

**LITIGATION UPDATE**

**By**

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## I. CHALLENGE TO PYGMY-OWL LISTING – *NAHB v. Norton*.

The litigation challenging the listing of the Arizona population of the cactus ferruginous pygmy-owl as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 – 1544, continues, with a second appeal now pending before the Ninth Circuit Court of Appeals. Last year, the Ninth Circuit held in *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, (9<sup>th</sup> Cir. 2003), that the U.S. Fish and Wildlife Service’s (“FWS”) decision to list Arizona pygmy-owl population as an endangered species was arbitrary and capricious. The Ninth Circuit’s opinion effectively declared that the pygmy-owl population is not a “species,” i.e., not an entity that is eligible for listing under the ESA. However, earlier this year, the district court declined to set aside the listing on equitable grounds, from which ruling Home Builders have appealed.

### A. The Ninth Circuit’s 2003 Opinion.

The central issue in Home Builders’ prior appeal was whether, in listing the Arizona pygmy-owl population as an endangered species, FWS violated its *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act*, 61 Fed. Reg. 4,722 (Feb. 7, 1996) (“DPS Policy”). Normally, only species or subspecies of plants and animals qualify for listing under the ESA. See 16 U.S.C. § 1532(16) (definition of “species”). In certain limited circumstances, however, a distinct population segment or “DPS” of vertebrate fish or wildlife may be treated as a species and be eligible for listing under the ESA. Under the DPS Policy, a population of animals may be listed only if that population is both “discrete” (i.e., separated from other populations of the same species) and “significant” (i.e., important to the welfare of the species as a whole). DPS Policy, 61 Fed. Reg. at 4,725. Unless both criteria are satisfied, the population is not eligible for listing and protection under the ESA.

The Ninth Circuit held that the Listing Rule violated the DPS Policy’s test for “significance” because FWS ignored the larger, contiguous pygmy-owl population in western Mexico and focused solely on the fringe populations in southern Arizona and Texas. The court rejected the argument that species’ populations in the United States are more important than species’ populations in foreign countries, stating “[u]nder the DPS Policy, a discrete population segment must be significant ‘to the taxon to which it belongs.’ . . . The FWS’s argument, however, emphasizes the significance of the Arizona pygmy-owls to the United States, not to its taxon.” *Id.*, 340 F.3d at 852 (quoting DPS Policy, 61 Fed. Reg. at 4,725). Therefore, the court held FWS had no legitimate basis, consistent with the criteria in the DPS Policy, for concluding that the Arizona pygmy-owl population is significant to the taxon cactus ferruginous pygmy-owl. *Id.*

Although the Ninth Circuit held that FWS acted arbitrarily and capriciously in designating the Arizona pygmy-owl population as a DPS, and reversed the district court’s judgment, the court did not set aside the listing rule. Instead, the Court remanded the case “for further proceedings consistent with [its] opinion.” *Id.*

## **B. The Proceedings on Remand to the District Court.**

On remand to the district court, Home Builders requested entry of a final judgment vacating the pygmy-owl listing rule pursuant to Rule 58, *Fed.R.Civ.P.* FWS conceded that the listing rule should be vacated based on the Ninth Circuit's opinion. However, the intervenor group, headed by Defenders of Wildlife, opposed vacating the listing rule based on the small number of pygmy-owls known to exist in southern Arizona. Despite their disagreement on how the unlawful rule should be treated, all parties agreed that the listing rule had been found to be arbitrary and capricious based on a substantive violation of the ESA and the DPS Policy. The district court stated: "The question thus becomes whether the Court may leave a *substantively-flawed agency rule* in place pending remand to the agency for reconsideration, or must vacate such a rule." Order (filed June 28, 2004) at 3-4 (emphasis supplied).<sup>1</sup>

Home Builders argued that district court must follow the plain language of the Administrative Procedure Act ("APA"), which governs judicial review of FWS decisions under the ESA. As discussed below, the APA provides that a court "shall hold unlawful and set aside agency actions" determined to be arbitrary, capricious, an abuse of discretion, or otherwise unlawful. 5 U.S.C. § 706(2)(A). The district court, however, concluded that it was not required to vacate the pygmy-owl listing rule despite its substantive defects. Instead, the district court evaluated a series of "equitable concerns" to conclude that the rule should be left in place:

The Court will remand the Listing Rule to Defendant FWS for reconsideration but leave the Listing Rule in place for the duration of the agency's deliberations. Therefore final judgment is inappropriate at this time.

*Id.* at 10. The district court ordered FWS to provide a status report concerning its "reconsideration" of both the listing rule and the rule designating critical habitat for the pygmy-owl (which was previously set aside by the district court) by January 31, 2005. However, the district court provided no deadline for completing the remand proceeding or other instructions. *Id.* at 12.

## **C. Home Builders' New Appeal.**

As a consequence of the district court's ruling, the pygmy-owl listing rule remains in effect and is being enforced even though it has been found to be defective. On August 3, 2004, Home Builders filed their notice of appeal of the district court's order. The issue on appeal is a narrow administrative law question: Whether the district court was required by the judicial review provision of the APA to vacate the pygmy-owl listing rule in light of Ninth Circuit's holding in *Nat'l Ass'n of Home Builders* that the rule is arbitrary and capricious due to a substantive violation of the applicable law. The APA's judicial review provision, Section 10(e), specifically provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret

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<sup>1</sup> A copy of the district court's order is attached.

constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. ***The reviewing court shall ... (2) hold unlawful and set aside agency action,*** findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... .

5 U.S.C. § 706 (emphasis supplied). Thus, on its face, the APA provides that federal agency actions found to be arbitrary, capricious or otherwise unlawful must be set aside by the court.

In the past, the Ninth Circuit has generally followed the plain language of the APA, and has vacated agency actions found to be arbitrary, capricious or otherwise unlawful.

***An administrative decision involving the ESA will be set aside*** if the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action is found to be without observance of the procedure required by law.

*Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S. Dept. of Energy*, 232 F.3d 1300, 1305 (9th Cir. 2000) (emphasis supplied). *See also, e.g., Bonnicksen v. United States*, 367 F.3d 864, 879-80 (9th Cir. 2004) (“We must set aside the Secretary’s decision if it was ‘arbitrary’ or ‘capricious’ because the decision was based on inadequate factual support.”); *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1118 (9th Cir. 2004) (“We must set aside the Corps’ actions, findings, or conclusions if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”).

The Ninth Circuit has allowed agency actions to stand where the agency’s violation is *procedural* in nature and can be corrected by completing the omitted procedure. In *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392, 1405-06 (9<sup>th</sup> Cir. 1995), FWS was directed to allow public review and comment on an undisclosed report prepared by the USGS. However, the agency’s rule listing the Bruneau Hot Springs snail was allowed to remain in effect. Similarly, in *Western Oil and Gas Ass’n v. U.S. Environmental Protection Agency*, 633 F.2d 803, 813 (1980), although the EPA was directed to provide opportunity for, and to consider comments on, an agency rule implementing the Clean Air Act, the rule was allowed to remain in effect. The Ninth Circuit has not specifically addressed whether a *substantively* defective rule may be left in place and enforced while the agency decides what to do on remand.

