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In Reply Refer To:
02-21-02-F-0268

December 3, 2002

E-Mail Transmission

Mr. Terry Oda
Clean Water Act Standards and Permits Office (WTR-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Dear Mr. Oda:

This letter constitutes the U.S. Fish and Wildlife Service's biological opinion (BO) pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), as amended (ESA). At issue is the U.S. Environmental Protection Agency's (EPA) approval of the State of Arizona's Arizona Pollutant Discharge Elimination System (AZPDES) program and the impacts that may result from the program transfer. Clean Water Act (CWA) section 402(b) states that EPA "shall approve" a State NPDES program where the State program meets the conditions specified in CWA section 402(b). All of the listed threatened and endangered species and their designated or proposed critical habitats in, adjacent to, or dependent on surface waters in Arizona are considered in this biological opinion.

This BO is based on information provided in the June 21, 2002 biological evaluation (BE), Arizona Department of Environmental Quality's (ADEQ) project proposal, telephone conversations with EPA, field investigations, meetings, and other sources of information. Literature cited in this BO is not a complete bibliography of all literature available on the species of concern, and its effects, or on other subjects considered in this opinion. A complete administrative record of this consultation is on file at Arizona Ecological Services Field Office in Phoenix, Arizona.

Consultation History

We received your request for formal consultation and the attached BE on June 24, 2002. In your letter and BE, you determined that the proposed transfer of authority to ADEQ is simply an administrative action that is not likely to have adverse effects on water quality and therefore is not likely to adversely affect listed species or critical habitat. On August 20, 2002, we responded to your letter and requested more information, including how the section 7 process will continue to be implemented following AZPDES approval. The EPA responded in a letter we received on

August 22, 2002, that it would follow the “Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act” (National MOA), and that the National MOA “procedures contemplate close cooperation, but not section 7 consultation”.

Under the terms of the National MOA, we continued exploring ways to retain conservation mechanisms equal to or greater than those provided under section 7 of the ESA. On September 13, 2002, we met with you and ADEQ to discuss the issue. At that meeting, ADEQ voluntarily agreed to provide us copies of all future Notices of Intent (NOIs) for the approval of construction stormwater permits in northwest Tucson and other identified areas of concern. ADEQ has also agreed to include a form letter from us to the applicants informing them of ESA procedures, the potential for section 9 violations of the ESA, and how non-Federal applicants can obtain a section 10(a)(1)B permit for incidental take of endangered species. ADEQ recently received a \$79,000 grant from EPA to develop a “Smart Notice Of Intent” system to be used when Phase II of the construction stormwater permitting program begins. However, while we see the value in ADEQ’s offer and intend to accept it, we did not believe the resulting process would provide the species conservation equivalent to that required of Federal agencies under section 7 of the ESA since it does not provide sufficient guidance for a landowner to determine if listed species may be adversely affected, will not protect plant species, and does not protect habitat essential for species recovery. EPA will provide funding to ADEQ for three years to run its program although EPA did not include funding as part of the proposed action and was not considered in this BO.

Subsequently, EPA, ADEQ, and the FWS pursued avenues to continue protection for listed species under the National MOA. We elevated our concerns to our Region 2 office. When our Regional Director and EPA’s Regional Administrator could not resolve the issue on October 2, 2002, we elevated the discussion to our respective Washington, D.C. headquarters. In discussions with our Washington, D.C. office, we reviewed the definition of “indirect effect”¹. We conclude that development in Arizona is reasonably certain to occur in the future, but the transfer of the permit authority will not cause the continued real estate development. Therefore, we are not considering continued development absent EPA’s administration of the program to be an indirect effect of the proposed action. This exclusion of certain impacts of development from our evaluation of indirect effects is dependent on the specific circumstances of the program approval action considered in this consultation and is not necessarily applicable to consultations on federally permitted actions or other Federal permit programs. We elaborate on our reasoning in the Effects of the Action section below.

January 14, 2002: EPA Region 9 received Arizona’s AZPDES program submission.

January 23, 2002: EPA sent its request for informal consultation on AZPDES approval.

February 15, 2002: EPA determined that Arizona’s AZPDES program package is incomplete.

¹Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur 51 FR19958.

May 30, 2002: Teleconference between EPA Region 9 and Arizona Ecological Services Field Office (AESO).

June 13, 2002: Teleconference between EPA Region 9 and AESO.

June 24, 2002: EPA Region 9 submitted Biological Evaluation to AESO requesting formal consultation and determined that the AZPDES approval may affect, but is not likely to adversely affect all Arizona listed species and their critical habitats.

July 11, 2002: EPA Region 9, AESO, and FWS Region 2 conferenced.

August 20, 2002: AESO submitted request for more information to EPA Region 9.

August 22, 2002: EPA indicated that it had already supplied AESO with the necessary information.

September 13, 2002: AESO, EPA Region 9, and ADEQ met to discuss ways to ameliorate the loss of Federal conservation mandates under section 7 after AZPDES approval. This meeting satisfied Level 1 criteria for elevation under the National MOA.

September 26, 2002: AESO sent letter to EPA acknowledging EPA's request for formal consultation.

October 2, 2002: FWS Region 2 Director and EPA Region 9 Administrator agreed to elevate issue according to National MOA satisfying Level 2 requirements.

October 4, 2002: AESO and EPA Region 9 jointly submitted an elevation paper according to the National MOA for Level 3 review.

October 16, 2002: EPA Region 9 sent AESO copies of ESA comments it received during its public comment period.

October 28, 2002: EPA Region 9 forwarded AESO copies of Arizona Game and Fish Department comments regarding AZPDES approval.

November 1, 2002: Terry Oda and Steve Spangle met in FWS Arizona Ecological Services Field Office to discuss development of BO.

November 14, 2002: Transmitted draft BO to EPA.

November 20, 2002: Received electronic comments on draft BO from EPA and ADEQ.

November 22, 2002: Telephone conference held between EPA Region 9 and AESO.

November 27, 2002: Second draft BO sent to EPA.

December 2, 2002: EPA sent second draft BO comments to AESO.

BIOLOGICAL OPINION

Description of the Proposed Action

The action in review is the proposed approval of AZPDES for the State of Arizona by EPA Region 9. The CWA authorizes States to administer the National Pollutant Discharge Eliminating System (NPDES) program provided the State program meets the conditions specified in CWA section 402(b) and its implementing regulations. ADEQ would administer the AZPDES program under State law, which the EPA will have determined to be at least as stringent as the CWA and its implementing regulations. A significant benefit of Arizona's assumption of the NPDES program is that the number of State staff dedicated to permit issuance and permit enforcement will be substantially greater than that which was available to EPA when it issued NPDES permits for Arizona. Currently, EPA has 2 full-time staff involved in permitting, planning, and coordination activities for Arizona. There are also 2.5 full time employees currently working on compliance and enforcement. Arizona currently has 10 staff assigned to its water permitting program and is expected to hire another 9 staff for an estimated total of 19 staff. Because NPDES permits are labor-intensive, increased staffing should provide significant environmental benefits by ensuring that high-quality permits are issued more timely, and that expired, but administratively continued, NPDES permits will be reduced. More State and EPA resources can now be devoted to permit writing and compliance.

