

US EPA ARCHIVE DOCUMENT

Response To Comments Received on State of Arizona's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program

December 5, 2002

I. Category : Public Participation in State Enforcement Process

Comment 1; Arizona Center for Law in the Public Interest

The AZPDES Appeals Process Is Not Consistent With Federal Requirements.

EPA may only approve a state's NPDES permit program that is consistent with and not less-stringent than the federal NPDES permit program. 40 C.F.R. § 123.1. Although states are free to enact provisions that are more stringent than the federal requirements, the states must meet the minimum federal requirements. Federal law requires that states administering NPDES programs shall provide for public participation in the state enforcement process by providing either of the following:

- (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest **which is or may be adversely affected**; or
- (2) Assurance that the state agency or enforcement authority will:
 - (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26 (b)(4);
 - (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
 - (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 C.F.R. § 123.27 (d) (emphasis added). Furthermore, the judicial review available under a state's NPDES program must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30. There can be no serious dispute that the language in 49-323 (A) fails to comply with federal law.

A.R.S. § 49-323 (A) provides, in pertinent part, that an appeal may be taken "by any person who is adversely affected by the action or by any person who may with reasonable probability be adversely affected by the action and who has exercised any right to comment on the action . . ." This provision is far more restrictive than the federal standard and clearly violates the

requirements of 40 C.F.R. § 123.30. This “procedure” will have a chilling effect on public participation in all aspects of the permitting process but especially the judicial review because it severely limits the right to judicial review of a permitting decision. Again, the Arizona Center for Law in the Public Interest and the Sierra Club, among others, have been raising this issue for over a year. We raised it with the Arizona Legislature, the Governor, and the Arizona Department of Environmental Quality. At this point it is evident that unless the State of Arizona is ordered to make the necessary changes by either EPA or a court, the State will maintain the status quo of denying citizens their federally established right to judicial review of permit decisions.

Response: The regulations that set forth the State program requirements for the NPDES program contain provisions that address public participation in both state enforcement and permitting processes. These provisions set forth different requirements and standards for each of these processes. The commenter appears to be commenting on the adequacy of the State of Arizona’s provisions related to public participation for both the enforcement and permitting processes.

First, in response to the comment related to public participation in enforcement actions, EPA disagrees that the State of Arizona fails to meet the standard set forth in the regulations. The regulations require that a state seeking NPDES authority provide for public participation in the state enforcement process by providing either “intervention as of right in any civil or administrative action to obtain remedies specified in [40 C.F.R. § 123.27(a)(1), (2), or (3)] by any citizen having an interest which is or may be adversely affected; or” provide assurance that it will meet an alternate test of public participation. As explained in detail below, EPA believes that Arizona meets the public participation requirement by providing intervention as of right in civil actions to obtain the remedies specified in 40 C.F.R. § 123.27(a)(1), (2) and (3).

As the commenter notes, 40 C.F.R. § 123.27(a) requires a state seeking authority to administer the NPDES program to have certain enforcement authorities. Specifically, it requires that the State have authority to: (1) restrain immediately and effectively any person by order or by suit from engaging in activity which is endangering or causing damage to public health or the environment; (2) sue to enjoin any threatened or continuing violation of NPDES requirements; and (3) to assess civil and criminal penalties for violations of NPDES requirements. The State of Arizona meets the requirements of 40 C.F.R. § 123.27(a)(1), (2), and (3) by having the authority to file a civil action to: (1) immediately and effectively restrain a person¹; (2) enjoin any threatened or continuing violation of any NPDES program requirement; and (3) recover civil and

¹ While the State has authority to issue an administrative compliance order, it can be appealed and does not become final until after a decision on the appeal. Accordingly, ADEQ must file a judicial action to “immediately and effectively” restrain a person from engaging in activity which is endangering or causing damage to public health or the environment.

criminal penalties.²

Public participation in all of the civil actions described above, is governed by Rule 24 of the Arizona Rules of Civil Procedure. Specifically, Rule 24 (a)(2) of the Arizona Rules of Civil Procedure allows intervention as of right upon timely application “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” (Emphasis added). This provision is identical to Rule 24 (a)(2) of the Federal Rules of Civil Procedure.

