

## **TWG: PERMIT PROCESS**

**Meeting:** #5      **Date:** Nov. 1, 2018      **Time:** 9 a.m.-12 p.m.

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

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

### **Staff Support:**

- Andy Koester, ADEQ                       Kelly Cairo, GCI

### **Discussion Items:**

#### Administration

- Tricia reported that she inserted a benefit/drawback summary table in permit transition current state, and will send a draft gap analysis table to the group for review (done 11/2/2018).
- Tricia explained that she has discussed permit types with the Fees TWG, with additional follow up pending. Additionally, ESA reached out regarding three possible alternatives:
  - Permittee to obtain a project-specific Section 10 permit (would require a habitat conservation plan), which would authorize incidental take for species.
  - Section 7 “lite” with an early “off-ramp” where the off-ramp would let EPA re-federalize the permit.
  - Statewide Section 10 permit with an HCP – would take at least a decade to obtain.
- Andy asked about a permit termination process. Currently a certificate of compliance is submitted to the Corps upon completion of the project. Permits also have expiration dates. Corps can inspect projects and mitigation efforts for compliance and completion.

#### Vision/General Permits

Tricia noted areas of agreement and changes on the live document. The sub-group authors of each section will incorporate the suggestions into the document. Highlights of additional discussion follow.

- The group discussed types of general permits and using a tiered approach regardless of whether the permit is NWP, RGP or emergency permit.
- Do we need activity-specific permits? Scott noted the Sacramento letter of permission (which is an individual permit) process for one-acre permit for minor impacts that are not tied to activity as an option. Caveats would include ESA issues.

- Would ADEQ need a process similar to NEPA? Need to talk about what aspects of NEPA would not covered under 404(B)(1).
  - Corps rules, Rivers and Harbors Act usually cover these issues.
  - NEPA doesn't mandate any decision.
  - Group will review a Corps 404 NEPA document for differences between 404(b)(1) and NEPA in preparation for discussion at the November 15<sup>th</sup> meeting.
- Michigan designs their own permits.
- The group discussed adoption of federal nationwide permits by reference, NEPA requirements, and options for other processes to coordinate the public process.
- Permit type Options – Scott proposed a minor general permit that is not activity-specific, but disturbance-level specific. Tricia asked about pursuing the concept of a major general permit and minor general permit, similar to Michigan with minor being disturbance-level based and major being activity-specific.
  - Minor
    - Like the idea, but not necessary to fully develop the idea.
    - Minor general permit considerations:
      - acreage limitation
      - tiered notification (adding in concurrence notification similar to RGPs 81 and 96)
      - exclusions such as special aquatic sites
      - not activity-specific, but to exclude certain types of activities that would require additional review
      - may use general condition triggers – e.g., if you trigger a “may-affect” or higher designation under ESA, this would no longer be a minor general permit or would require a higher level of notification
  - Major
    - Major general permits considerations:
      - would require a notification
      - activity and disturbance type should be considered for notification, may not be appropriate to lump these issues together
      - project may be 50-acre, but impact could be to half-acre. Permit limits are specific to permanent impacts to waters, not entire project. Temporary effects in constructing the project may be a consideration for the type of permit (minor vs major) and notification level.
    - Think Michigan had issues that were addressed by calling out specific activities –EPA agrees with this approach.
      - A general permit up to a certain level of impact could avoid the 55 different permits.
- Decision to consider three methods in white paper:
  1. Minor permit disturbance level specific and major permit disturbance- or activity-specific
  2. General permit, disturbance specific, but conditions are activity-specific, notification required

### 3. Nationwide permit approach specific to Arizona

- TWG agreed to keep the current exemptions per 404(f); 40 CFR 233.11(i) cited in group. Scoop and haul/“incidental fallback” exemption should be maintained .
- Discussion is needed regarding maintaining appeals process to match federal statute 40 CFR 233; Action Item: Tom Klimas will check 40 CFR 233 to identify if a state appeal process is defined there.
- Agreed to expand emergency authorization “potentially broadened” language to include environmental risk concept, oral notification. CFR language indicates emergency permit may not be able to be expanded to include environmental risk; group discussed the potential of a general permit to cover environmental risk repair and protection activities instead.
- With a state-issued permit, the lack of 401 certification means that a 408 cannot be issued under the terms of the new Section 408 Engineering Circular. This needs to be addressed in the ADEQ/Corps MOA. The state 404 permit will need to be used in lieu of a 401 certification. These concepts also should be added to the gap analysis section of the document.
- Corps makes the call on what is considered a Section 10 water.
- Action item: Scott will report on Michigan and New Jersey adoption of 404(B)(1).
- Action item: Tricia will follow up with Karla regarding the TWG concern about the language, “government projects should not be weighed too heavily for profit.”
- Action item: Betsi will provide Tricia with state constitution language which prevents use of public lands for commercial profit.
- Agreed that ADEQ should have the option of issuing LOPs, but it is not necessary for TWG to propose specifics.