Also, ADEQ has voluntarily agreed to provide us copies of all future NOIs for the approval of construction stormwater permits in northwest Tucson and other identified areas of concern. ADEQ will include a form letter from us to the applicants informing them of ESA procedures, the potential for section 9 violations of the ESA, and how non-Federal applicants can obtain a section 10(a)(1)(B) permit for incidental take of endangered species.

EPA has agreed to follow the National MOA coordination process described in detail below for AZPDES permits where there are concerns about any listed species or their critical habitat, including aquatic-dependent species or upland, terrestrial species. EPA notes that it does not have CWA authority to object to State NPDES permits to address non-water-quality-related concerns about listed species or critical habitat.

I. Overview of the Federal Clean Water Act Programs

A. The Federal Clean Water Act

The CWA established the basic structure for regulating discharges of pollutants into waters of the United States. It gave EPA the authority to implement pollution control programs such as setting wastewater effluent standards for industry. The CWA also required the establishment of water quality standards (WQS) for all surface waters. The CWA made it unlawful for any person to discharge any pollutant from a point source into navigable waters, except when in compliance

with a NPDES permit. It also funded the construction of sewage treatment plants under the construction grants program and recognized the need for planning to address the critical problems posed by non-point source pollution.

The environmental protection goals of the CWA contain specific references to protecting “fish”, “shellfish”, “wildlife”, and “aquatic life”; these terms clearly encompass federally listed and proposed species. Section 101(a) provides as its goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” 33 U.S.C. § 1251(a)(2). This goal is consistent with the ESA’s purpose of providing “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved (16 U.S.C. 1531 § 2(b)).

B. Water Quality Standards

Water quality standards are not a part of the proposed action and therefore are not subject to this consultation. However, because the AZPDES program must be administered to comply with WQS, a brief discussion of WQS and the status of WQS in Arizona is included.

Section 303 of the CWA requires States to develop water quality standards which are designed to protect the public health or welfare, enhance the quality of water and serve the purposes of the CWA. Water quality standards consist of : 1) designated uses of waterways (e.g., protection and propagation of fish, shellfish, and wildlife); 2) criteria which will ensure the protection of designated uses; and 3) an anti-degradation policy that protects existing uses and provides a mechanism for maintenance of high water quality. The CWA directs States to take into consideration, among other things, the “propagation of fish and wildlife” when revision or adopting WQS (33 U.S.C. § 1313(c)(2)(A)). Under the CWA, the State must review and, if necessary, revise adopted standards once every three years using a public participation process.

The EPA has a mandatory duty to review and either approve or disapprove WQS submitted by the State. Pursuant to 40 CFR 131.21, WQS revisions submitted to EPA do not become effective for CWA purposes until the EPA acts to approve them. The CWA requires the EPA to approve (within 60 days) or disapprove (within 90 days) any WQS revisions submitted by the State. Upon disapproval, the EPA has the statutory duty to promptly propose and promulgate replacement standards. Where required under Section 7 of the ESA, EPA consults with the Service on federally promulgated WQS and on the approval of new or revised State or Tribal water quality standards and implementing procedures that are subject to EPA review and approval under Section 303(c) of the CWA.

The State of Arizona conducted a complete WQS program revision on January 10, 1992. Following the State’s adoption and submission of WQS on February 18, 1992, the EPA initiated formal consultation with the Service pursuant to Section 7 of the ESA on May 21, 1993. That consultation, the first programmatic consultation on the Arizona WQS, concluded on February 16, 1994 with a BO from the Service. On April 26, 1996, Arizona submitted revisions of the State WQS to the EPA. On June 27, 1996, EPA initiated Section 7 consultation with the Service

on those revisions, and on December 11, 1998, the consultations on those revisions was concluded with the Service's issuance of a biological opinion. The State adopted revisions to the April 26, 1996 WQS. These revisions were received by the EPA on April 11, 2002. If necessary, the EPA's action on those revisions will be the subject of a separate consultation under Section 7.

C. National Pollutant Discharge Elimination System Permit Program

The CWA sections 307, 318, 402, and 405 establish the NPDES permit system to regulate the discharge of pollutants from point sources into navigable waters (33 USC 1311, 1342). The NPDES program is the national program from issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and for imposing and enforcing pretreatment requirements.

1. Permits

Permits are licenses for facilities to discharge a specified amount of pollutant into a receiving water under certain conditions. In addition to discharge limitations, NPDES permits impose other requirements such as monitoring procedures and pollution prevention measures (known as "best management practices"). Permits typically contain technology based limits which represent the best conventional technology (BCT), for conventional pollutants (biological oxygen demand, total suspended solids, fecal coliform, pH, and oil and grease), best available technology economically achievable (BAT) for nonconventional and toxic pollutants, and secondary treatment limits for publicly-owned treatment works (POTWs) and new source performance standards (NSPS) for new sources. Where technology-based or secondary treatment limits are not sufficient to meet water quality standards in receiving waters, permits must contain more stringent limits (known as water quality-based limits or "WQBELs") to meet those water quality standards so that the receiving waters meet those WQS. The CWA requires that NPDES permits contain effluent limitations that contribute to the maintenance and attainment of water quality which assures "the protection and propagation of a balanced population of shellfish, fish, and wildlife . . ." (33 U.S.C. 1312(a)).

There are two basic types of permits: individual and general. An individual permit is a permit specifically tailored for an individual facility. The permitting authority develops a permit for that facility based on information contained in the permit application. Before issuance, the permit is public noticed for 30 days. Public notice of a draft permit elicits comments from concerned individuals or agencies. The permitting authority is obliged to respond to all significant comments. A public hearing may be requested in writing by any interested party. Upon resolution of any issues, the permit may be issued to the facility for up to five years.

A general permit is developed and issued by a permitting authority to cover multiple facilities within a specific category. These facilities must be in a geographical area that corresponds to

existing geographic or political boundaries. General permits are regulated under 40 CFR 122.28. These permits may be written to cover categories of point sources having common elements such as storm water point sources; facilities that involve the same or substantially similar types of operations; facilities that require the same effluent limitations or operating conditions or standards for sewage sludge use or disposal; facilities that require the same monitoring where tiered conditions may be used for minor difference within class; and facilities that are more appropriately regulated by a general permit. The general permit clearly identifies the applicable conditions for each category or subcategory of dischargers are subject to the regulated water quality based limits. Typical general permits include those for Concentrated Animal Feeding Operations (CAFOs), de minimis dischargers, and storm water dischargers. These permits are subject to the same administrative processes for review and comment as individual permits.

After the development of the general permit, dischargers seeking coverage under a general permit submit to the permitting authority a written notice of intent (NOI) to be covered by the general permit. The requirements for the contents of the notice of intent are specified in the general permit. While there is no public comment opportunity on the general permit, the NOI submittal process generally does not provide a specific opportunity for public comment.