In its “NPDES State Program Guidance,” July 1986, EPA notes that in addition to the two options set forth in 40 C.F.R. § 123.27(d), there is a third option available to States. Specifically, EPA provides “a State may allow intervention through a rule analogous to Rule 24(a)(2) of the Federal Rules of Civil Procedure and provide an assurance by the appropriate State enforcement authority that it will not oppose intervention under the State analogue on the ground that the applicant’s interest is adequately represented by the State.” For purposes of AZPDES enforcement, ADEQ is the principal enforcement authority, and it recently provided an assurance “that it will not oppose intervention under the State analogue on the ground that the applicant’s interest is adequately represented by the State” in an addendum to the Memorandum of Agreement (MOA) with EPA Region 9.³ Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.27(d).

Second, EPA disagrees with the commenter that the State of Arizona fails to meet the regulations

² The State does not have administrative authority to assess civil or criminal penalties.

³ According to the Attorney General, State law provides the Director with enforcement discretion, *e.g.*, “the director, through the attorney general, may request a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief necessary to protect the public health” A.R.S. §49-262 (A) (emphasis added); “the attorney general may, and at the request of the director shall, commence an action in superior court to recover civil penalties [for violations of, *inter alia*, AZPDES rules or permits]. A.R.S. §49-262 (C). Further, as explained in the Attorney General’s Statement, the Arizona Supreme Court has stated that the exercise of a discretionary power “is wholly within the function of the administrative body except that it may not abuse its discretion.” *Arizona State Highway Commission v. Superior Court of Maricopa County*, 81 Ariz. 74, 299 P.2d 783, 785 (Ariz. 1956) (citation omitted). Thus, according to the Attorney General, ADEQ is authorized to exercise its enforcement discretion by agreeing not to oppose intervention under Civil Procedure Rule 24 (a)(2) on the ground that an applicant’s interest in an AZPDES enforcement action is adequately represented by the State. The Attorney General’s Statement also states that the same principle would apply in the event the Attorney General undertook an independent action not requested by the Director to seek civil penalties under A.R.S. §49-262 (C) or injunctive relief under § 49-262 (B).

that address public participation in the State permitting process. As the commenter notes, the regulations that address judicial review of approval or denial of permits available under a state's NPDES program requires that the state procedures must be "sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits." 40 C.F.R. § 123.30.

The standard that applies to judicial review in federal court of a federally-issued permit is set forth in Section 509(b)(1) of the CWA which provides in pertinent part:

Review of the Administrator's action ... (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person....

As explained in the Attorney General's Statement, Arizona law provides an opportunity for judicial review in state court of the final approval or denial of permits by: (1) the permittee or permit applicant; (2) any person who was a party to the administrative appeal of the final permit action; and (3) person who can demonstrate an interest that qualifies the person to intervene in the action. Further, the Attorney General explains in her statement that "any interested person may intervene in the administrative appeal as a matter of right, in addition to the right of appeal granted to any person who is or may with reasonable probability be adversely affected by the permit action." Finally, parties to a proceeding before an administrative agency may seek judicial review by filing a complaint within 35 days after being served with a copy of the administrative decision. Therefore, EPA believes that the State of Arizona meets the requirements of 40 C.F.R. § 123.30, which sets forth the standards for "Judicial review of approval or denial of permits."