### NEPA

- Do we see anything critical in 404(B)(1) that will not be covered? Cumulative impacts, human use, economics, tribal and cultural. Scope of analysis was discussed, as well as WOTUS.
  - Michigan uses a map overlay to dictate cultural resources coordination. New Jersey uses a map overlay as well as additional archaeological review.
  - Action item: Tricia will check with Sig Deg TWG to verify they are dealing with scope of analysis.
  - Scott recommended memorializing significant flash points (more controversial conversation topics not currently with consensus), regardless of whether they are part of a majority or minority opinion. Current flash points are:
    - Activity-specific general permits
    - Scope of analysis (when there is not a federal nexus)

### Permit transition

- How will an existing 5- or 10-year permit be handled for reporting obligations and inspection? Needs to be addressed in ADEQ/Corps MOA. AZPDES permit transition moves all future action to ADEQ. Would apply to pending permits, and presumably active permits. Has fee implications as well.

- Agreed to recommend that ADEQ accept active permits and pending permits close to completion as approved by Corps, without modification.
- Process for transitioning mitigation activities for active projects and inactive projects needs to be included in USACE MOA. Tricia will reach out to Compensatory Mitigation group on this discussion.
- Process for transitioning pending enforcement actions should be noted as well. If an enforcement action is underway, may be appropriate for USACE to retain that through completion.
- Except for caveat mentioned above, agreed that the permit, mitigation, and enforcement actions should be considered as a unit when transitioning.
- Streamlined renewal process: concerned about avoiding rewriting the permit every five years. Should be for time extensions without major modifications in scope or footprint
- Streamlined renewal: list of information requests for permittee to provide to ADEQ could be created; recommendation in the Forms section
- Text regarding which NWPs the state may want to adopt – include a complete table of all NWPS with a column to note why those not adopted do not apply to Arizona. Table will be an appendix and list of NWPs in Permit Transition can be replaced with a reference to this table.
  - Action item: Scott agreed to create this table
- There will be a group assignment to consider aspects of NEPA that are not covered by 404(b)(1). Will also need to address the state authority for adding these requirements?
- Forms and online tools will be continued to the next meeting.

#### Other

- References now includes Florida documents that may be helpful.

#### Assignments

- Permit types subgroup to revise future state section
- All: review revised current/future state for LTF and revised current state for permit types , current and future state for federal nexus and EPA role.
- Scott to create table for NWPs, including a note as to why those not adopted do not apply to Arizona.
- All to consider aspects of Corps NEPA that would not be covered by 404(b)(1), as well as the state authority for adding these requirements.

Next Meeting: Nov. 15, 9 a.m.-12 p.m. at ADEQ

- Agenda: Forms and Online Tools, Federal Nexus, NEPA discussion

#### **Action Items:**

- (10/18) Tricia to draft a table of cons and gap closure options to include in white paper. Done 11/2/2018

- (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.
- (10/18) Sheila to propose additional outlier language to represent the significant effort involved in these permits.
- (10/18) Tricia to contact Corps regarding emergency permit/typical recommendation of obtaining an existing NWP. Also, expand on this information in the white paper. Done 10/24/2018
- (10/18) Tricia to ask Corps about forms and guidance for Letters of Permission and how the abbreviated process works. Done 10/24/2018
- (10/18) Tricia to research: If the state assumes some 404 NWPs, do they become a state permit? Done 10/24/2018
- (10/18) Tricia to check whether ADEQ can enforce on 401 permits. May be an issue of certification vs. permit. Done 10/24/2018
- (11/1) Tom Klimas to check 40 CFR 233 to identify if a state appeal process is defined there.
- (11/1) Scott to report on Michigan and New Jersey adoption of 404(B)(1).
- (11/1) Tricia to follow up with Karla regarding the TWG concern about the language, “government projects should not be weighed too heavily for profit.”
- (11/1) Betsi to provide Tricia with state constitution language which prevents use of public lands for commercial profit.
- (11/1) Tricia will check with Sig Deg TWG to verify they are dealing with scope of analysis.
- (11/1) Scott to draft NWP table.

#### **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) Coordination for those who need a 404 from both the state and federal governments.
- (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.
- (11/1) Discussion regarding maintaining appeals process to match federal statute 40 CFR 233.

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

- Activity-specific general permits
- Scope of analysis (when there is not a federal nexus)