2. Pretreatment

Pretreatment programs are designed to eliminate the serious problems posed when toxic pollutants are discharged into sewage systems. The CWA called for the EPA to develop National Pretreatment Standards to restrict the quantity of toxic industrial pollutants discharged into sewage systems. These standards forbid certain types of discharges by any sewage system user (40 CFR 403.5) and place restrictions on 126 toxic pollutants for specific industrial categories. Publicly owned treatment works (POTWs) with flows greater than 5 million gallons per day (mgd) or smaller POTWs with significant industrial dischargers are required to develop local pretreatment programs which must enforce all National Pretreatment Standards.

II. State NPDES Approval

The purpose of this section is to explain the legislative authorities that allow a State to be authorized to operate a NPDES program, the minimum requirements of a State that wishes to receive authority to operate a NPDES program, and the process for a State to apply for the authority to operate a NPDES program. This section will also provide a description of the current status of Arizona's application for authority to operate the AZPDES program.

A. Legislative Authorities

States may be approved to administer the NPDES program. While the CWA does not require that states operate the NPDES program, the CWA's language and legislative history clearly reflect a Congressional intent that states be primarily responsible for administering the program

(33 U.S.C. 1251(b))¹. States may choose to apply for the following programs: basic municipal and industrial permit program, pretreatment program, Federal facilities program, general permit program, and sludge permit program. The approval process is a shift in administration of the program from the EPA to the State or Tribe. The State or Tribe administers the program under State or Tribal law, which the EPA has determined to be at least as stringent as the CWA and its implementing regulations. Any programmatic actions taken by the State or Tribe are State or Tribal actions, not Federal actions.

B. State Requirements

Under section 402 of the CWA, eligible States can obtain the EPA's approval to operate their own NPDES permit programs, provided they meet the requirements of section 402 (b) and applicable Federal regulations at 40 CFR 122, 123, 124, and 125, and that it has the resources and legal authority to do so. States must have the legal authority to implement all of the required provisions, and the program must be administered in conformance with each provision. To date, forty-four states have authorized NPDES programs.

C. Application Process

The EPA has 30 days from receipt of a State program submission to notify the State whether its submission is complete (40 CFR 123.21). After determining that the State has a complete program submittal, the EPA has 90 days from the submittal date to approve or disapprove the program based on 40 CFR 123.61 (b) and the CWA.

D. Arizona Status

As stated above, the State of Arizona is requesting approval from EPA for ADEQ to administer the NPDES program as the AZPDES program. The AZPDES program will cover all permitting, surveillance/inspection, public assistance, and enforcement regulatory processes associated with the following:

1. Issuance of individual permits for discharges from industrial, commercial, mining, and

¹ "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the states manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution." 33 U.S.C. 1251 (b).

silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include POTWs and privately-owned treatment works;

2. Issuance of general permits;
3. Administration of the NPDES pretreatment program;
4. Administration of all stormwater discharge programs, including municipal storm sewer systems (combined and separate), general permits for stormwater discharges, and individual permits for stormwater only discharges; and
5. Administration of permitting for Federal facilities.

The AZPDES program submittal includes the following documents as required by 40 CFR 123.21:

1. A letter from the Governor of Arizona requesting approval of the described program;
2. An Attorney General's statement of authority that Arizona's laws are as stringent as the CWA;
3. A Memorandum of Agreement to be signed by EPA Region IX Administrator upon approval of the program;
4. A complete program description, as required by 40 CFR 123.22, describing how the State intends to implement the AZPDES program; and
5. Copies of all applicable State statutes and regulations, including those governing the State administrative process.

III. Arizona's Proposed Program

A. Individual Permits

Arizona individual permits may cover industrial, stormwater, commercial, mining, and silvicultural dischargers; animal feeding operations and aquatic animal production facilities; and domestic wastewater treatment facilities that include POTWs and privately owned treatment works. EPA issued NPDES permits will become AZPDES permits upon approval of the AZPDES program.

The individual permit issuance process includes application review, permit development, and public notice and issuance. Arizona permits will include technology and, as needed, water quality-based effluent limits. The Arizona WQS will be used to determine the applicable water quality-based effluents limits for the receiving water.

After the creation of a draft permit, the draft permit will be public noticed in a local newspaper for at least 30 days. ADEQ will send copies of the public notice, draft permit, and a fact sheet to the EPA Region 9 for review, unless EPA waives its right to receive such documents. The EPA may make general comments upon, objections to, or recommendations on the draft permit within thirty days of receiving the draft permit. As required by the NPDES regulation and described in the National MOA, ADEQ will provide notice and copies of draft permits to the Service. ADEQ will notify other interested Federal and State agencies by mailing them a copy of the public notice or draft permit and soliciting their comments. ADEQ will discuss issues with appropriate agencies. Arizona regulations require that a public hearing will be held if significant public interest exists. The public hearing will address final decisions on draft permits. If no comments are received that require a change in the draft permit, the permit is effective immediately upon issuance. No public notice will be required when a request for permit modification, revocation and reissuance, or termination is denied. A written notice of the denial will be given to the requester and to the permittee, if different from the requester.

Based on all of the comments received, ADEQ will prepare a final permit, or if the draft permit is changed as a result of the comments, the revised permit will be submitted to the EPA for review. ADEQ will provide the applicant and each person who submitted comments or requested notice a response to comments and notify them of the permit decision. A final permit decision will become effective 30 days after service of the notice of the final permit decision unless a different effective date is specified in the decision, or the permit is appealed.

The EPA has the authority to object to State NPDES draft permits in specified circumstances. At the close of the comment period and after resolution of the reasons for EPA objections, ADEQ will issue a permit decision. If ADEQ and EPA are unable to resolve the reasons for EPA's objections, the EPA has the authority to veto and to issue the permit under Federal law. See section entitled "Additional EPA involvement in AZPDES permits" for details on when and how the EPA may object to a permit.

B. General Permits

EPA has issued industrial stormwater, construction stormwater, and CAFO general permits in Arizona. These permits will become AZPDES permits upon approval of the AZPDES program. Arizona's general permit issuance procedures will be similar to those governing individual permits. For example, a general permit will be subject to the same public notice requirements and will undergo the same procedures for EPA approval as an individual permit. In addition, as will be done for individual permits, ADEQ will provide copies of draft general permits to the Service and other interested parties, and afford them an opportunity to comment.

Dischargers seeking coverage under a general permit will submit a written notice of intent (NOI) to ADEQ in order to be covered by the general permit unless exempted under the general permit. A NOI is a notice that an applicant submits to the permitting authority indicating its commitment to comply with the terms of a general permit. Each general permit will specify NOI

requirements. The information required to be included in an NOI will include, at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges and the receiving stream(s). General permits will also specify the deadlines for submitting NOIs and the dates when a discharge is authorized under the permit. If ADEQ determines that an applicant does not meet the general permit criteria, ADEQ may require the applicant to file an application for an individual permit and may take appropriate enforcement action if the applicant does not comply.