II. Category: Funding of the AZPDES Program

Comment 1; Arizona Center for Law in the Public Interest

The State Of Arizona Cannot Adequately Fund The AZPDES Program. Pursuant to the Clean Water Act, the state seeking delegation must have adequate authority to administer the NPDES program. 33 U.S.C. § 1342(b). In the present case, Arizona lacks the authority because the program has no funding mechanism whatsoever. It is our understanding that EPA is providing the majority of the funding for the AZPDES program. Without EPA funding, it is apparent that the State would be unable to support the AZPDES program thereby forcing EPA to withdraw delegation. In addition to the State's ongoing budget crisis, the State has assured that the AZPDES program would not be self-supporting by prohibiting itself from instituting any type of

permit fee. A.R.S. § 49-255.01 (J) states that ". . . The Department shall not charge a fee to issue, deny, modify, suspend or revoke a permit under this Article or to process permit applications." Permit fees are a widely-used for obtaining additional funding for such programs on both state and federal levels. See e.g., Cal. Water Code § 13260 (establishing annual fees). It is our understanding that the State made the decision to not implement permit fees in order to gain support for the primacy process from the regulated community. However, this compromise will likely cost Arizona the NPDES program because after EPA funds are terminated, Arizona will most likely be unable to fund the program as it is currently defined.

Response: According to the AZPDES Program Description (page 5), federal funding makes up approximately 40% and state funding makes up 60% of the AZPDES program funding. EPA believes that the Arizona Legislature has indicated a commitment to fund the AZPDES program through its funding of nine positions for the AZPDES program for FY2002 and FY2003 before the program was authorized. In addition, during recent budget negotiations, the Arizona Governor ensured that the funding for these AZPDES positions stayed intact. Any government program, state or federal, is subject to the uncertainties of the budget process in the future. EPA believes that the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

III. Category: Laboratory Analytical Capabilities

Comment ; Navajo Nation

Program Description, Page 2, III. Organization and Structure: There is a lack of discussion concerning the laboratory analytical capability to be utilized by the AZPDES Program for compliance and enforcement purposes. It is well understood that the State of Arizona operates an excellent analytical laboratory that will likely be utilized by the AZPDES Program.

Response: ADEQ has verified that when ADEQ staff take effluent samples, ADEQ staff will send the samples to the Arizona Department of Health Services (ADHS) laboratory for analysis unless the laboratory does not have the equipment or capability to perform the necessary analysis. In that case, ADEQ will utilize an ADHS certified contract laboratory.

IV. Category: Preservation of Historic Properties

Comment 1; Inter-Tribal Council of Arizona

While the State does not authorize or administer the NPDES program in Indian Country, the regulation of discharges could pose the potential threat to lands and historic sites in Indian Country. In addition, the proposed MOA [Memorandum of Agreement] between the State of Arizona and EPA does not deal effectively with possible adverse impacts to historic properties that are located outside of Indian reservation lands. These include archeological sites, burial grounds, traditional cultural properties and other sites considered to have national importance to

the Tribes that are now afforded some consideration for protection under the NHPA. The NHPA provides that the American Indian tribal governments shall be consulted on projects or undertakings that may impact properties listed on or eligible for inclusion on the National Registry for Historic Places that are located on any lands within the State of Arizona.

Response: EPA believes that historic properties, including tribal historic resources located both in and out of Indian Country within the State of Arizona, will be protected under the AZPDES program. Under State law, ADEQ is required to provide notice of all proposed AZPDES permits to a number of parties, including affected tribes and the State Historic Preservation Officer (SHPO). This notification will provide parties with an opportunity to comment on proposed permits. In addition, under a separate Memorandum of Understanding (MOU), ADEQ and the SHPO's Office have agreed to procedures that, among other things, further specify the coordination they will undertake should the SHPO believe that a proposed permitting action may have an adverse effect on historic properties. The MOU also commits ADEQ to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and to seek ways to avoid, minimize or mitigate any adverse effects to such properties. Further, their MOU provides that if the two agencies are unable to resolve the issues identified by the SHPO, the SHPO will notify EPA for appropriate consideration under EPA's Clean Water Act oversight of the program. Therefore, under the AZPDES program, potential effects of ADEQ permitting actions on historic properties will be considered and addressed as part of the permitting process.

