, there would not be any gaps.
 - There was a recommendation to insert coordination gap language into this section.

- Scott believes that a state public hearing would be more likely under state assumption and this information may be warranted for inclusion in the white paper.

Draft White Paper/Permit Types

Tricia noted areas of agreement on the live document. Additional highlights follow.

- Tricia reminded the group that recommendations included in the white paper that have been discussed and agreed upon during a meeting will not be revisited.
- Action item: Tricia to update/clarify language notations from Scott.
- Karla clarified the first gap/option in the Permit Types section that it was intended to mean the program must go through the appropriate process to update the ARS to accommodate the 404 program. Additionally, ADEQ should review all TWG areas for potential updates to ARS.
- ADEQ can't adopt a rule unless there is statutory authority to do so. Scott believes NEPA would require a statutory change. The group agreed that ADEQ will need to determine whether regulatory or statutory changes would be necessary. Add to Permit Types gaps section.
- Karla provided a hypothetical situation in which a permittee learns they need NEPA review at the end of the process, when they are expecting the permit to be issued. She cautioned regarding the importance of a thorough checklist.
- Action item: Tricia to search on use of word "project" and verify that the word usage is appropriate.

Next Meeting

- January 24, 9 a.m.-12 p.m., agenda to include discussion of remaining gaps/options sections.
 - The group agreed to create a recommendation summary table to be referenced in an appendix.

Assignments and Action Items:

- (11/15) Duane to follow up on how Michigan and New Jersey address nationwide permits triggering federal involvement. (Resolved.)
- (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). (Resolved.)
- (12/13) Tricia to draft information from 40 CFR 233.41, which includes specific enforcement requirements. ADEQ current fines for violations are \$25,000 for civil, with fines for criminal violations included in statute. (Done.)
- (12/13) Scott to include information about criminal fines and state enforcement in the gap analysis. (Done.)
- (12/13) Tricia to include 404(b)(1) language regarding permit decisions/denial. (Done.)
- (12/13) Tricia will ask members to characterize their status as opposed, uncertain, or in support of ADEQ assumption. (Done.)
- (12/13) Tricia to contact ESA chair regarding nationwide permits and Section 106. (Done.)
- (12/13) Tricia to summarize and distribute public interest review options for consensus. (Done.)

- (1/10) Tricia to ensure that the white paper states that recommendations are limited to the 404 program only.
- (1/10) Tricia to ensure that citizen suit information is properly represented.
- (1/10) Scott to develop NEPA “no” discussion.
- (1/10) Tricia to adapt language from Sandy’s paper for the NEPA “yes” discussion.
- (1/10) Duane to send gaps and options information for LTF to Tricia by COB Jan. 14.
- (1/10) Marinela to check on whether current state regulations cover EPA requirements by Jan. 18.
- (1/10) Tricia to update/clarify language notations from Scott.
- (1/10) Tricia to search on use of word “project” and verify that it is used appropriately.

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). (Done.)
- (11/15) What are the gaps when NEPA goes away? What should be done to address these gaps?
- (12/13) May want to recommend ADEQ consider the timing of the public process in the white paper.

Divisive Issues for Additional White Paper Discussion:

- Public Interest Review and NEPA equivalent (Resolved/discussed 1/10/19)