Pursuant to the MOA between Arizona and EPA, the EPA may review any NOI. ADEQ will provide a copy of the NOI to the EPA within 15 days of the EPA's request to review the NOI. The EPA has 10 days after the receipt of the NOI to notify ADEQ of the EPA's determination of whether or not the applicant is eligible for coverage under the general permit. If the EPA determines that an applicant for a general permit does not meet the eligibility criteria of the general permit, ADEQ and the EPA will meet to discuss the basis for EPA's concerns.

C. Pretreatment

To date, the EPA has approved 15 pretreatment systems for municipalities in Arizona. Upon AZPDES program approval, Arizona will assist municipalities in developing pretreatment ordinances. The pretreatment approval determination program includes a public notice process. Public notice in a local newspaper will occur within 20 working days of a POTW pretreatment approval determination. The public notice procedure will provide a minimum public comment period of 30 days. The public noticed information will be provided to any party upon request and ADEQ is required to circulate the public notice to inform interested and potentially interested persons of the pretreatment program submission. The required public notice process includes mailing notices of the request for approval of the submission to designated 208 planning agencies, Federal and State fish, shellfish and wildlife resource agencies (unless such agencies have asked not to be sent the notices); and to any other person or group who has requested individual notice. The applicant, any affected State, and interested State or Federal agency, person, or group of persons may request a public hearing. ADEQ will hold a public hearing if a significant interest in a public hearing exists or if significant issues or information are brought to the attention of ADEQ during the comment period that was not considered previously in the permitting process. ADEQ will not approve a submission if the EPA objects to the approval in writing.

D. Enforcement

The purpose of the EPA's compliance and enforcement program is to ensure compliance with the NPDES regulations. This is achieved through compliance assistance, compliance incentives, and civil and criminal enforcement. NPDES regulations are enforced through civil judicial enforcement for the collection of penalties and/or injunctive relief, through criminal enforcement, and through use of administrative enforcement authorities in order to remedy any noncompliance and deter future violations. Upon approval, ADEQ will have various enforcement tools available to it that are similar to those available to the EPA under the CWA. ADEQ's enforcement tools are available for all CWA violations under the AZPDES program.

The EPA continues to retain enforcement authority after program approval. Therefore, enforcement is not part of this consultation. While ADEQ will take most of the actions, if the EPA determines that ADEQ has not initiated a timely and appropriate enforcement action against a violator, the EPA may proceed with any or all of the enforcement actions available under section 309 of the CWA. EPA Region 9 currently has ongoing enforcement actions in each of its State administered NPDES programs.

IV. Additional EPA Involvement in the AZPDES Permitting Program

In addition to the oversight authorities outlined in the previous sections, procedures and time lines for the EPA review and objection to State NPDES permits are established by statute and regulation in CWA Section 402(d) and 40 CFR 123.44. The EPA's approval of State authority to administer a NPDES program is not a delegation of Federal permitting authority; the State operates its program wholly under State law. Approved State programs are, at all times, required to maintain their programs consistent with the minimum statutory and regulatory requirements of the CWA. Upon EPA approval, the State takes over primary responsibility for issuance of permits and administration of the NPDES program within the State. The EPA maintains an oversight role. Where the EPA determines that exercise of its objection authority is appropriate to protect federally-listed or proposed species, the Agency will utilize its existing authorities under CWA. The EPA will review many, though not all, State draft NPDES permits. The number of State permits reviewed is established in the MOA between the Arizona and EPA Region 9.

In Arizona, the following section from the MOA between Arizona and EPA states the types of permits that the EPA may review. Section IV.D.1. states: "At this time, the EPA waives the right to comment on, or object to, the sufficiency of permit applications, draft permits, proposed final permits (to the extent that it is necessary to submit to the EPA), and final (issued) permits for all discharges or proposed discharges with the exception of the categories described below:

1. Discharges which may affect the waters of another State, Tribe, or nation;
2. Discharges proposed to be regulated by general permits;
3. Discharges from POTWs with a daily average discharge exceeding one million gallons per day (MGD);
4. Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 MGD;
5. Discharges from any major discharger;
6. Discharges from any discharger within any of the industrial categories listed in 40 CFR Part 122 Appendix A;

7. Discharges from any other sources with a daily average discharge exceeding 0.5 MGD, except that EPA may waive review of permits for discharges of non-process wastewater regardless of flow; and
8. POTWs required to have a pretreatment program.”

The EPA retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director a written notice of termination. In addition, the State must supply the EPA with copies of final permits (40 CFR 123.24 (e)). Therefore, all permits may be subject to EPA review.

The nature of EPA’s review of a particular State permit will vary with the size of the facility and discharge, the pollutants being discharged, the nature of the receiving water, and other environmental factors. However, at a minimum, any EPA review would ensure that a State draft permit limits are consistent with CWA requirements to protect human health and the environment. The EPA does this by, among other things, determining whether State permits indeed attain water quality standards. If the permit does not meet those requirements, EPA has the ability to object to a State draft permit during the permit issuance process. The EPA’s authority to object to State issued draft permits is found at CWA Section 402(d) and 40 CFR 123.44(c), which lists nine grounds on which EPA can object to the permit. They are:

1. the permit fails to apply, or to ensure compliance with, any applicable requirement of 40 CFR 123;
2. in specified cases, where the permit would affect waters of another State or Tribe and the written recommendations of the affected State or Tribe have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;
3. the procedures followed for formulating the proposed permit fail in a material respect to comply with procedures required by CWA or by regulations thereunder or by the MOA between the State and EPA;
4. any finding made by the State Director in connection with the proposed permit misinterprets the CWA or any guidelines or regulations under CWA, or misapplies them to the facts;
5. any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information requirements are inadequate to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

6. in the case of any proposed permit with respect to which applicable effluent standards and limitations or standards for sewage sludge use and disposal under sections 301, 302, 306, 307, 318, 403, and 405 of CWA have not yet been promulgated by the EPA, the proposed permit, in the judgement of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this paragraph apply to determinations made pursuant to 40 CFR 125.3(c)(2) in the absence of applicable guidelines, to best management practices under Section 304(e) of CWA, which must be incorporated into permits as requirements under Section 301, 306, 307, 318, 403, or 405, and to sewage sludge use and disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA, as the case may be;
7. issuance of the proposed permit would in any other respect be outside the requirements of CWA, or regulations issued under CWA; and
8. the effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d) (requiring the imposition of water quality based standards where a discharge has the reasonable potential to exceed WQS).
9. (Not relevant in Arizona)

If EPA objects to a State draft permit and EPA's concerns are not addressed by the State, authority to issue the permit passes to EPA. However, EPA must exercise its general objection authority within 30 days and specific objection authority within 90 days of EPA's receipt of the draft permit. In addition to reviewing draft State permits, EPA may also conduct permit quality reviews (PARS) of final State permits to ensure that the State is issuing good permits. The EPA inspects State permittees and can take Federal enforcement actions against State permittees as described in Section 309 of the CWA. Citizen groups can also sue for permit violations under section 505 of the CWA.