There are decisions from other federal circuits (none of which involved the ESA) in which a court has allowed defective rules and other agency actions to remain effective during remand in order to allow the agency an opportunity to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision. Typically, in these cases, the court has found that the agency failed to respond to comments from the regulated community or overlooked a key issue during its decision-making process. For example, the cases cited by district court as support for allowing the pygmy-owl listing rule to remain in effect, such as *Fox Television Stations, Inc. v. Fed. Com. Comm’n*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002); *Central Me. Power Co. v. Fed. Energy Reg. Comm’n*, 252 F.3d 34, 47-48 (1st Cir. 2001); *Central and South West Serv., Inc. v. U.S. Environmental Protection Agency*, 220 F.3d 683, 692 (5th Cir. 2000), involved that situation. In this case, however, the nature and extent of the

substantive defects in the listing rule arguably go well beyond the limited exception to *vacatur* provided in this line of decisions.<sup>2</sup>

On August 16, 2004, Home Builders moved to expedite their new appeal. Both FWS and Defenders of Wildlife objected. In addition, the intervenors moved to dismiss the appeal on jurisdictional grounds, contending that the district court's order is interlocutory in nature and cannot be appealed until a final judgment is entered. As this paper is written, the Ninth Circuit has not ruled on either motion. Home Builders filed their opening brief with the court on October 1, 2004.

## **II. CHALLENGE TO AZPDES PROGRAM – *Defenders of Wildlife v. Flowers*.**

On December 5, 2002, the U.S. Environmental Protection Agency (“EPA”) approved the State of Arizona’s application to administer the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) Program in Arizona. *See Approval of Application by Arizona to Administer the National Pollution Elimination System (NPDES) Program; Arizona*, 67 Fed Reg. 79,629 (Dec. 30, 2002). The NPDES Program is now being administered locally by the Arizona Department of Environmental Quality (“ADEQ”) as the Arizona Pollutant Discharge Elimination System (“AZPDES”) Program, rather than by EPA’s Region 9 Office in San Francisco, California. The approval represents the culmination of a multi-year effort by ADEQ, interested parties and industry groups to develop the necessary legal and administrative structure to support the AZPDES Program. This litigation challenges EPA’s decision to transfer permitting authority to Arizona based on the alleged loss of “conservation benefits” to listed species that previously resulted when EPA administered the program.

### **A. Background on EPA’s Approval of the AZPDES Program.**

Prior to EPA’s decision to transfer NPDES permitting authority to Arizona, EPA authorized the discharge of pollutants into what EPA categorized as “navigable waters” and their tributaries located in Arizona pursuant to the Clean Water Act (“CWA”). Under the CWA, the “discharge of any pollutant” is prohibited without a permit. 33 U.S.C. § 1311(a). The NPDES Program, created by Section 402 of the CWA, authorizes the permitting authority (EPA or a transferee State) to issue permits for “the discharge of any pollutant, or combination of pollutants.” 33 U.S.C. § 1342(a)(1). *E.g., Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1009-10 (9<sup>th</sup> Cir. 2002) (summary of CWA and NPDES Program); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 530 (9<sup>th</sup> Cir. 2001)

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<sup>2</sup> Even where a decision is remanded to allow an agency to provide an adequate explanation, however, some judges maintain that the action must be vacated. *E.g., Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (J. Sentelle dissenting) (“In my view, ‘[o]nce a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court – in the absence of any contrary statute – to vacate the agency’s decision.’”), *quoting Checkosky v. Securities & Exchange Comm’n*, 23 F.3d 452, 491 (D.C. Cir. 1994) (J. Randolph dissenting). “The remand-only disposition ... is contrary to law. It rests on thin air. No statute governing judicial review of agency action permits such a disposition and the controlling statute – 5 U.S.C. § 706(2)(A) – flatly prohibits it.” *Checkosky*, 23 F.3d at 490 (J. Randolph dissenting).

(same).

Under Section 402(b) of the CWA, a state may obtain authority to administer the NPDES Program by demonstrating that it will comply with nine enumerated requirements. 33 U.S.C. § 1342(b)(1)-(9). Put simply, a state must demonstrate in its application that it has authority to issue permits which comply with the CWA, has authority to impose civil and criminal penalties for permit violations, and has authority to ensure that the public is given notice and opportunity for a hearing on each proposed permit. *See generally* 40 C.F.R. § 123.

If the statutory and regulatory requirements in CWA Section 402(b) and 40 C.F.R. Part 123 are met, “[t]he Administrator shall approve each such submitted program . . . .” 33 U.S.C. § 1342(b). As EPA explained in its notice regarding Arizona’s application, Section 402(b) “requires EPA to authorize a State to administer an equivalent state program, upon the Governor’s request, provided the State has appropriate legal authority and a program sufficient to meet the Act’s requirements.” *State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona*, 67 Fed. Reg. 49,916 (August 1, 2002).

The State of Arizona submitted its initial application to EPA in December 2001, which was found to be incomplete. Ultimately, in June 2002, Arizona was found to have submitted a complete package for partial program approval, including most discharges of wastewater subject to the federal NPDES Program (e.g., municipal wastewater and storm water point source discharges, pretreatment of wastewater, and wastewater and storm water discharges from industrial facilities). Believing its transfer of permitting authority to Arizona was subject to Section 7 of the ESA, EPA initiated consultation with FWS pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and FWS’s implementing regulations, 50 C.F.R. Part 402.

As the consultation proceeded, local FWS field staff expressed concern over the loss of a “federal nexus” required to trigger ESA Section 7’s obligations. Specifically, the local staff worried that AZPDES permits issued to developers and other landowners without Section 7 consultation would adversely impact two terrestrial species, the pygmy-owl and the Pima pineapple cactus, and suggested that a “jeopardy” determination may be appropriate unless EPA agreed to impose conditions on Arizona under which Section 7 consultation would continue to be triggered by permitting decisions. EPA’s Region 9 staff disagreed with FWS’s analysis of the effects of the proposed action, and contended that EPA lacked authority to impose ESA-based conditions in transferring permitting authority to a state. This dispute is summarized in the two agencies’ interagency elevation document:

FWS believes that Arizona’s draft NPDES program will not provide the same level of protection to listed species affected by *non-water quality related impacts* related of [sic] State permitting actions as the Federal NPDES program . . . . FWS is concerned that, following EPA Region 9’s approval action, endangered species, in particular the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted *in the future* by projects that will require State NPDES permits issued by the State of Arizona. The FWS’s concerns

involve the indirect effects of permit issuance from *non-water-quality-related impacts* from these project, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. *The concerns do not involve water quality issues related to the discharges that will be regulated under the State NPDES permits.*

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*Based on the non-water-quality-related indirect impacts described above, FWS may conclude that EPA Region 9's approval of the Arizona NPDES program could result in "jeopardy" to the cactus ferruginous pygmy-owl and/or the Pima pineapple cactus. . . . [FWS has also agreed in discussions with EPA Region 9 that any water-quality-related impacts associated with Arizona NPDES permits following the Region's proposed approval action are not likely to adversely affect listed species or their critical habitat, or that any adverse effects would be addressed adequately through the coordination procedures outlined in the National MOA cited above, as described in more detail below. The issue here is whether those procedures and EPA Region 9's legal authorities will or can allow EPA Region 9 to object to State NPDES permits to address indirect impacts to terrestrial species not resulting from water quality. [Emphasis supplied.]*

Due to this conflict, and in accordance with the protocol developed to resolve such disputes,<sup>3</sup> the agencies "elevated" the issue to a higher level for review. Senior FWS officials clarified that the agency's field staff's interpretation of the jurisdiction and legal authority of EPA under CWA Section 402(b) was erroneous, concluding that the "biological effects of this action will be minimal due to the administrative nature of the proposed action."

