

AESO/SE
2-21-00-I-245

March 7, 2003

Dr. Fari Tabatabai
Acting Chief, Regulatory Branch
Los Angeles District, Corps of Engineers
P.O. Box 532711
Los Angeles, California 90053-2326

Dear Dr. Tabatabai:

The U.S. Fish and Wildlife Service (FWS) received the U.S. Army Corps of Engineers' (COE) February 25, 2003, request for our concurrence under Section 7 of the Endangered Species Act, with your determination that implementation of the Section 404 Clean Water Act Nationwide Permit (NWP) program in Arizona may affect, but is not likely to adversely affect, the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*). Your request for concurrence is based on the proposed implementation of the enclosed "Guidelines to ensure the Nationwide Permit program will not adversely affect the cactus ferruginous pygmy-owl," which were developed jointly by our staffs.

The FWS Arizona Ecological Services Field Office is pleased to have worked cooperatively with your staff to develop the enclosed Guidelines. With proper and successful implementation, we believe these Guidelines will appreciably contribute to the conservation of the pygmy-owl. We believe the Guidelines include clear direction on establishing the proper scope of impact analysis for each project that would be authorized under a Nationwide permit. The inclusion of interrelated and interdependent actions within the scope of analysis should effectively address our concern that the totality of project-related impacts, including those above the ordinary high water mark, are assessed. Accordingly, based on the proposed implementation of the enclosed Guidelines, we concur that the NWP program may affect, but is not likely to adversely affect, the cactus ferruginous pygmy-owl.

Please note that our concurrence is contingent upon proper and successful implementation of the Guidelines. Should such implementation not be the case, our concurrence would no longer be valid and formal consultation may be necessary. However, based on the professionalism and courtesy exhibited by your staff during the informal consultation process, we are optimistic that these Guidelines will prove effective.

Dr. Fari Tabatabai

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If you have questions or concerns regarding this matter, please contact Mike Martinez (ext 224).

Sincerely,

Steven L. Spangle
Field Supervisor

Enclosure

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM
Project Manager, Regulatory Branch, Army Corps of Engineers, Tucson, AZ
Director, Arizona Game and Fish Department, Phoenix, AZ

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Guidelines to ensure the Nationwide Permit program will not adversely affect the cactus ferruginous pygmy-owl

February 24, 2003

Staff from the U.S. Fish and Wildlife Service (FWS) Arizona field office and the Army Corps of Engineers (COE) has jointly developed the following guidelines. We believe adoption of these procedural guidelines by the Regulatory Branch of the COE in Arizona would ensure the NWP program does not adversely affect the cactus ferruginous pygmy-owl (pygmy-owl). These procedures will become effective on the date the FWS concurs on the COE's "may affect, not likely to adversely affect" determination for purposes of this informal, programmatic consultation on effects of the NWP program on the pygmy owl.

- 1) For proposed NWP notification¹ projects located in south, central, and northeastern Maricopa; southeastern Gila where contiguous with Pinal; southwestern Graham; northwestern Cochise; and all of Pinal, Pima, and Santa Cruz Counties, the COE will review current pygmy-owl location information, provided by FWS, and the criteria in 5A before making an effect determination. If the proposed discharge of dredged or fill material meets the criteria in 5A for a no effect determination, the COE will proceed with NWP processing. However, the COE will provide the applicant's project information, as described in #2, to the FWS at the time a "no effect" determination is made and prior to permit verification. Provision of this information does not require a concurrence or response. If the COE concludes the proposed project may affect but is not likely to adversely affect the pygmy-owl, the COE will proceed with condition 2 below.
- 2) For all proposed NWP notification¹ projects which meet the "may affect not likely to adversely affect" criteria in condition 5B below, the COE will initiate informal consultation and provide all available information to allow FWS to adequately review the proposed project. This will include project location, project type, discharge amount, overall project size, vegetation community type, and any relevant analysis of direct, indirect, and cumulative effects, as required by general condition 13 of the NWP program. To the extent FWS needs additional information, the COE will either provide the information or have the applicant provide it directly to the FWS. The FWS will provide a letter of concurrence (or non-concurrence) with a written explanation within 30 days of receipt of the initial COE letter or receipt of additional available information, if requested.
- 3) The COE has determined it will assert discretionary authority and will require submittal of an individual permit application and initiate formal consultation for any proposed NWP project which the COE has determined does not meet the criteria under condition 5 or for which the FWS has provided a non-concurrence in writing on a "may affect not likely to adversely affect" determination *unless* the applicant chooses to revise the project to meet the criteria under 5. The FWS will conclude formal consultation within 135 days of receipt of any required and available information.

