

United States Department of the Interior
U.S. Fish and Wildlife Service
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AESO/FA

January 5, 2004

Ms. Cindy Lester
Chief, Regulatory Branch
U.S. Army Corps of Engineers
3636 North Central Avenue, Suite 760
Phoenix, Arizona 85012-1936

Dear Ms. Lester:

The Fish and Wildlife Service thanks you for Public Notice 2003-00525-AP (PN) dated December 22, 2003, issued by the U.S. Army Corps of Engineers. Mirage Mountain, LLC has applied for a Section 404 Clean Water Act (CWA) permit to build the 53 acre Mirage of Scottsdale condominium complex in unnamed washes in Scottsdale, Maricopa County, Arizona (section 24, T3N, R5E). We have also received the Compensatory Mitigation And Monitoring Plan, dated December 2003. These comments are provided under the authority of and in accordance with the Fish and Wildlife Coordination Act (48 Stat. 401, as amended U.S.C. 661 et. seq.) (FWCA), but do not constitute our final review of the permit application under the FWCA.

The proposed Mirage of Scottsdale project will include 178 condominium units in 57 buildings, and associated recreational areas, roads, utilities, and retention basins. The project would result in direct discharges into approximately 0.80 acre of jurisdictional washes. Your review should address the total impact of the development including direct, indirect, and cumulative effects; and all interrelated and interdependent activities including those located above the ordinary high water mark. The footprint of the permitted project that should be assessed is, at minimum, the total 53 acres of development. In addition, your assessment should include the effects of adjacent development on jurisdictional waters not subject to a discharge and the effects of the project on a landscape scale. We suggest an assessment be conducted to determine the extent of secondary and cumulative effects as defined in the Section 404(b)(1) Guidelines (CFR 40 part 230.11).

Corps regulations (CFR 33, Appendix B to Part 325) states that the District Engineer is considered to have authority over portions of the project beyond the limits of jurisdiction "where the environmental consequences of the larger project are essentially products of the Corps permit action." If impracticable to completely avoid impacts to jurisdictional waters through bridge spans or upland buffers, the proposed development could not occur "but for" the issuance of a Section 404 permit and it would be within Corps authority to extend the scope of analysis beyond the limits of the ordinary high water mark and assess interrelated and interdependent actions.

We believe the Corps has the authority and responsibility to consider all indirect effects of the discharge of dredged and fill material. The Section 404(b)(1) Guidelines direct the Corps to analyze the effects of Section 404 permitted activities on “surrounding areas” as well as “other wildlife” including resident and transient mammals, birds, reptiles, and amphibians (40 CFR Part 230.32). Additionally, the Regulations For Implementing The Procedural Provisions Of The National Environmental Policy Act (NEPA) (40 CFR, Parts 1502.16 and 1508.8) state that the environmental consequences of an action include both direct and “Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”

Transient wildlife species associated with aquatic ecosystems typically utilize adjacent uplands for a large portion of their life cycle resulting in an intimate biological and ecological relationship between adjacent uplands and waters as recognized on page 5 of the mitigation plan. Modification of upland areas may displace transient wildlife species, lower plant and animal species density and richness, disrupt the normal functions of the ecosystem, and lead to reductions in overall biological productivity and diversity. The loss of upland vegetation communities could have a negative impact on wildlife populations within and adjacent to the project area as uplands provide movement corridors, nesting areas, and foraging areas for numerous wildlife species. The proposed modification could adversely affect population dynamics through habitat loss or fragmentation, disrupt intra- and interspecific wildlife interactions, and result in population and community shifts. Development and increased human activity could place increased stress on local wildlife populations resulting in reduced fecundity and recruitment, adversely affecting local population viability.

The PN states that a preliminary determination has been made that an environmental impact statement is not required for the proposed work. As such, we assume that your agency is preparing an environmental assessment (EA) in accordance with the National Environmental Policy Act (NEPA). We request that, when completed, the draft EA be submitted to our office so we may evaluate the environmental impact and complete our review of the proposed project.

Your EA should include the potential effects of the entire development on Sonoran desertscrub vegetation communities and local and regional wildlife resources including potential shifts in community structure, and changes in diversity, relative abundance, and species richness. The analysis should be more than a qualitative assessment and use acceptable empirical methodologies to quantify and evaluate impacts on biotic resources.

The PN states that the applicant has submitted an on-site compensatory mitigation plan totaling 6.41 acres. The mitigation plan states on page 4, “the primary wildlife habitat function of ephemeral waters of the U.S. in the project area is the provision of habitat for native birds, small to medium-sized vertebrates, and invertebrates.” However, the plan does not utilize empirical methods to quantify these functions. The mitigation plan also states on page 11, “Mitigation success criteria will be the achievement of target vegetation characteristics (vegetation density/diversity similar to the reference area) two years after temporary irrigation has ceased.” Again, the plan does not provide the empirical criteria that would be utilized other than “85% survival.”

The mitigation plan should not only address vegetative parameters such as canopy cover, biomass, and total volume; but also changes or loss of animal diversity, abundance, density, and richness. Monitoring provisions and criteria should track the success of mitigation for animal populations as well as vegetation communities. Empirical methods and criteria are needed to illustrate how the mitigation proposal would quantitatively replace the biological functions of the jurisdictional waters affected by the project

Accordingly, we believe the mitigation plan has not adequately demonstrated replacement of the loss and/or impairment of biological functions. We suggest that the biological functions provided by jurisdictional waters on the project site, including the role and influence of adjacent uplands, be reevaluated in a quantitative fashion that addresses both vegetative and animal components. The mitigation plan should then be revised to address these functions and resubmitted to our office so that we may reevaluate the plan and provide additional recommendations.

In closing, we request an opportunity to review the draft EA and revised mitigation plan and provide substantive comments and recommendations in accordance with the FWCA and Section 404(m) of the CWA. If we can be of further assistance please contact Mike Martinez (x224) or Don Metz (x217).

Sincerely,

/s/ Steven L. Spangle
Field Supervisor

cc: Regional Administrator, Environmental Protection Agency, San Francisco, CA
Supervisor, Project Evaluation Program, Arizona Game and Fish Department, Phoenix, AZ
Endangered Species Program, Arizona Field Office, Fish and Wildlife Service, Phoenix, AZ