On December 3, 2002, FWS issued a biological opinion (hereinafter, "AZPDES BO"), concluding that approval of the AZPDES Program would not jeopardize any listed species or adversely modify critical habitat. In reaching this conclusion, FWS determined, first, that the loss of Section 7-related "conservation benefits" is not an indirect effect of the action because approval of the AZPDES Program does not cause the loss of these benefits. Second, approval of the program will not cause any increased development or an increase in permit requests. Whether a property is developed depends on a variety of different factors, and is not driven by whether EPA or the state issues NPDES permits. Third, FWS acknowledged that EPA does not have legal authority to regulate the non-water-quality-related impacts associated with state permit programs, and cannot object to state-issued permits on grounds other than those set forth in the CWA and its implementing regulations. Finally, FWS found that to the extent there are

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<sup>3</sup> See *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; Notice*, 66 Fed. Reg. 11,202 (Feb. 22, 2001).

future effects attributable to approval of the AZPDES Program, those effects are speculative in nature and are not an indirect effect of the action. AZPDES BO at 19-21. *See* 50 C.F.R. § 402.02 (definition of “effects of the action”).<sup>4</sup>

Ultimately, on December 5, 2002, EPA determined that Arizona had satisfied all of the requirements imposed by CWA Section 402(b) and its implementing regulations, and approved both the AZPDES Program and the transfer of the permitting authority to Arizona.

### **B. The Pending Litigation.**

On December 16, 2002, Defenders of Wildlife and Center for Biological Diversity (“Defenders”) filed an amended complaint in the *Defenders of Wildlife v. Flowers* case pending before the district court in Tucson, adding a claim challenging the AZPDES BO on the basis that FWS failed to properly evaluate and consider the indirect effects on listed species, particularly the pygmy-owl, caused by the transfer of permitting authority to Arizona. Defenders then moved for a preliminary injunction against FWS and the AZPDES BO, and argued that by operation of law, an injunction against the AZPDES BO would prevent EPA from transferring permitting authority to Arizona.

Subsequently, on April 2, 2003, Defenders filed a petition with the Ninth Circuit seeking direct review of EPA’s decision to approve the AZPDES program under the CWA’s judicial review provision, 33 U.S.C. § 1369(b)(1), which permits “interested persons” to seek judicial review of certain actions by EPA, including determinations concerning state permitting programs under CWA Section 402(b), in the circuit courts of appeal.

In the meantime, on June 2, 2003, after briefing on Defenders’ motion for preliminary injunction was completed and converted by agreement of the parties into a dispositive motion, the district court ruled that it did not have jurisdiction over Defenders’ challenge to the AZPDES BO. Order (filed June 2, 2003). The court subsequently ordered that the claim be severed and transferred to the Ninth Circuit, where it was consolidated with the pending direct review proceeding initiated in April 2003. Order (filed July 17, 2003). The consolidated cases have been briefed, and oral argument is set for November 1, 2004.

### **C. Important Issues on Appeal.**

The challenge to AZPDES Program raises several significant issues under the ESA and CWA, including Defenders’ Article III standing, the Ninth Circuit’s jurisdiction to decide claims based on an alleged violation of ESA Section 7 under the CWA’s judicial review provision, whether EPA was required to comply with Section 7 in approving the AZPDES Program, and whether EPA and FWS properly characterized the federal action and its effects in concluding that approval of the AZPDES Program will not jeopardize any listed species. The discussion that follows will focus on the latter issues, which are significant and, if squarely addressed by the court, may result in an important ruling.

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<sup>4</sup> Under this definition, “indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur.” *Id.*

## 1. Was EPA's Approval of the AZPDES Program and Transfer of Permitting Authority Subject to Section 7 Consultation?

Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2). The term “action” is broadly defined in FWS’s regulations to mean “all activities or programs of any kind.” 50 C.F.R. § 402.02 (definition of “action”).<sup>5</sup> However, FWS’s rules governing interagency consultation also provide that “Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.” 50 C.F.R. § 402.03 (emphasis added). See also *Environmental Protection Information Center v. The Simpson Timber Co.*, 255 F.3d 1073, 1083 (9<sup>th</sup> Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9<sup>th</sup> Cir. 1995); *Platte River Whooping Crane Trust v. F.E.R.C.*, 962 F.2d 27 (D.C. Cir. 1992). Thus, if there is no federal discretion, there is no “action” for Section 7 consultation purposes.

In this case, the federal “action” potentially triggering an obligation to consult under Section 7 was EPA’s approval of the AZPDES Program and transfer of permitting authority to the State of Arizona. EPA determined that the requirements set forth in CWA Section 402(b) and its implementing regulations were satisfied. Arguably, then, EPA’s approval of the AZPDES Program and transfer of permitting authority was mandatory, i.e., EPA could not deny the state’s application or impose additional conditions and requirements intended to protect species listed under the ESA. EPA’s decision was, therefore, not an “action” as defined by the ESA, and ESA Section 7 consultation was not required.

This issue was addressed by the Fifth Circuit Court of Appeals in *American Forest & Paper Ass’n v. U.S. Environmental Protection Agency*, 137 F.3d 291 (5<sup>th</sup> Cir. 1998). That case involved EPA’s approval of Louisiana’s NPDES permitting program under CWA Section 402(b). In response to concerns about the state’s ability to protect listed species, EPA conditioned approval of the program on the state’s agreement to submit proposed permits to FWS and the National Marine Fisheries Service for review. If either federal wildlife agency determined that the permit would adversely impact listed species, Louisiana would be required to modify the permit or EPA would veto the permit. A trade association challenged EPA’s authority to impose this requirement in approving Louisiana’s program.

The court began by evaluating the plain language of CWA Section 402(b), concluding that the statute clearly provides that EPA “shall approve” state permitting programs that meet the statute’s specified requirements. 137 F.3d at 297. The key question, therefore, was “whether EPA may deny a state’s proposed program based on a criterion – the protection of endangered species – that is not enumerated in § 402(b).” *Id.* EPA argued that “ESA § 7(a)(2), when construed alongside the Supreme Court’s broad reading of the statute in [*Tennessee Valley*

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<sup>5</sup> Examples of federal actions include: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modification to the land, water or air. 50 C.F.R. § 402.02.

*Authority v. Hill*, 437 U.S. 153 (1978)], compels EPA to do everything reasonably within its power to protect endangered species.” 137 F.3d at 298. The court rejected that argument, holding that “if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.” *Id.*

Adopting the rationale of *Platte River Whooping Crane Trust*, the court concluded:

We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction. *The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.*

137 F.3d at 299 (emphasis added).<sup>6</sup>

In short, *American Forest & Paper Ass’n* holds that EPA’s discretionary decision-making concerning the transfer of permitting authority to a state is limited to determining whether the requirements set forth in CWA Section 402(b) are satisfied. This issue has not been squarely addressed in the Ninth Circuit, and has been raised in this case by the industry intervenors.

## **2. Whether EPA and FWS Correctly Identified and Utilized the Proper Scope of the Action and its Effects in Consulting.**

In this case, the precise federal “action” at issue is EPA’s approval of the AZPDES Program and transfer of NPDES permitting authority to Arizona under CWA Section 402(b). EPA explained that this “action” was ministerial and administrative in nature:

This Federal action is an administrative shift of authority and is not associated with any physical action that will alter habitat or affect biota. In changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes

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<sup>6</sup> The issue of ESA Section 7 affecting an agency’s statutory obligations was addressed in *Platte River Whooping Crane* in the context of F.E.R.C. hydropower relicensing procedures. The court there addressed the ESA’s impact on F.E.R.C.’s statutory obligations to relicense under the Federal Power Act (“FPA”). The FPA provides that if an existing license will expire prior to issuance of a new license, annual licenses are to be issued “under the terms and conditions of the existing license.” 16 U.S.C. § 808(a)(1). The FPA further provides that existing licenses can only be modified by the mutual consent of the agency and the licensee. 16 U.S.C. § 799. The plaintiffs sued to require F.E.R.C. to place environmental restrictions on the licensee through the annual license procedure. They argued that ESA Section 7 effectively modified the FPA, citing *Tennessee Valley Authority*. 962 F.2d at 34. Characterizing the plaintiffs’ theory as “far-fetched,” the court concluded that Section 7 simply “directs agencies to ‘utilize their authorities’ to carry out the ESA’s objectives; it does not *expand* the powers conferred on an agency by its enabling act.” *Id.* (emphasis in original).

for consultation will no longer apply. Thus, there will be a reduction in the number of mechanisms available to protect Federally-listed species and designated critical habitat in Arizona. However, in the transfer of authority ... there will be no substantive change in the permit program.

*Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program* (June 21, 2003) at 15. In addition, as discussed above, FWS determined that any impacts associated with the transfer of permitting authority would not constitute "effects of the action" because any future impacts on listed species would be not be caused by Arizona assuming permitting authority and, in any case, those impacts would be speculative and not reasonably certain to occur.

Relying on comments from FWS field staff, however, Defenders argue that EPA's decision to transfer permitting authority to Arizona will directly translate into negative "on-the-ground" impacts to listed species and their habitat. Defenders reason that, under the AZPDES Program, developers will no longer be required to implement ESA-based "conservation benefits" for listed species that result from consultations between EPA and FWS. In their brief, Defenders explain that prior to EPA's transfer of the NPDES Program, "[a]s a result of the section 7 process, EPA and FWS were able to work with developers to reduce development impacts on listed species . . . from the impacts of NPDES-authorized commercial and residential development." Petitioners' Opening Brief at 11.

Defenders therefore contend that the AZPDES BO is unlawful because fails to contain "a meaningful analysis of the effects on listed species or critical habitat of losing all ESA section 7 protections in connection with NPDES-permitted commercial and residential development, despite the fact FWS's own endangered species experts determined that the loss of such protections would likely result in jeopardy to listed species." *Id.* at 19.

Defenders' argument assumes that vegetation removal, land clearing, grading and similar activities by private landowners are authorized or otherwise induced by an NPDES permit, and that as part of the permitting process, EPA can generally regulate private land use activities.<sup>7</sup> An NPDES permit, however, does not authorize construction or land development, but instead authorizes discharges of pollutants into jurisdictional waters. Private development activities in upland areas are regulated by state and local land use laws and ordinances, not by the CWA, and are not direct or indirect effects of the issuance of a NPDES permit. Therefore, the scope of its analysis utilized in the AZPDES BO would appear to have been correct, and there is no loss of "conservation benefits" by virtue of Arizona assuming authority to issue NPDES permits.

Unfortunately, this is a relatively confusing issue, which is complicated by the internal FWS communications generated by FWS field staff suggesting that EPA does, in fact, have authority to regulate construction activities in upland areas to protect terrestrial species. If Defenders' primary argument were adopted by the court, it would cause serious problems for

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<sup>7</sup> The next section of this paper, which discusses the remaining claims that were decided in the *Defenders of Wildlife v. Flowers* litigation, provides examples of how FWS field staff attempts to use CWA permits to obtain "conservation benefits."

agencies that issue permits and other approvals in connection with private projects.

### **III. CHALLENGES TO ARMY CORPS OF ENGINEERS' "NO EFFECT" DETERMINATIONS – *Defenders of Wildlife v. Flowers* Revisited.**

The *Defenders of Wildlife v. Flowers* litigation was initiated by Defenders of Wildlife and Center for Biological Diversity (“Defenders”) in April 2002, and involved a variety of different ESA-based claims, primarily arising under Section 7, asserted against the U.S. Army Corps of Engineers (“the Corps”) and, initially, EPA.<sup>8</sup> Notably, all of the claims concerned the pygmy-owl. In August 2003, the district court issued a series of orders deciding all outstanding claims. Two of those orders are currently on appeal to the Ninth Circuit and are awaiting oral argument.<sup>9</sup>

#### **A. Continental Reserve Section 404 Permit, 2003 WL 22143266 (D. Ariz. Aug. 18, 2003).**

Defenders challenged the Corps’ decision to issue an individual permit to landowners developing a 598-acre project in Marana known as Continental Reserve. Continental Reserve is a master-planned community containing single-family homes, a park, an elementary school site and a substantial amount of open space. As platted, Continental Reserve will contain approximately 1,800 residential units.

In connection with this project, the landowners applied for a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of fill materials impacting 4.9 acres of jurisdictional waters located within the project. In evaluating the permit application, the Corps determined that the proposed action would have no effect on any listed species or critical habitat, including the pygmy-owl. The property is not located within any designated critical habitat for the pygmy-owl, and surveys conducted by the landowners’ biologists in 1998, 1999, 2000 and 2001 detected no pygmy-owls on or near the property.

FWS, however, strongly objected to the Corps’ “no effect” determination. In a series of letters signed by David Harlow, the former supervisor of FWS’s Arizona Ecological Services Field Office, FWS contended that the property contained “suitable” habitat for pygmy-owls, that the project area serves as a “movement corridor” for pygmy-owls, and that the project is within the general geographical area in northwest Tucson occupied by pygmy-owls. Harlow also indicated that FWS believed a pygmy-owl territory existed within approximately 0.5 miles of the project site, and that “it is reasonable to assume” that pygmy-owls may have used the property in the past and would do so again in the future.

Notwithstanding these objections, the Corps refused to withdraw its “no effect” determination and would not initiate consultation with FWS. In responding to FWS, the Corps

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<sup>8</sup> The original claim against EPA was dismissed after the AZPDES Program was approved and permitting authority transferred to the State of Arizona in December 2002. As discussed in the preceding section of this paper, Defenders amended their complaint at that time to challenge the biological opinion relating to approval of Arizona’s program.

<sup>9</sup> Copies of those orders are attached. The remaining orders are available on Westlaw.

pointed out that the property had been surveyed for four consecutive years without detecting any pygmy-owls and that FWS had not included the property in its designation of critical habitat in 1999, which conflicted with FWS's contention that the property is important as a migration corridor. Moreover, the Corps reviewed the scientific evidence regarding the 1998 detections of a pygmy-owl near the property, concluding that the single owl was apparently a migrating juvenile and no pygmy-owl territory was actually established.

Following the issuance of the permit, Defenders filed suit, contending that the Corps violated Section 7 of the ESA by issuing the permit without consulting with FWS. Defenders' claim was based primarily on the series of letters written by FWS objecting to the Corps' "no effect" determination and demanding that the Corps engage in consultation.

The district court rejected Defenders' challenge, concluding that the Corps' "no effect" determination "must be upheld because it is based on a consideration of the relevant factors and that there has been no clear error of judgment." The district court emphasized that the federal agency proposing the action is responsible for initially determining whether the action will have an effect on listed species or designated critical habitat, quoting from FWS's 1986 notice adopting the rules governing interagency consultation<sup>10</sup> as well as a letter from Harlow stating that FWS does not provide concurrences with an agency's "no effect" determinations. Under these circumstances, the district court concluded that the Corps "reasonably rejected the undocumented assertions made by" FWS, and had provided a rational explanation for its decision.

Defenders have appealed this decision to the Ninth Circuit. Briefing of the appeal was completed last spring, and the parties are awaiting oral argument. In the meantime, the landowner has been proceeding with its project.