The EPA will periodically review State NPDES programs to ensure that such programs are conforming with Federal requirements. EPA can also withdraw its approval for a State to operate a NPDES program when EPA finds on its own initiative or in response to a petition by a third party that the State is not administering the program in accordance with the CWA.

V. Arizona Assumption of the NPDES Program

A. The National MOA and Coordination Procedures Regarding Issuance of State Permits

Through the National MOA, the EPA intends to utilize the appropriate mechanisms in the EPA's oversight role with respect to ADEQ-issued NPDES permits to provide continued protection to federally-listed species and designated critical habitat in Arizona following EPA's approval of the AZPDES program. The EPA and the Service have agreed to follow coordination procedures for the EPA review of permits issued by the AZPDES program. These coordination procedures were designed for all existing and new permitting programs approved by EPA under section 402 of the CWA. The purpose of coordination procedures is to achieve the EPA and the Service's

shared objectives of protecting the quality of waters of the United States and those species that depend on those waters. The coordination procedures are outlined in Section IX of the National MOA, entitled “Permitting Program Activities”.

Implementation of the National MOA procedures will ensure that the Service has an opportunity to review and comment on draft AZPDES permits and work with the State of Arizona and the EPA to address potential effects to federally-listed species and critical habitat. We also note that in Section V of the National MOA, the EPA has agreed to meet regularly with the Service to identify high priority areas of concern, and to assist with determining which categories of NPDES permits should be identified for review by the EPA and the Service for concerns regarding federally-listed species and critical habitat.

Highlights of Section IX of the National MOA that will ensure continued protection of federally-listed species and designated critical habitat in Arizona include the following:

1. The Service will provide the State with information on federally-listed species and any designated critical habitat in the State lands, with special emphasis on aquatic and aquatic-dependent species.
2. The State is obligated under existing CWA regulations to provide notice and copies of draft permits to the Service. EPA will exercise its oversight authority to ensure that the State carries out this obligation. EPA and the Service will work with the State to share information on permits that may raise issues regarding impacts to threatened or endangered species or designated critical habitat.
3. If the Service or the EPA is concerned that a NPDES permit is likely to have more than minor detrimental effects on federally-listed species or critical habitat, the Service or EPA will contact the State (preferably within 10 days of receipt of a notice of a draft State permit) to discuss identified concerns. The Service or EPA will provide appropriate information in support of identified concerns. The Service and EPA will provide copies to each other of comments made to the State on issues related to federally-listed species.
4. If unable to resolve identified issue(s) with the State, the Service will contact EPA not later than five working days prior to the close of the public comment period on the State’s draft NPDES permit. Telephone contacts should be followed by written documentation of the discussion with EPA and include or reference any relevant supporting information.
5. If contacted by the Service, EPA will coordinated with the Service and the State to ensure that the permit will comply with all applicable CWA requirements, including State water quality standards, which include narrative criteria prohibiting toxic discharges, and will discuss appropriate measures protective of federally-listed species and critical habitat.
6. EPA may make a formal objection, where consistent with its CWA authority, or take other appropriate action, where EPA finds that a State NPDES permit will likely have a more than minor detrimental effect on federally-listed species or critical habitat. For those NPDES

permits with detrimental effects on federally-listed species or critical habitat that are minor, it is the intention of the Service and EPA that the Service will work with the State to reduce the detrimental effects stemming from the permit. For those NPDES permits that have detrimental effects on federally-listed species or critical habitat that are more than minor, including circumstances where the discharge fails to ensure the protection and propagation of fish, shellfish and wildlife, and where the State and the Service are unable to resolve the issues, it is the intention of the Service and EPA that EPA would work with the State to remove or reduce the detrimental impacts of the permit, including, in appropriate cases, by objecting to and federalizing the permit where consistent with EPA's CWA authority. EPA will use the full extent of its CWA authority to object to a State permit where EPA finds (taking into account all available information, including any analysis conducted by the Service) that a State permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

7. EPA may review or waive review of draft State NPDES permits (40 CFR 123 (d)). EPA will work with the Service through the local/regional coordinating teams described in the National MOA to help determine which categories of permits should be reviewed for endangered species concerns. If EPA finds that a draft permit has a reasonable potential to have more than a minor detrimental effect on listed species or critical habitat, and review of a draft permit has been waived, EPA will withdraw this waiver during the public comment period (40 CFR 123.24 (e)(1)).
8. If EPA objects to a NPDES permit under paragraph 6 above, EPA will follow the permit objection procedures outlined in 40 CFR 123.44 and coordinate with the Service in seeking to have the State revise its permit. A State may not issue a permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a NPDES permit, EPA will consult with the Service prior to issuance of the permit (as a Federal action) as appropriate under Section 7 consultation if it may affect listed species or critical habitat. EPA will meet ESA requirements as provided in 40 CFR 122.49(c) and 50 CFR part 402 governing the issuance of NPDES permits.

B. Additional Continuing Protections under the ESA, CWA, and AZPDES program

Following AZPDES program approval, dischargers will continue to be subject to the requirements, prohibitions, and implementing regulations of the ESA, CWA, and the AZPDES Program, each of which provides protection to federally-listed species and/or designated critical habitat in addition to that afforded by the coordination procedures described above.

ESA section 9 will continue to apply to State and NPDES permittees. ESA Section 9 and Federal regulations pursuant to ESA section 4(d) state that it is unlawful for any person to "take" any fish or wildlife species that is listed under the ESA. "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct". Harm is further defined by the Service to include significant habitat modification or

degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

Section 7 of the ESA will continue to apply to EPA's proposed approval of the WQS submitted by the State of Arizona where EPA finds that such approval may affect federally-listed species or designated critical habitat. As noted above, WQS are used to develop NPDES permit limits, and are used as the basis for enhancing public health, water quality, and wildlife.

The EPA will oversee the AZPDES permit program. The EPA will review draft permits ensuring, at a minimum, that the permit limits are consistent with CWA requirements. Where permits have been changed as a response to public comment, EPA will have another opportunity to review those permits. For general permits, the EPA may review NOIs to ensure that the NOI meets the requirements of the permit. The EPA has the authority to object to both permits and pretreatment programs. After AZPDES program approval, the EPA will retain authority to enforce based on CWA violations in Arizona. Finally, the EPA will periodically review the State NPDES program to ensure that the program is conforming with Federal requirements. The AZPDES program must be at least as stringent as the CWA and its implementing regulations. There will be no change in enforcement authorities of the EPA as the EPA continues to retain its enforcement authority after program approval.

Public participation is an important avenue for individuals to increase protection for federally-listed species and designated critical habitat. All AZPDES permits and pretreatment programs will be public noticed by ADEQ for 30 days. This period of time provides the opportunity for individuals to become aware of and comment on proposed projects. Public hearings will be held to resolve issues surrounding draft permits if there is significant public interest, or if significant issues or information have been brought to the attention of ADEQ during the comment period that was not considered previously in the permitting process. The permit writer will respond to all comments received during the public notice and hearing. Citizens can sue in response to permit violations under Section 505 of the CWA.