Additionally, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues related to permits that may have a potential adverse effect on tribal historic properties. Finally, as recognized in the MOA between EPA and ADEQ, EPA retains the authority under the CWA to object to AZPDES permits that do not meet applicable CWA requirements, and if the objections are not resolved, to issue the permits itself. Accordingly, should a proposed AZPDES permit having a potential adverse effect on tribal resources result in a violation of applicable CWA requirements, EPA will have the authority, consistent with the CWA, to object to its issuance.

Comment 2; Inter-Tribal Council of Arizona

The present language of the MOA between EPA and ADEQ is not in accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175, and 512 DM 2. The following language is suggested: "Meaningful consultation with the Tribes shall be adhered to by ADEQ on requested permits and permit modifications for projects, programs, and activities on Federal and State lands carried out under the auspices of this MOA that have a potential adverse effect on tribal historic properties."

The identification and evaluation of historic properties, assessment of effects and consultation

procedures are outlined under rules and regulations promulgated for section 106 of the National Historic Preservation Act (16 U.S.C. § 470f). It should be noted that the permitting process in itself triggers a Section 106 review process with the requirement for tribal consultation.

Response: EPA will continue to consult with Tribes, consistent with the federal trust responsibility, on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties, whether or not located in Indian Country. Therefore, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 3; Inter-Tribal Council of Arizona

In addition to consultation requirements, ITCA requests that the MOA between EPA and ADEQ be amended to include the following language, “The potential effects of a permitted project on federally recognized Indian tribes and their historic properties and culturally important sites located outside of Indian reservation lands be evaluated and determined such that there are no detrimental effects to traditional cultural places, waters, or historic sites before a NPDES permit is issued.”

Response: For the reasons set forth in response to Comment 1 in Category IV above, EPA believes that an amendment to the MOA between EPA and ADEQ is not necessary.

Comment 4; Inter-Tribal Council of Arizona

The current draft MOA adequately addresses the responsibility of EPA to implement and enforce the NPDES program within present day American Indian reservation boundaries. But it should include provisions whereby EPA consults with Indian tribes to insure that no adverse effects to tribal lands and to culturally important sites outside of Indian reservation lands occur if or when any NPDES permit be issued by either EPA or ADEQ.

Response: As explained in response to Comment 1 in Category IV above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that may affect Tribes after approval of the AZPDES program. Such consultation may address matters that may impact lands and culturally important sites both within the boundaries of Indian country and outside such boundaries. Therefore, EPA believes that an amendment to the MOA is not necessary.

Comment 5; Bruce Nigel

Analysis of the authorization request indicates that zero protection of historic properties will be granted by the state should that government issue its own permits. Currently, under the NPDES program an authorization to discharge under a NPDES permit requires that historic properties not be adversely impacted by the activities authorized by the permit. According to federal law, a

Clean Water Act permit may not be issued if the resultant (sic) of the permit will be the destruction of historic property. In Arizona, without such protection, developers will be encouraged to grade their property without thought of protecting or cataloging irreplaceable historic artifacts. The “encouragement” is manifest by the fact that without historic property protection, developers will experience cost savings by not expending any money on preserving those artifacts.

Response: EPA disagrees with this comment. As explained above in response to Comment 1 in Category IV above, EPA believes that historic properties, including tribal historic and cultural resources located both in and out of Indian Country within the State of Arizona, will be provided protection under the AZPDES program. In addition, EPA believes this comment misstates the effect of federal law. Where applicable, federal law, such as the NHPA, generally imposes only procedures to evaluate potential impacts of and possible alternatives for proposed permits which may adversely impact historic resources. As described in detail above, EPA believes that procedural safeguards remain under the AZPDES program. Accordingly, EPA disagrees that developers will be encouraged to destroy historic and cultural resources under the AZPDES program.