**B. Entrada del Oro Section 404 Permit, 2003 WL 22145716 (D. Ariz. Aug. 18, 2003).**

Defenders also challenged a "no effect" determination made by the Corps in connection with issuing an individual Section 404 permit to the developer of the Entrada del Oro project, located in northern Pinal County approximately 10 miles southeast of Apache Junction. Entrada del Oro is a master-planned community containing approximately 440 acres, consisting of single-family residences, parks, a school site and open space. At build-out, the project will contain approximately 1,100 single-family homes.

In late 2000, the landowner applied for an individual Section 404 permit for the purpose of constructing road and utility line crossings in connection with developing the property. At the time the application was filed, the Entrada del Oro property was located within critical habitat

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<sup>10</sup> *Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. 19926, 19949 (June 3, 1986) ("The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.").

designated for the pygmy-owl.<sup>11</sup> Although no pygmy-owls had ever been observed on or near the property, the Corps initially determined that the action may affect, but is not likely to adversely affect, pygmy-owls based on the existence of critical habitat for that species. Accordingly, in January 2001, the Corps contacted FWS and requested FWS's concurrence in its finding.

FWS declined to concur with the Corps' "may affect, not likely to adversely affect" determination, and instead requested additional information from the Corps. In April 2001, the Corps again requested the concurrence of FWS in its finding, providing additional scientific information to support it. The Corps also explained that the landowner had agreed to various project modifications that would preserve large wash corridors (where the suitable habitat was located) as well as upland linkage corridors, thus maintaining key habitat components. However, FWS still would not concur with the Corps' determination, and in May 2001, the Corps requested the initiation of formal Section 7 consultation.

After several meetings with the Corps and the landowner, FWS again requested additional information on the project rather than initiating consultation. In August 2001, the landowner submitted a draft biological assessment to the agencies, which concluded that the project may affect, but is not likely to adversely affect, the pygmy-owl and its designated critical habitat. However, FWS still did not initiate consultation.

In September 2001, the district court in *Nat'l Ass'n of Home Builders* set aside the designation of critical habitat for the pygmy-owl. 2001 WL 1876349 (D. Ariz. Sept. 21, 2001). Based on this new development, the Corps reevaluated its previous "may affect, not likely to adversely affect" determination, which was based principally on impacts to pygmy-owl critical habitat, and decided to withdraw its Section 7 consultation request. After notifying FWS of its decision, the Corps issued its permit, authorizing the landowner to impact a total of 0.78 acres of jurisdictional waters for road and utility line crossings.<sup>12</sup>

As in the case of Continental Reserve, FWS objected to the Corps' position, indicating consultation was necessary because the Entrada del Oro property contains habitat that may be suitable for pygmy-owls. The Corps declined FWS's request for consultation and stood by its "no effect" determination.

Defenders subsequently brought suit, alleging that the Corps violated Section 7 by issuing the permit without completing consultation. The district court affirmed the Corps' "no effect" determination, again noting that the Corps' "no effect" determination and ultimate

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<sup>11</sup> *Designation of Critical Habitat for the Cactus Ferruginous Pygmy-Owl; Final Rule*, 64 Fed. Reg. 37419 (July 12, 1999).

<sup>12</sup> Previously, the Corps was enjoined from authorizing activities under nationwide permits in Pima and Pinal Counties, because it failed to adequately consider the possible impacts on the pygmy-owl when the permits were issued. *Defenders of Wildlife v. Ballard*, 73 F.Supp.2d 1094, 1112-15 (D. Ariz. 1999). Consequently, a number of developers in those counties have been required to apply for individual permits even where the impacts to jurisdictional waters are minimal.

decision whether to formally consult with FWS were decisions for the Corps to make, not FWS. The district court also held that even if formal consultation had been initiated, the Corps had authority to terminate consultation after the critical habitat for the pygmy-owl was vacated. The district court found that the Corps had considered the relevant factors in making its “no effect” determination, including the fact that pygmy-owls had not been found within the project site or its general area, there was no critical habitat designation, there was minimal suitable habitat on the project site, and the project would not present a barrier to movement of pygmy-owls should any actually migrate to northern Pinal County in the future. Under these circumstances, the district court concluded that the Corps had articulated a rational explanation for its decision.

Defenders also appealed from this order, which is consolidated with the Continental Reserve appeal discussed above. In addition, the landowner, Grosvenor Holdings, has cross-appealed from the district court’s partial denial of its request to intervene in the lawsuit to protect its rights under the permit. As stated above, briefing of this appeal has been completed, and the parties are awaiting oral argument.

**C. Haciendas de la Carolina and Saguaro Ranch Permits, 2003 WL 22143263 and 2003 WL 22145708 (D. Ariz. Aug. 18, 2003).**

Defenders also challenged Corps’ permitting decisions associated with two other real estate developments in Pima County, Haciendas de la Carolina, an 8-acre residential subdivision, and Saguaro Ranch, a master-planned 1,032-acre subdivision. The district court did not reach the merits of either of these challenges, however.

The landowner of the Haciendas de la Carolina project applied for a Section 404 permit in order to construct a storm water retention/detention basin and a road crossing over an unnamed jurisdictional wash on the property. Like Entrada del Oro, the Haciendas de la Carolina project was located in an area designated as critical habitat for the pygmy-owl. The landowner retained a consultant to perform a biological evaluation, which concluded that the project may potentially have adverse impacts on the pygmy-owl and, accordingly, the Corps requested the initiation of formal consultation with FWS in November 2000. The consultation was never completed, and in November 2001, the Corps terminated the consultation based on the order issued in the *Nat’l Ass’n of Home Builders* litigation invalidating the critical habitat designation.

The Corps issued a permit authorizing the landowner to construct the improvements, impacting a total of 0.07 acres of jurisdictional waters. Subsequently, on January 19, 2002, the landowner submitted a notice to the Corps indicating that the authorized work had been completed.

Defenders filed suit, challenging the Corps’ “no effect” determination and contending that the Corps was required to complete consultation prior to issuing the permit. The district court held that it lacked jurisdiction over the claim because Defenders lacked Article III standing.<sup>13</sup> Because the landowner had completed the work under the permit before the lawsuit

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<sup>13</sup> The constitutional requirements of standing are based on Article III of the Constitution, which limits judicial power to the resolution of cases or controversies. U.S. Const.,

was filed, as a consequence of which the Corps no longer had jurisdiction over the project, the district court was unable to grant any effective relief. Therefore, any alleged injury-in-fact asserted by Defenders and their members as a consequence of the lack of Section 7 consultation would not be redressed by a favorable decision.

In the case of the Saguaro Ranch project, the landowner applied for coverage under EPA's Construction General Permit ("CGP") for discharges of storm water that would result from the project's construction. FWS raised concerns regarding whether the Saguaro Ranch developer could obtain coverage under the CGP without first completing Section 7 consultation. Ultimately, EPA requested the initiation of formal consultation, and in October 2002, FWS issued a biological opinion concluding that the project was not likely to jeopardize the continued existence of the pygmy-owl. Based on the biological opinion, EPA notified the developer that the project would meet the requirements of the CGP as long as it complied with certain "special conservation measures" contained in the biological opinion.

As discussed previously, on December 5, 2002, EPA approved the AZPDES Program and transferred authority to issue NPDES permits to the State of Arizona. As a consequence of this action, existing federal permits issued under Section 402 of the CWA were converted into state permits. Moreover, the federal CGP expired in February 2003 and was replaced by the State of Arizona's CGP.

In April 2003, Saguaro Ranch filed a notice of intent ("NOI") to be covered by Arizona's CGP. Saguaro Ranch did *not* submit an NOI or otherwise request coverage under EPA's CGP following the issuance of the biological opinion.