In Arizona there is a native plant law and a permit program to regulate the movement and/or salvage of sensitive plants on the Department of Agriculture's list of protected plants. The list includes federally-listed plant species. The following paragraph is a summary of Arizona's native plant laws and an overview of the permit program:

Native plants cannot be removed from any lands, whether they are owned by a private individual or managed by a government agency, without a permit from the Arizona Department of Agriculture. Theft of protected native plants from private, state, or federal lands may result in a felony charge, as well as native plant law violation. Landowners have the right to destroy or remove plants growing on their private land but 20 to 60 days prior to

the destruction of any protected native plants, landowners are required to notify the Arizona Department of Agriculture. Landowners can also move protected plants to a different location on their property without a permit from the Department of Agriculture. The landowner also has the right to see or give away any plant growing on the land. However, protected native plants growing may not be legally possessed, taken, or transported from the growing site without a permit from the Arizona Department of Agriculture (ARS 3-901 *et seq.*; A.A.C. R3-4-601 *et seq.*).

Status of the Species and Environmental Baseline

The status of all listed species in Arizona can be found at AESO's public website at <http://www.arizonaes.gov> in the "Document Library" under "Documents by Species" and in previous opinions. For a list of all threatened and endangered plants and animals and critical habitats in, adjacent to, or dependent on surface waters in Arizona, refer to Appendix I at the end of the BO. Then, referring to AESO's website, click on the "Document Library", next "Documents by Species", and search for information on a species of choice. Beginning with plants, the species are divided by taxonomic groups. Click on a species, then refer to the "General Species Information" in the Title column. Choose the saguaro cactus icon on the left to access the general species account. Readers need Adobe Acrobat Reader in order to access the species accounts. For more information, scroll down the list of available documents for a species. Some species have "Fact Sheets" available that also provide status and environmental baseline information. Also, additional information on the current status of species and environmental baseline can be found in previous opinions, also at AESO's public website. Once in the "Document Library", go to "Biological Opinions". Search for the most recent opinion on a species of choice by scrolling down the page, scanning the "Listed Species Affected" column on the right.

The environmental baseline includes past and present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all proposed Federal actions in the action area that have undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation process. The environmental baseline defines the current status of the species and its habitat in the action area to provide a platform from which to assess the effects of the action now under consultation.

EPA currently conducts ESA section 7 consultations on its own NPDES permitting actions in Arizona where it finds that its action may affect listed species or critical habitat in, adjacent to, or dependent on surface waters in Arizona. Its consultations have considered all effects of the Federal permitting action, including indirect effects and the effects of interrelated and interdependent actions. Effects considered have included, in some cases, construction activities and groundwater pumping. There have been a total of 17 Pima pineapple cactus formal consultations since listing; five of them have been with EPA, all occurring after 2000. A total of 2,423 acres of Pima pineapple cactus have been conserved in some manner. Of that amount, 1,146 acres (47%) were conserved through conservation measures gained through section 7 consultation with EPA, specifically on indirect effects from authorizing general construction storm water permits.

Similarly, the conservation status of the cactus ferruginous pygmy-owl (pygmy-owl) has benefitted from our ability to conduct section 7 interagency consultations with EPA. We have issued 12 residential and commercial development biological opinions involving the pygmy-owl to EPA in northwest Tucson since 1999; these total 7,517.86 acres. Through the section 7 consultation process, we work with developers to reduce development impacts in pygmy-owl breeding areas, and maintain dispersal and movement corridors to reduce the likelihood of genetically isolated populations. We are in informal consultation for 16 residential and commercial development projects throughout Maricopa, Pinal, and Pima counties solely because of the EPA section 7 consultation responsibilities; these projects consist of approximately 30,000 acres and would most likely require formal consultation if they remain a Federal action. Absent a Federal nexus, projects planned for areas where pygmy-owls are present will be reviewed for the appropriateness of developing a habitat conservation plan under section 10 of the ESA.

Prior to listing of the pygmy-owl and section 7 consultations, most construction in pygmy-owl habitat was high-density with no conservation. Pygmy-owls do not utilize areas of high-density development; in addition to the loss of habitat, the resulting habitat fragmentation affects dispersal, courtship, and pair bonding. The northwest Tucson population consistently has the highest known productivity of young produced each year and contains 7 of the 18 known pygmy-owls in the State, or approximately 40% of the known population.

We have received 104 NOIs for authorization under the construction stormwater permit. Out of the 104 NOIs, we believe that 72 NOI may be a concern for either the Pima pineapple cactus, the pygmy-owl, or both; the development that will occur according to these NOIs will total approximately 2,633 acres. Of these NOIs, project development will affect 18 acres of Pima pineapple cactus habitat, 1,267 acres of pygmy-owl habitat, and 1,348 acres of habitat potentially occupied by both Pima pineapple cactus and pygmy-owl habitat.

In summary, we currently consult with the EPA on NPDES permits and NOIs under the general construction stormwater permit, where listed species and/or critical habitat are likely to be adversely affected by construction activities. This consultation process has provided some measures to protect species or minimize effects to species and critical habitat, including the Pima pineapple cactus, razorback sucker, Gila topminnow, southwestern willow flycatcher, and cactus ferruginous pygmy-owl.

Effects of the Action

Effects of the action refer to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated and interdependent with that action, that will be added to the environmental baseline. 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. Indirect effects are those that are caused by the proposed action and are later in time, but are still

reasonably certain to occur (50 CFR 402.02). Therefore, when examining indirect effects we first determine whether a Federal action causes an indirect effect. We then analyze whether an indirect effect caused by the action is reasonably certain to occur.

While reviewing this above referenced EPA approval, we have spent considerable time analyzing direct and indirect effects. In the course of our analysis, we have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits. We have stated that the loss of these conservation benefits is an indirect effect of the approval. Furthermore, we have stated that the loss of conservation benefits as an indirect effect will appreciably reduce the conservation status of the cactus ferruginous pygmy-owl and the Pima pineapple cactus.

After further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action. This proposed approval does not cause the loss of conservation benefits for listed species or critical habitat. A loss of section 7 authority over non-Federal actions in the action area does not necessarily mean that listed species in the action area will lose all opportunity to receive conservation benefits stemming from the ESA. Sections 9 and 10 of the ESA, and section 7 for other Federal agency actions in the action area, still provide some measure of protection and conservation of the species (see discussion below).

Regarding causation, the FWS uses the “but for” test. This test means that a Federal action is the cause of an effect if, and only if, “but for” the action the effect would not have occurred. Put another way, the action (EPA approval of NPDES to the State of Arizona) must have been a substantial factor in the occurrence of the effect (loss of conservation benefit). This test assumes that a Federal action cannot be the cause of some effect unless the Federal action is necessary for the occurrence of the effect. If the effect occurs whether the proposed Federal action goes forward or not, then there is no “but for” causation link between the proposed Federal action and the effect. In order for an indirect effect to be reasonably certain to occur, it must be more than speculative but does not have to be absolutely certain. For a loss of conservation benefit to be an indirect effect, the loss of conservation benefit must also be “reasonably certain to occur”. Whether or not actions are reasonably certain to occur is evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by an agency in an action area; or they are a logical extension of the proposed action.

