TWG: PERMIT PROCESS

Meeting: #6  Date: Nov. 15, 2018  Time: 9 a.m.-12 p.m.

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

Staff Support:
☒ Andy Koester, ADEQ  ☒ Kelly Cairo, GCI

Discussion Items:
Administration
• Tricia reported that she inserted a Gaps summary table in each section.
• Tricia shared highlights from the chair meeting.
  ○ The Tribal Work Group will be formed and producing a white paper.
  ○ Scope of analysis – EPA phone call resulted in the knowledge that the EPA considers the entire project. This differs from the Corps’ more limited approach to scope of analysis.
    ▪ Duane suggested that ADEQ’s approach should be the same as the Corps. However, will EPA accept this scope?
  ○ The next general stakeholder meeting will be a webinar, December 6, 1-3 p.m.
    ▪ Action item: All to provide Tricia with any questions/input from broader group.
    ▪ Action item: Tricia to send email reminder to TWG.
  ○ Duane suggested adding an “Existing form examples” in Google Docs. (done)

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

Forms and Online Tools/Current State
• Forms – Form recommendations should state that ADEQ should include stakeholders in development of forms, checklists, guidance documents.
• Decision Document Template – ADOT template is ADOT-specific, but contains great comments. TWG will include the national USACE template, but the group will also review the ADOT template. Will make it clear that it’s a combined decision document.
• Individual Permits – Corps project manager has discretion in determining whether an individual permit or general permit is needed.
  o Question for Corps: Would like to know more about when Corps uses this discretion regarding IP or nationwide permits.

Forms and Online Tools/Future State
• ADEQ can only issue five-year permits.
  o Cumulative impacts will be significant for large master planned communities, for example.
  o Sounds like we need a vehicle to address these longer-term projects that notes conditions and requirements. Letters of permission are not permits, but list conditions and requirements. Programmatic agreement may be a consideration as well.
  o Action item: Tricia to discuss options for longer term permits and LOP with Permits Types subgroup.

• Findings and Determinations – Decided to split out the requirements for NEPA and 404(B)(1) guidelines.
• NEPA Template – EA template is not available on the Department of Energy website and reference will be removed.
• Tricia will ask Corps: Does the Corp have a substantive review checklist?
• Administrative checklist is used to determine whether items listed are present, not how well each item is done. Substantive review is used to determine whether sufficient information is present for the permit to go out for public notice. The USACE can publish public notice prior to receipt of 404(b)(1) analysis or NEPA analysis.
• Submissions – There should be a hard copy option rather than a mandate for electronic submission, especially considering smaller entities making submittals.

Federal Nexus/Current State
• Duplicative text will be merged/eliminated.

Federal Nexus/Future State
• Action item: Tricia to follow up with Corps regarding: Are there critical resource waters in Arizona?
• If ADEQ adopts nationwide permits, some of them will trigger federal involvement. Current Corps processes cover these issues in “other conditions.” Believe that EPA will not approve state assumption without these issues addressed.
  o The group agreed a paragraph is needed to explain this concept.
  o Action item: Duane to follow up on how Michigan and New Jersey address these issues.
• The group agreed to include: ADEQ should review the NEPA analysis/consultations/documents prepared for a project with a federal nexus and adopt needed documents and consultations as part of their process, as appropriate rather than requiring separate documents from the applicant.
• Does ADEQ need an MOA with every federal agency involved in the current process? MI and NJ only have MOAs with USACE, EPA, and USFWS (MI) – how do they handle interactions with other agencies?
  o Action item: Jennifer to report on how Michigan and New Jersey have dealt with this.
One option ADEQ should consider is to not issue individual permits, but only issue general permits. This is what is occurring in Utah.

- Action item: Duane to document suggestion in white paper.

Case 3—in this case, the extent of scope of analysis and the area considered for cumulative impacts can differ by lead agency. ADEQ can’t dictate an approach to a federal organization.

- Scope of analysis here is for NEPA, not for the project. The intent here was to use the more rigorous federal process. Language will be added to clarify.

Andy suggested adding mechanisms within LTF to halt the clock to allow for outside consultation, and tasks outside the control of ADEQ.

Other White Paper Considerations

- Can’t make the assumption that in all cases the federal agency would be required to conduct consultation under Section 7 and 106. Need to state that other TWGs are addressing certain regulations, but that there are others regulations not addressed and therefore constitute a gap.

- Tricia to add to Introduction to include the assumption that Corps will continue to provide Section 408 permits.

- Federal agencies decide amongst themselves who the lead federal agency will be on a project when there are multiple federal agencies involved.

- MOAs—will know more about extent of recommendation for ADEQ MOAs after reviewing Michigan and New Jersey. Could recommend that ADEQ have at least a conversation with the other federal agencies to clarify process and procedure expectations for projects with federal agency involvement and 404 permitting. Andy verified that ADEQ is considered a cooperating agency for some current NEPA actions.

Assignments

- Tricia will update the white paper on forms discussion.
- Federal nexus team will update today’s chair notes. (done)
- All: review documents to prepare for discussion NEPA, public process, EPA role
- Tricia will email assignments.

Next Meeting: Nov. 29, 9 a.m.-12 p.m. at ADEQ

- Agenda: NEPA discussion, public process, EPA role

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.
- (10/18) Sheila to propose additional outlier language to represent the significant effort involved in these permits. (Done, comment added.)
- (11/1) Tom Klimas to check 40 CFR 233 to identify if a state appeal process is defined there. (Done. FYI, it is not specifically 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.” (Done.)

• (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.

• (11/15) All to provide Tricia with any questions/input from broader group.

• (11/15) Tricia to send email reminder to TWG regarding questions/input from broader group.

• (11/15) Tricia to discuss options for longer term permits and LOP with Permits Types subgroup.

• (11/15) Tricia to remove ADOT references in forms/links.

• (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.

• (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:
  o Use of discretion regarding issuance of types of permits – IP and nationwide.
  o Does the Corp have a substantive review checklist?
  o Are there any critical resource waters in Arizona?

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.

• (11/1) Discussion regarding maintaining appeals process to match federal statute 40 CFR 233.

• (11/15) Permit types: use of multiple/stacked nationwide permits.

• (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)