Defenders subsequently brought suit against FWS, contending that the agency violated Section 7 and its implementing regulations when it determined, in the biological opinion, that the proposed action was not likely to jeopardize the continued existence of the pygmy-owl. The district court held that this claim was moot. As a consequence of the transfer of NPDES permitting authority to Arizona, EPA lacked authority to issue NPDES permits in Arizona. Consequently, the proposed action – the discharge of storm water under EPA's CGP – was no

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Art. III, § 2. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). The "irreducible constitutional minimum of standing" includes the following three elements:

- 1) The plaintiff must have suffered an injury-in-fact – an invasion of a legally protected interest which is both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.
- 2) The injury must be traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.
- 3) It must be likely, not speculative, that the injury will be redressed by a favorable decision.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (involving claims under the ESA).

longer going to occur. Instead, the discharge of storm water resulting from construction activities would be regulated by Arizona and permitted under the AZPDES Program. Therefore, no legal consequences would flow from the challenged biological opinion.<sup>14</sup>

**D. General Section 7 Claims Against the Corps, 2003 WL 22143270 and 2003 WL 22143271 (D. Ariz. Aug. 18, 2003).**

In addition to challenging the permitting decisions discussed above, Defenders asserted two general claims against the Corps based on alleged violations of Section 7. First, Defenders contended that the Corps has engaged in a “pattern, practice and policy” of consulting with FWS only when authorized activities would adversely impact either formally designated critical habitat or occur in areas actually occupied by pygmy-owls. The court rejected this claim because Defenders failed to challenge a “final agency action” as required under the APA. *See* 5 U.S.C. § 704; *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 891-94 (1990) (challenged BLM “program” was not an “identifiable agency action”).

Second, Defenders alleged that the Corps violated Section 7(a)(1) of the ESA, which provides:

All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of the endangered species and threatened species listed pursuant to Section [4 of the ESA].

16 U.S.C. § 1536(a)(1). Defenders argued that the Corps violated this provision by failing to use its authority under the CWA to carry out programs to conserve the pygmy-owl.

In evaluating this claim, the district court noted that the decisions addressing the obligation of federal agencies under Section 7(a)(1) are somewhat confused. While federal agencies are obligated to carry out programs for the conservation of listed species, agencies enjoy considerable discretion in fulfilling that obligation. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1416-17 (9<sup>th</sup> Cir. 1990); *Sierra Club v. Glickman*, 156 F.3d 606, 616-18 (5<sup>th</sup> Cir. 1998). Ultimately, the district court found that the Corps had completed consultation with FWS regarding the effects of its nationwide permit (“NWP”) program in Arizona on the pygmy-owl, and as part of the consultation, the agencies had jointly developed guidelines to ensure that the NWP program does not adversely affect pygmy-owls. *Guidelines to ensure the Nationwide Permit program will not adversely affect the cactus ferruginous pygmy-owl* (Feb. 24, 2003), available at <http://arizonaes.fws.gov/cactus.htm>. The district court found that the adoption and implementation of these guidelines was sufficient to satisfy the Corps’ obligation under Section 7(a)(1).

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<sup>14</sup> In addition, the biological opinion was formally withdrawn by FWS, at the request of EPA, on May 2, 2003. Consequently, at the time the district court addressed this claim, there was no biological opinion in existence.

#### IV. OTHER RECENT DECISIONS OF INTEREST.

##### A. ESA Decisions.

##### 1. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004).

*Gifford Pinchot Task Force* involved challenges to six biological opinions issued by FWS in connection with federal timber sales in national forests in the Pacific Northwest. The biological opinions focused on adverse impacts to the Northern spotted owl, a threatened species under the ESA. This opinion contains several important holdings, the most significant of which is the court's determination that the regulatory definition of the term "destruction or adverse modification," codified at 50 C.F.R. § 402.02, is impermissibly narrow and therefore unlawful.

The first challenge to the biological opinions was based on FWS's use of changes to the spotted owl's habitat as a proxy to determine whether the timber sales would jeopardize the continued existence of the species. The appellants argued that the use of this proxy was improper, and that the analysis of jeopardy should focus on the actual number of owls as opposed to simply analyzing habitat changes. The Ninth Circuit stated that "[t]he test for whether the habitat proxy is permissible in this case is whether it 'reasonably ensures' that the proxy results mirror reality." 378 F.3d at 1066. Although characterizing the issue as a "close case," the court upheld FWS's approach, concluding that it was a permissible interpretation of the ESA. *Id.* at 1066-67.

Next, the appellants challenged FWS's reliance on the so-called Northwest Forest Plan ("NFP") in performing its jeopardy analysis. The NFP was developed in the mid-1990s in response to numerous lawsuits concerning the listing of the Northern spotted owl and the impact of that listing on timber harvesting and other forest management activities. In the biological opinions, FWS relied on compliance with the management prescriptions imposed by the NFP in determining that timber harvesting would not jeopardize the spotted owl. The Ninth Circuit held that it was appropriate for FWS to rely on the plan because the NFP is a "unique land-management plan" that was reviewed and approved in prior litigation. Moreover, FWS did not rely solely on the NFP, but also conducted independent analyses using site-specific data. *Id.* at 1067-68.

After affirming the approach used by FWS in analyzing whether the proposed timber sales would jeopardize the spotted owl, the Ninth Circuit turned to the critical habitat portion of the challenged biological opinions. Here, the appellants argued that FWS's regulatory definition of the term "adverse modification" is unlawful. Under this definition, "destruction or adverse modification" of critical habitat means:

[A] direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival *and* recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02 (emphasis supplied). Thus, under the definition, “adverse modification” will occur only if the changes to a species’ critical habitat diminish its value for *both* the survival and recovery of the species.

Following the Fifth Circuit’s decision in *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001), the Ninth Circuit concluded this definition is unlawful because it effectively ignores the “recovery goal” of critical habitat. The court noted that the term “critical habitat,” as defined in the ESA, 16 U.S.C. § 1532(5), expressly includes areas that are “essential to the conservation of the species.” The term “conservation” is defined in the ESA as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3). Applying these definitions, the Ninth Circuit found that “the purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot*, 378 F.3d at 1070. Accordingly, the court concluded that FWS was operating under an unlawful regulation in consulting on the proposed timber sales.

Obviously, this ruling is significant. Two federal circuits, the Ninth Circuit and the Fifth Circuit, have now held that the regulatory definition of “adverse modification” is impermissibly narrow and fails to properly account for the recovery goal implicit in designating areas as critical habitat that are essential to *conservation* of the species. This holding raises serious questions regarding the validity of other biological opinions on proposed federal actions occurring in areas that have been designated as critical habitat, and will likely force FWS to reconsider its regulatory definition of “adverse modification.”

The Ninth Circuit issued two other rulings that are noteworthy. First, the court held that FWS had improperly relied on alternative spotted owl habitat that is protected under the NFP to compensate for the loss of critical habitat. *Id.* at 1075-76. The court stated:

Once designated, critical habitat receives its legal protection because it is subject to the exact Section 7 consultations at issue in this case. ... If we allow the survival and recovery benefits derived from a parallel habitat conservation project ... that is not designated critical habitat to stand for the loss of designated critical habitat in the adverse modification analysis, we would impair Congress’ unmistakable aim that critical habitat analysis focus on the actual critical habitat. We would also be approving a transition away from ESA protections to mere compliance with the broader but perhaps less rigorous NFP.

*Id.* at 1076. This holding constrains FWS and federal agencies from relying on the protection of habitat that is suitable for a listed species as a substitute for formally designed critical habitat in complying with Section 7(a)(2)’s standard.