Comment 6; Bruce Nigel

The Arizona delegation proposal does not make even the smallest token attempt at allowing the native American communities any input into the issuance of NPDES authorizations. Under Arizona’s proposal, a permitted activity adjacent to native American tribal lands could cause the ruin of valuable artifacts on the land before the tribal government was even aware the activity was authorized. The program proposed by the state will allow thousands of authorizations without any public notice of the development. On the vast majority of developable lands the historical significance is yet to be determined. Therefore, in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona, the delegation for authorization should be rejected.

Response: EPA believes that Tribes will continue to play an important role in ensuring that historic and cultural resources are protected under the AZPDES program. Specifically, the AZPDES regulations require ADEQ to provide notice of a proposed permit to a number of persons, including affected tribes and the SHPO’s Office. This notification, among other things, will provide parties with an opportunity to comment on proposed permits. Therefore, Tribes will have an opportunity to provide input to ADEQ on potential adverse effects on tribal cultural and historical resources. In addition, as set forth in Response to Category IV Comment 1 above, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including issues relating to permits that may have a potential adverse effect on tribal historic properties. Therefore, Tribes also may raise concerns related to proposed AZPDES permits as part of the government-to-government consultation process. Accordingly, EPA believes that Tribes will continue to have opportunities for input on proposed permits administered under the AZPDES program.

In addition, the CWA requires EPA to approve submissions from States seeking approval to administer the NPDES program, unless EPA determines that the submission fails to meet the statutory criteria set forth in Section 402(b). Accordingly, EPA does not have the authority to deny a State's application to administer the NPDES program based only on a finding that it would be "in the best interest of Environmental Justice and preserving the archeological and cultural history of the citizens of Arizona."

Comment 7: The Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: ...(2) completion of the ongoing consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites.

In the Navajo Nation's development of its own NPDES program submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NPDES permit actions and historic properties and sites. For NPDES permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NPDES permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), the Agency consults with the appropriate SHPO and/or Tribal Historic Preservation Officer on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. Accordingly, on July 25, 2002, EPA initiated

discussions with the State of Arizona's SHPO on the State's application to administer the NPDES program. Among other things, EPA and the SHPO discussed the issue of coordinating with Tribes on the AZPDES application. Following on this discussion, on August 9th, 2002, EPA sent a letter to each of the 23 Tribal Governments located within the State. EPA sent this letter to ensure each Tribe had notice of, and an opportunity to provide input on, Arizona's application, and to outline the AZPDES application and the process EPA would follow to review the application.

On August 23, 2002, EPA provided the Arizona SHPO's Office with EPA's determination that approval of Arizona's application would have no effect on historic properties in Arizona. As part of the coordination process, the SHPO's Office raised certain issues regarding approval of the Arizona program for further discussions. By letter dated September 23, 2002, the SHPO withdrew these issues for consideration and informed EPA that it was working with ADEQ to coordinate its activities in the protection of Arizona's cultural resources. On October 18, 2002, the SHPO and ADEQ entered into a Memorandum of Understanding (MOU) assuring the SHPO that it would receive notices of certain proposed permit actions. This MOU further provides for coordination between ADEQ and the SHPO to resolve any identified issues to ensure that AZPDES permits will comply with Arizona water quality standards and Arizona laws protecting historic properties. For those permits with the potential to adversely affect historic properties, ADEQ and the SHPO agreed to seek ways to avoid, minimize or mitigate any adverse effects to historic properties stemming from the proposed permit. EPA believes that the agreement between ADEQ and the SHPO is consistent with EPA's determination that approval of the State permitting program would have no effect on historic properties.

See also response to Comment 12 in Category XII below for EPA's response to comment pertaining to Endangered Species.