In regards to water quality-related impacts, we believe that there will not be any direct effects of the action since the proposed action is merely an administrative transfer of authority. Although there will likely be indirect effects stemming from water quality issues, the location, frequency, and magnitude of those effects are unknown at this time and cannot be quantified or summarized. Further, when these effects occur, we believe these indirect actions will be adequately addressed by the resolution processes established in the National MOA.

We do not believe that the approval of the program will cause any increased development or an increase in permit requests under the AZPDES program. Developments are driven by any

number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval. The approval does not provide an incentive to develop in the action area, as would a new highway or water line. The approval merely changes the NPDES regulating authority from EPA to the State of Arizona. While development may be reasonably certain to occur in the future, EPA's approval action will not cause development. Therefore, development is not an indirect effect of the approval action. Further, loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Finally, EPA Region 9 has determined that it does not have the legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS, including the authority to object to such permits based on grounds other than guidelines and requirements of the CWA such as non-water quality related impacts to listed species and critical habitat. EPA Region 9 believes that its ability to address any FWS concerns arising in this consultation is limited by its CWA authorities. We defer to EPA in regard to its interpretation of the CWA. Accordingly, even if section 7 consultation was to occur after a state assumes the program, the conservation benefits that actually could be obtained through consultation are speculative at best.

Further, it is speculative to conclude that the loss of conservation benefit is a necessary result of EPA's approval of the NPDES program to the State of Arizona. It is speculative as to whether or not future development will seek and acquire section 10 permits that will require developments to minimize and mitigate the effects of their action to the maximum extent practicable. At this time, we cannot say with any degree of reasonable certainty that section 10 will not provide some level of mitigation and minimization of development impacts, and cannot predict the degree to which future section 10 processes will aid in species conservation when compared to the benefits that have been historically provided by section 7. It is also speculative as to whether or not more or less conservation benefit will be provided through State and local law and/or regulations. For example, a Sonoran Desert Multi-Species Conservation Plan is currently being drafted to protect the species of greatest concern including cactus ferruginous pygmy-owl and Pima pineapple cactus. Clearly section 9 of the ESA precludes take of listed species, which precludes significant modification of habitat at areas where pygmy-owls are present. Therefore, the loss of conservation benefit is speculative, unpredictable, and unquantifiable; it is not a logical extension of EPA's approval action and is thus not an indirect effect of the approval action. Further, even if the loss of conservation benefit was an indirect effect, it cannot be said that the approval action will "likely jeopardize" the species or "adversely modify" critical habitat, because at this time and for all the reasons discussed above, the amount and location of future development and required mitigation are speculative.

Cumulative Effects

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

There are many private, State, and local actions that are going to occur in the future which have the potential to affect the cactus ferruginous pygmy-owl, Pima pineapple cactus, and other listed species and critical habitats. Although we are concerned and believe that these future, non-Federal actions may lead to impacts that will erode the environmental baseline of the species such that future Federal actions may cause jeopardy, it is not the proposed action itself that is jeopardizing these species.

Pima County has been working on a multi-species conservation plan since 1999. The intent is to produce a Habitat Conservation Plan (HCP) and submit an application for a section 10(a)(1)B permit. It is not known what species will be included in the permit application or what conservation measures will be included in the HCP. There could be some conservation benefits for species addressed in this BO.

Conclusion

After reviewing the current status of all the species and critical habitats in, adjacent to, or dependent on surface waters in Arizona listed in Appendix I, the environmental baseline for the State of Arizona, the effects of the proposed AZPDES program approval and the cumulative effects, it is our biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of these species, and is not likely to destroy or adversely modify designated or proposed critical habitat.

While reviewing this above referenced approval, the FWS has spent considerable time analyzing direct and indirect effects. In the course of this analysis, our field office staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section 7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmy-owl and the Pima pineapple cactus. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.

In changing from a Federal permitting program to a State permitting program, the permit-related section 7 processes for consultation will no longer apply. Essentially, there will be no substantive change in the permit program, but there will be a reduction in the number of mechanisms available to both of our agencies to protect federally-listed species and critical

habitat in Arizona. We believe that the assumption of the program by the State of Arizona will not cause development, and concur that EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

Amount or Extent of Take

The Fish and Wildlife Service does not anticipate the proposed action will incidentally take any species listed in Appendix I.

Disposition of Dead or Injured Listed Species

Upon locating a dead, injured, or sick listed species initial notification must be made to the Service's Law Enforcement Office, Federal Building, Room 8, 26 North McDonald, Mesa, Arizona (telephone: 480/835-8289) within three working days of its finding. Written notification must be made within five calendar days and include the date, time, and location of the animal, a photograph if possible, and any other pertinent information. The notification shall be sent to the Law Enforcement Office with a copy to this office. Care must be taken in handling sick or injured animals to ensure effective treatment and care, and in handling dead specimens to preserve the biological material in the best possible state.

CONSERVATION RECOMMENDATION

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information.

1. We recommend that the EPA provide funding to the FWS to conduct section 10 Habitat Conservation Plans with private landowners.

REINITIATION NOTICE

This concludes formal consultation on the AZPDES program authorization as outlined in the BE (EPA 2002). As provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

We look forward to working with both the EPA and ADEQ in the future for the recovery and conservation of listed species and critical habitat. We think that the program transfer to Arizona will result in greater water quality and improved coordination among agencies. No further section 7 consultation is required for this project at this time. Should project plans change, or if additional information on the distribution of listed species or critical habitat becomes available, the conclusions herein may need to be reconsidered. If we can be of further assistance in this matter, please contact Carrie Marr (x214) or Debra Bills (x239).

Sincerely,

/s/ Steven L. Spangle
Field Supervisor

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
Assistant Field Supervisor, Fish and Wildlife Service, Tucson, AZ
Arizona Department of Environmental Quality, Phoenix, AZ (Attn: Karen Smith)
John Kennedy, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ

LITERATURE CITED

U.S. Environmental Protection Agency (EPA). 2002. Biological evaluation for Endangered Species Act consultation on USEPA's proposed approval of the State of Arizona's NPDES program.