The court also ruled against FWS in reviewing the appellants’ challenge to several amendments to the biological opinions. The court noted that, as a general rule, the discovery of new data would not justify an amendment to a biological opinion. Instead, if new data are

discovered that may affect the jeopardy or critical habitat analysis, then FWS is obligated to reinstate consultation pursuant to 50 C.F.R. § 402.16. On the other hand, if the data were available at the time the biological opinions were originally issued, then the data should have been considered in connection with preparing the biological opinions. FWS cannot, however, provide additional evidence through an amendment to support its original conclusion. *Id.* at 1077.

## 2. *Cold Mountain v. Garber*, 375 F.3d 884 (9<sup>th</sup> Cir. 2004).

The most recent Ninth Circuit decision dealing with the Section 9 “take” prohibition, 16 U.S.C. § 1536(a), is *Cold Mountain v. Garber*. In that case, the Montana Department of Livestock (“MDOL”) applied for a special use permit from the Forest Service to operate a facility to capture and test bison migrating out of Yellowstone National Park for brucellosis, a bacterial organism that infects livestock. 375 F.3d at 886.

The Forest Service prepared a biological assessment, and initiated consultation with FWS regarding the effects of the proposed action, which were expanded to include not only the operation of the capture facility, but also the hazing (herding) of bison back into Yellowstone. Three active bald eagle nest sites were located within the action area. FWS ultimately issued a biological opinion, determining that the capture facility was not likely to jeopardize the continued existence of bald eagles, but would adversely impact some eagles, and could lead to reproductive failure. Accordingly, FWS included an incidental take statement in the biological opinion, which incorporated certain conditions and requirements relating to bison hazing. *Id.* at 887-88.

Environmental groups brought suit against the Forest Service and FWS, as well the MDOL, alleging that the bison hazing restrictions included in the incidental take statement were being violated by the MDOL. The district court granted summary judgment for the defendants, concluding that the evidence was insufficient to establish that bald eagles had been taken. The court also found that the restrictions on helicopter hazing – the activity that was the primary focus of the complaint – had not been violated. *Id.* at 889.<sup>15</sup>

On appeal, the plaintiffs argued that the Forest Service’s failure to enforce the hazing restrictions contained in the incidental take statement amounted to a prohibited take of bald eagles. The plaintiffs presented affidavits, videotape footage and photographs purporting to demonstrate violations of the hazing restrictions by the MDOL. The plaintiffs also argued that these violations resulted in the reproductive failure of bald eagles at one of the nest sites. Accordingly, the plaintiffs argued, the MDOL’s hazing of bison resulted in the “harassment” of

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<sup>15</sup> The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” with respect to listed species. 16 U.S.C. § 1532(19). “Harass” in the definition of take is defined by rule as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

bald eagles. *Id.* at 889-90.

The Forest Service argued in response that any alleged violations were committed by a state agency, the MDOL,<sup>16</sup> and in the event that a prohibited take occurred, MDOL should be charged with the violation. “In sum, the federal defendants object to what they characterize as an unprecedented theory of liability under the ESA, in which the Forest Service is vicariously liable for the prohibited takes of its permittee, the MDOL.” *Id.* at 890.

The Ninth Circuit, unfortunately, declined to address the Forest Service’s argument, which it described as “the novel question of the Forest Service’s liability under the ESA for the actions of its permittees.” *Id.* Instead, the court focused on the evidence presented by the plaintiffs, concluding that they “failed to establish a causal link between any alleged hazing violations and the [bald eagle] nest failure.” *Id.*, citing *Pyramid Lake*. The court noted that the plaintiffs had submitted only generalized scientific studies regarding the reactions of bald eagles to noise from helicopters that did not specifically address the effects of the aircraft noise on the species’ reproductive success. In addition, the court found that the plaintiffs had failed to present specific evidence establishing a casual relationship between the bald eagle nest’s reproductive failure and the alleged hazing violation. *Id.*

## **B. NEPA Decisions.**

### **1. *Dept. of Transp. v. Public Citizen*, \_\_ U.S. \_\_, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004)**

In *Public Citizen*, decided June 7, 2004, the Supreme Court addressed the appropriate scope of analysis of environmental effects required under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321-4370(d).<sup>17</sup> The court rejected the use of a strict “but for” analysis in determining whether an effect is caused by the proposed action, holding instead that a federal agency is *not* required to consider effects that result from causes beyond the agency’s control. This is a significant decision that applies to all federal agencies. In addition, the limited scope of analysis approved in *Public Citizen* should apply by implication to other federal statutes under which federal agencies are required to evaluate the environmental effects of a proposed action, including the evaluation of effects of an action on listed species and critical habitat under Section 7 of the ESA.<sup>18</sup>

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<sup>16</sup> The district court granted the MDOL summary judgment on sovereign immunity grounds. The agency was voluntarily dismissed from the appeal. *Id.* at 889 and n. 4.

<sup>17</sup> The Supreme Court reversed the Ninth Circuit. *Public Citizen v. Dept. of Transp.*, 316 F.3d 1002 (9th Cir. 2003).

<sup>18</sup> FWS has recognized that the review of effects required under NEPA, which is a procedural statute that applies only to federal agencies, is broader than the review required during Section 7 consultation. See *Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. at 19932-33 (discussing definitions of “effects of the action” and “cumulative effects” codified at 50 C.F.R. § 402.02).

In *Public Citizen*, the Federal Motor Carrier Safety Administration (“FMCSA”) promulgated rules imposing registration and safety requirements on Mexican-domiciled motor carriers operating in the United States. To comply with NEPA, FMCSA prepared an environmental assessment (“EA”) evaluating the impact of its proposed rules, and determined that the rules would not have a significant impact on the environment and that an EIS was not required. *Id.* at 2210-12. FMCSA did *not* evaluate the overall environmental impacts caused by Mexican trucks operating in the United States, and instead limited the scope of its analysis to the impacts caused by the rules themselves. *Id.* at 2212. Although implementation of the rules was a statutory prerequisite for the entry of Mexican trucks into the United States, FMCSA reasoned that the impacts from Mexican truck operations would be caused by the President’s decision to lift a long-standing moratorium. *Id.* at 2211-12. The agency’s rules were challenged on several grounds, including the manner in which the effects of the action were analyzed in the EA.

In approving the narrow scope of analysis employed by the agency, the Supreme Court, in subpart II.B of its opinion, stated that a “but for” causal relationship between an agency’s action and an environmental effect “is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. . . . NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Id.* at 2215 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

The Supreme Court also emphasized that NEPA and its implementing regulations are qualified by “a ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.” *Id.* In other words, if the agency lacks authority to prevent or minimize the environmental effect because the effect is caused by an action over which the agency has no control, the agency is not required to evaluate the effect under NEPA. *Id.* at 2215-16.

Applying these causal limitations, the Supreme Court concluded:

We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant “cause” of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a “major Federal action.”

*Id.* at 2217. Because FMCSA did not have authority to regulate cross-border operations by Mexican motor carriers, and could only impose certain registration and safety requirements on them, the agency appropriately limited its analysis to the effects caused by the adoption and implementation of its registration and safety rules. *Id.*

**2. Save Our Sonoran, Inc. v. Flowers, 381 F.3d 905 (9<sup>th</sup> Cir. 2004) (pet. for rehearing filed Sept. 15, 2004).**

*Save Our Sonoran, Inc. v. Flowers* (“SOS”) involved a challenge to a permit issued to a developer, Lone Mountain, by the Corps under Section 404 of the CWA. The central issue in

this case was whether the Corps violated NEPA by limiting the scope of its analysis of environmental impacts to “waters of the United States” (i.e., those portions of the developer’s property within the Corps’ CWA jurisdiction). As discussed below, the Ninth Circuit, in affirming the district court’s preliminary injunction against the Corps and Lone Mountain, declined to follow Supreme Court and Ninth Circuit precedent, and effectively held that private land uses may be subject to restrictions NEPA.