¹ The term "notification" refers to those NWP's in which the applicant is required to notify the COE pursuant to the terms of the specific NWP and/or General Condition 11.

4) The Section 7 scope of analysis for individual NWP's shall include an evaluation of the effects of the action and cumulative effects on pygmy-owl and/or critical habitat as defined in the Regulations for Interagency Cooperation (50 CFR Part 402). "Effects of the action" include the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interdependent or interrelated with the action. "Indirect effects" are those that are caused by the proposed action and are later in time, but still reasonably certain to occur. "Interrelated actions" are those that are part of a larger action and depend on the larger action for their justification. "Interdependent actions" are those that have no independent utility apart from the action under consideration.

5) Specific criteria for determining effects to pygmy-owls are detailed below.

A) No Effect - either:

1) The project:

- a. occurs outside of pygmy-owl survey zones 1, 2 and 3² and
- b. the project occurs outside of the maximum dispersal distance (21 miles³) of a known pygmy-owl site⁴

Or

2) The project occurs above 4,000 ft elevation.

Or

3) The project occurs inside of survey zones 1, 2 or 3, or critical habitat (except for special management areas, as defined in the Draft Pygmy-owl Recovery Plan), but no habitat components (as defined under B(1)(b) below) are present on or within 400 meters of project boundaries (the distance from which noise and human activity may disturb a pygmy-owl site).

Or

4) The project is located within one of the areas defined as the Urban Exclusion Zone for the pygmy-owl.

Or

5) The project site:

- a. occurs inside of survey zones 1, 2, or 3,
- b. has been surveyed for pygmy-owls using the approved survey protocol and no pygmy-owls were detected,
- c. contains suitable habitat but the project will not disturb habitat components consisting of multiple layers or large trees (>2 m in height) and saguaros and will not preclude movement of pygmy-owl

² For purposes of this document, proposed critical habitat and draft recovery areas are contained within zones 1, 2, and 3 and are, therefore, not referenced separately.

³The maximum dispersal distance is based on Arizona Game and Fish Department telemetry data for dispersing juvenile cactus ferruginous pygmy-owls.

⁴ A pygmy-owl site consists of the nest or activity center (center of locations used by a non-breeding individual) of a resident owl (documented since 1993), which has been in the area for more than 2 weeks.

- by creating an inadequate configuration of habitat or appreciably increasing human activity levels, and
- d. is outside of the maximum dispersal distance (21 miles) of a known pygmy owl site.

B) May Affect, Not Likely to Adversely Affect - The project is wholly beneficial to the pygmy-owl; or effects are insignificant, discountable and short in duration; either:

1) The project:

- a. has been surveyed for pygmy-owls using the approved survey protocol and no pygmy-owls were detected, or FWS has determined that surveys are not necessary,
- b. will not appreciably alter habitat components consisting of multiple layers or large trees (> 2 m in height) and saguaros,
- c. will not preclude movement of pygmy-owl by creating an inadequate configuration of habitat or appreciably increasing human activity levels,
- d. will not be located <400 m from a known pygmy-owl site, and
- e. will be of short duration (14 days from March 20 to May 31; otherwise 90 days).

Or

2) Heavy construction activity occurs outside of the pygmy-owl breeding season (February 1-July 31) and no habitat components, as defined above, will be removed.

Or

3) The project proponent works with FWS to design the project so that effects are insignificant or discountable.

6) COE may call FWS with specific project information for survey recommendations and habitat suitability guidance.

7) The FWS will evaluate information submitted under #1 to ensure this programmatic consultation for the NWP program is adequate in addressing the effects to the pygmy-owl. In addition, FWS and COE will meet on an annual basis, or as needed, to evaluate and discuss the continued effectiveness of these guidelines for protecting Arizona's population of pygmy-owls and to update maps, if necessary. At these meetings, the COE will provide a table identifying the following in regard to pygmy-owls: file number, NWP number, location coordinates, ESA effect determination made, permittee, waterway, county, acreage of impact to waters of the U.S., and status of construction (not constructed, under construction, or completed). If adaptive measures to this agreement are necessary, they will be explored at that time.