Appendix I: List of federally-listed species and critical habitat in, adjacent to, or dependent on surface waters in Arizona. 26

Federally-listed species and critical habitat				
	Common Name	Scientific Name	Critical Habitat	Species Type
1	ARIZONA AGAVE	<i>Agave arizonica</i>	NO	PLANT
2	ARIZONA CLIFFROSE	<i>Purshia subintegra</i>	NO	PLANT
3	ARIZONA HEDGEHOG CACTUS	<i>Echinocereus triglochidiatus</i> <i>var. arizonicus</i>	NO	PLANT
4	BRADY PINCUSHION CACTUS	<i>Pediocactus bradyi</i>	NO	PLANT
5	CANELO HILLS LADIES' TRESSES	<i>Spiranthes delitescens</i>	NO	PLANT*
6	COCHISE PINCUSHION CACTUS	<i>Coryphantha robbinsiorum</i>	NO	PLANT
7	HOLMGREN MILK-VETCH	<i>Astragalus holmgreniorum</i>	NO	PLANT
8	HUACHUCA WATER UMBEL†	<i>Lilaeopsis schaffneriana</i> ssp. <i>recurva</i>	YES*	PLANT*
9	JONES' CYCLADENIA	<i>Cycladenia humilis</i> var. <i>jonesii</i>	NO	PLANT
10	KEARNY'S BLUE STAR	<i>Amsonia kearneyana</i>	NO	PLANT
11	NAVAJO SEDGE†	<i>Carex specuicola</i>	YES*	PLANT*
12	NICHOL'S TURK'S HEAD CACTUS	<i>Echinocactus</i> <i>horizonthalonius</i> var. <i>nicholii</i>	NO	PLANT
13	PEEBLES NAVAJO CACTUS	<i>Pediocactus peeblesianus</i> var. <i>peeblesianus</i>	NO	PLANT
14	PEIRSON'S MILKVETCH	<i>Astragalus magdalena</i> e var. <i>peirsonii</i>	NO	PLANT
15	PIMA PINEAPPLE CACTUS	<i>Coryphantha scheeri</i> var. <i>robustispina</i>	NO	PLANT
16	SAN FRANCISCO PEAKS GROUNDSEL†	<i>Senecio franciscanus</i>	YES	PLANT
17	SENTRY MILK-VETCH	<i>Astragalus cremnophylax</i> var. <i>cremnophylax</i>	NO	PLANT
18	SILER PINCUSHION CACTUS	<i>Pediocactus sileri</i>	NO	PLANT
19	WELSH'S MILKWEED†	<i>Asclepias welshii</i>	YES	PLANT
20	ZUNI FLEABANE	<i>Erigeron rhizomatus</i>	NO	PLANT

	Federally-listed species and critical habitat			
	Common Name	Scientific Name	Critical Habitat	Species Type
21	DESERT TORTOISE, MOHAVE POPULATION†	<i>Gopherus agassizii</i>	YES	REPTILE
22	NEW MEXICAN RIDGE-NOSED RATTLESNAKE†	<i>Crotalus williardi obscurus</i>	YES	REPTILE
23	KANAB AMBERSNAIL	<i>Oxyloma haydeni kanabensis</i>	YES*	MOLLUSK*
24	BLACK-FOOTED FERRET	<i>Mustela nigripes</i>	NO	MAMMAL
25	HUALAPAI MEXICAN VOLE	<i>Microtus mexicanus hualapaiensis</i>	NO	MAMMAL
26	LESSER LONG-NOSED BAT	<i>Leptonycteris curasoae yerbabuena</i>	NO	MAMMAL
27	MEXICAN GRAY WOLF	<i>Canis lupus baileyi</i>	NO	MAMMAL
28	MT. GRAHAM RED SQUIRREL†	<i>Tamiasciurus hudsonicus grahamensis</i>	YES	MAMMAL
29	OCELOT	<i>Leopardus (=Felis) pardalis</i>	NO	MAMMAL
30	SONORAN PRONGHORN	<i>Antilocarpa americana sonoriensis</i>	NO	MAMMAL
31	APACHE (ARIZONA) TROUT	<i>Oncorhynchus apache</i>	NO	FISH*
32	BEAUTIFUL SHINER†	<i>Cyprinella formosa</i>	YES*	FISH*
33	BONYTAIL CHUB†	<i>Gila elegans</i>	YES*	FISH*
34	COLORADO PIKEMINNOW	<i>Ptychocheilus lucius</i>	NO	FISH*
35	DESERT PUPFISH†	<i>Cyprinodon macularius</i>	YES*	FISH*
36	GILA TOPMINNOW	<i>Poeciliopsis occidentalis occidentalis</i>	NO	FISH*
37	GILA TROUT	<i>Onchorhynchus gilae</i>	NO	FISH*
38	HUMPBACK CHUB†	<i>Gila cypha</i>	YES*	FISH*
39	LITTLE COLORADO SPINEDACE†	<i>Lepidomeda vittata</i>	YES*	FISH*
40	LOACH MINNOW†	<i>Tiaroga cobitis</i>	YES*	FISH*
41	RAZORBACK SUCKER†	<i>Xyrauchen texanus</i>	YES*	FISH*

Federally-listed species and critical habitat				
	Common Name	Scientific Name	Critical Habitat	Species Type
42	SONORA CHUB†	<i>Gila ditaenia</i>	YES*	FISH*
43	SPIKEDACE†	<i>Meda fulgida</i>	YES*	FISH*
44	VIRGIN RIVER CHUB†	<i>Gila robusta seminuda</i>	YES*	FISH*
45	WOUNDFIN†	<i>Plagopterus argentissimus</i>	YES*	FISH*
46	YAQUI CATFISH†	<i>Ictalurus pricei</i>	YES*	FISH*
47	YAQUI CHUB†	<i>Gila purpurea</i>	YES*	FISH*
48	YAQUI TOPMINNOW	<i>Poeciliopsis occidentalis sonorien sis</i>	NO	FISH*
49	BALD EAGLE	<i>Haliaeetus leucocephalus</i>	NO	BIRD*
50	BROWN PELICAN	<i>Pelecanus occidentalis californicus</i>	NO	BIRD*
51	CACTUS FERRUGINOUS PYGMY-OWL†***	<i>Glaucidium brasilianum cactorum</i>	YES	BIRD
52	CALIFORNIA CONDOR	<i>Gymnogyps californianus</i>	NO	BIRD*
53	MASKED BOBWHITE	<i>Colinus virginianus ridgewayi</i>	NO	BIRD
54	MEXICAN SPOTTED OWL†	<i>Strix occidentalis lucida</i>	YES	BIRD
55	NORTHERN APLOMADO FALCON	<i>Falco fem oralis septentrionalis</i>	NO	BIRD*
56	SOUTHWESTERN WILLOW FLYCATCHER	<i>Empidonax trailii extimus</i>	NO	BIRD*
57	WHOOPING CRANE†	<i>Grus americana</i>	YES*	BIRD*
58	YUMA CLAPPER RAIL	<i>Rallus lon girostris yumanensis</i>	NO	BIRD*
59	SONORA TIGER SALAMANDER	<i>Ambystoma tigrinum stebbinsi</i>	NO	AMPHIBIAN*
60	CHIRICAHUA LEOPARD FROG**	<i>Rana chiricahuensis</i>	NO	AMPHIBIAN*

*Aquatic and aquatic dependent species for the National Section 7 Consultation on Aquatic Life Criteria, as determined by the Service.

†Species with designated or proposed critical habitat in Arizona.

** 67 FR 40790. June 13, 2002. Endangered and Threatened Wildlife and Plants; Listed of the

Chiricahua Leopard Frog (*Rana chiricahuensis*); Final Rule.

*** 67 FR 71032. November 27, 2002. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl (*Glaucidium brasilianum cactorum*); Proposed Rule.