Lone Mountain is developing a residential community containing 794 single-family homes on a 608-acre parcel of land located in northeast Phoenix, which contains various ephemeral desert washes traversing the property from east to west. Lone Mountain consulted with the Corps and requested that a jurisdictional delineation be completed to determine whether any of the washes are subject to the Corps’ jurisdiction under Section 404 of the CWA. The Corps identified a total of 31.3 acres of jurisdictional “waters of the United States” within the property. *See* 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a) (Corps’ regulation defining “waters of the United States”).

On March 13, 2002, Lone Mountain was issued a permit under Section 404, authorizing the construction of improvements impacting a total of 7.5 acres of jurisdictional waters for road crossings, pad fill, utility line crossings and internal trail crossings. Before issuing the permit, the Corps completed an environmental assessment (“EA”) and made a “finding of no significant impact” in accordance with NEPA and the Corps’ NEPA implementation regulations, 33 C.F.R. Part 325, Appendix B. In the EA, the Corps evaluated the appropriate scope of analysis pursuant to its regulations, and determined:

After weighing the factors relevant to determining the scope of analysis, the Corps has determined that the Federal involvement in this project is not sufficient to extend the scope of analysis to the entire Lone Mountain site. The environmental consequences of the larger project are not essentially the products of the Corps’ permit action. The Corps’ scope of analysis for this permit is the area of direct impact to waters of the U.S., plus the immediately contiguous upstream and downstream washes that might be indirectly affected by work in waters of the U.S.

Save Our Sonoran (“SOS”) brought suit, alleging that the Corps violated NEPA, Section 404 of the CWA, and the Corps’ regulations in issuing Lone Mountain’s permit. SOS challenged the Corps’ finding that the activities authorized by Lone Mountain’s permit would not have a significant impact on the environment, arguing that the Corps should have prepared an Environmental Impact Statement (“EIS”) evaluating the impacts of Lone Mountain’s entire project. No claim was asserted against Lone Mountain. Instead, Lone Mountain was joined as a “necessary party to the injunctive relief” sought by SOS. SOS then moved for a preliminary injunction prohibiting all construction activity by Lone Mountain.

On May 30, 2002, the district court issued its first preliminary injunction order, suspending the permit and enjoining Lone Mountain and the Corps “from any activities that are within the scope of Army Corps of Engineers permit No. 2000-01928-RWF anywhere in section 16, known as Lone Mountain, in Phoenix, Arizona.” *Save Our Sonoran, Inc. v. Flowers*, 227

F.Supp.2d 1111, 1115 (D. Ariz. 2002). The district court identified the Corps' scope of review under NEPA as the controlling issue, but declined to follow *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001), distinguishing *Wetlands Action* on the basis that the wetlands in that case were "relatively small" and constituted a "separate piece of property."<sup>19</sup> Comparing the desert washes on Lone Mountain's property to "capillaries run[ning] through tissue," the district court concluded "the development of the entire section with 794 houses is directly dependent upon, and the product of, the Corps' permit action." On that basis, the district court held that a substantial question existed concerning the adequacy of the Corps' NEPA analysis, and that an injunction was appropriate.

On June 6, 2002, Lone Mountain appealed the preliminary injunction order. However, Lone Mountain believed the injunction applied only to those portions of the property within the Corps' jurisdictional delineation, which SOS did not challenge and was not at issue. Consequently, Lone Mountain continued to work in the property's uplands, avoiding impacts to the washes.

On June 27, 2002, the district court amended its preliminary injunction order, clarifying that the court intended to enjoin Lone Mountain from conducting *any* activity on its property in furtherance of its project, without regard to the Corps' jurisdiction, in order to preserve the status quo under NEPA. Lone Mountain appealed from the amended order, contending that the district had no power to enjoin Lone Mountain's activities in the areas of the property outside the Corps' jurisdiction. The two Lone Mountain appeals were consolidated with SOS's cross-appeal concerning the bond amount set by the court.

On appeal, the Ninth Circuit affirmed the district court. The court criticized Lone Mountain for "arguing that it can constrain the Corps' jurisdiction by submitting a gerrymandered series of permit applications." *SOS*, 381 F.3d at 912. The court also stated "it is the impact on jurisdictional waters that determines the scope of the Corps' responsibility, not the constricts of the developer. Lone Mountain's narrow jurisdictional interpretation would defeat the purpose of the CWA's mandate to regulate the pollutants that flow into the nation's waterways." *Id.* at 913. However, Lone Mountain did not submit multiple permit applications (it submitted one application and was issued one permit), nor did Lone Mountain question the Corps' jurisdictional delineation, which was not at issue in the case. Instead, Lone Mountain argued that the Corps' determination of the scope of analysis required under NEPA was correct and entitled to substantial deference on review. *See, e.g., Wetlands Action*, 222 F.3d at 1115 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76 (1989), and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

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<sup>19</sup> *Wetlands Action* is factually similar to *SOS*, and holds that the interdependence between a developer's project and the filling of wetlands is insufficient as a matter of law to "federalize" the entire project for NEPA purposes. *Wetlands Action*, 222 F.3d at 1116-17 ("The district court's determination that the project would not be able to proceed as planned without the permit and that the filling of the wetlands would not occur without the project is correct. *The conclusion that the district court drew from these findings, however, is in error.* The linkage that the district court found between the permitted activity and the specific project planned is the type of "interdependence" that is found in any situation where a developer seeks to fill a wetland as part of a large development ...") (emphasis supplied).

The court then addressed the primary legal authority followed by the district court, *Stewart v. Potts*, 996 F.Supp. 668 (S.D. Tex. 1998). Lone Mountain had argued to the district court and on appeal that *Wetlands Action*, rather than *Stewart*, constitutes controlling legal authority. However, the court adopted the district court's reading of *Wetlands Action*, concluding "[t]he district court correctly analyzed controlling law and applied it to the facts." *SOS*, 381 F.3d at 914.

Finally, in addressing the district court's "hardship analysis," the Ninth Circuit treated NEPA as imposing substantive obligations on Lone Mountain. The court accepted the district court's observation "that once the desert is disturbed, it can never be restored" (*id.* at 914-15), and agreed that if "an injunction does not issue, *unlawful* disruption to the desert is likely irreparable" (*id.* at 15; emphasis supplied). The "controlling precedent" cited by the panel on this point was a NEPA case in which a federal agency, the National Park Service, was enjoined from increasing the entry quota of cruise ships into an Alaskan national park. *Nat'l Parks & Cons. Ass'n v. Babbitt*, 241 F.3d 722, 737-39 (9th Cir. 2001). The panel did not explain how Lone Mountain's construction activities in upland areas outside the Corps' jurisdiction would violate NEPA or otherwise be "unlawful." Compare, e.g., *Wetlands Action*, 222 F.3d at 1114 ("Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action"; quoting *Churchill County v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998)).

Lone Mountain filed a petition for panel rehearing or for rehearing *en banc* on September 15, 2004. In addition to pointing out the intra-circuit conflict between *SOS* and *Wetlands Action*, the developer argued that *SOS* conflicts with the Supreme Court's decision in *Public Citizen*, which is discussed above. On October 5, 2004, the panel issued an order requiring *SOS* to respond to Lone Mountain's petition. On the following day, the panel issued an order suggesting that the parties should attempt to mediate their dispute.

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