Comment 8; Arizona Chamber of Commerce

Protection of historic properties should not be a significant concern for approval of ADEQ's program. Similar to the ESA Section 7 obligation, EPA is required under Section 106 of the National Historic Preservation Act ("NHPA") to consult with the State Historic Preservation Office ("SHPO") to identify and address adverse impacts of federal actions on sites listed on or eligible for listing on the National Register of Historic Places. ADEQ will not be required to consult with SHPO. However, it is our understanding that since cultural resources generally are located outside of aquatic areas, and are not affected by the quality or nature of the discharges permitted under the NPDES program, there has been relatively limited review of permitted activity under the EPA-administered NPDES program. In any event, federal NPDES regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to the State Historic Preservation Officers and any affected Indian Tribes. This same requirement also appears in the AZPDES regulations. *See* A.A.C. R18-9-A907(A)(3)(c) & (d).

As noted above, many projects that require a NPDES permit also require other federal permits

(e.g., CWA Section 404 permits); for these projects, NHPA requirements will continue to apply even if the NPDES program is administered by ADEQ. Moreover, significant protections exist outside of the NPDES program for historic properties and other cultural resources, as well as human remains. Disposition of state property, including State of Arizona trust lands where a substantial amount of private development occurs, is subject to state historic preservation requirements, including consultation with SHPO. Finally, the State of Arizona has a burial law that prohibits the disturbance of human remains and funerary objects without following a process for the orderly disposition of those remains and objects, including coordination with appropriate Native American tribes. See A.R.S. § 41-865. Violation of this state statute is a criminal offense. See A.R.S. § 41-865(G)&(H).

Although protections continue to exist for endangered species and historic properties, debating the sufficiency of those protections misses the point of the current process. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states.

Comment 9; Home Builders Association of Central Arizona

Identical to Comment 8.

Comment 10; Withey, Anderson & Morris

Identical to Comment 8.

Comment 11; Diamond Ventures Inc.

The protection of historic properties is not a significant concern of the approval of the AZPDES program in that, like the Endangered Species Act, ADEQ is not required to consult with the State

Historic Preservation Office (SHPO) (in accordance with Section 106 of the National Historic Preservation Act.) In the same manner as stated above, the AZPDES program is designed consistent with the programs in place with the vast majority of states relative to the National Historic Preservation Act.

Response to Comments 8, 9, 10, and 11: Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(f), requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. As discussed above in response to Comment 7 in Category IV above, EPA coordinated with the Arizona SHPO regarding EPA's potential approval of the AZPDES program. In addition, EPA agrees with the commenters that historic properties will be provided protections under the AZPDES program. Specifically, as explained above, under both State law and a MOU between ADEQ and SHPO's Office, procedures are laid out to ensure that permits comply with applicable laws to provide the maximum protection of historic properties and that ADEQ will seek ways to avoid, minimize or mitigate any adverse effects to such properties. Finally, consistent with the federal trust responsibility, EPA will continue to consult with Tribes on matters that arise under the AZPDES program which may affect Tribes, including permit issues that may have a potential adverse effect on tribal historic properties.

V. Category: International Wastewater Treatment Plant

Comment 1; Arizona Center for Law in the Public Interest

International Wastewater Treatment Plants Must Remain Under EPA's Authority. EPA should retain authority for regulating all NPDES permits for international wastewater treatment plants, and specifically, the Nogales International Wastewater Treatment Plant. EPA is an important part of the process towards repairing the Nogales Plant and it is imperative that EPA remain the regulator of that facility.

Response: EPA believes that the provisions for retaining authority for permits that are subject to EPA enforcement action or under appeal in Sections III.C.2. and C.3 of the Memorandum of Agreement between EPA Region 9 and ADEQ are appropriate. The permit for the Nogales International Wastewater Treatment Plant (NIWTP) was issued in 2001 and is not under appeal and the facility is not subject to a current EPA enforcement action. EPA has worked with ADEQ's Border Office and Water Permits Section staff on the NIWTP permit, thus ADEQ staff is familiar with the permitting circumstances. EPA does not believe it is appropriate to retain authority over this permittee and will rely on its oversight role.

VI. Category: Deferral of Sewage Sludge Authorization

Comment; Pima County Wastewater Management

Pima County Wastewater Management (PCWWM) holds NPDES permits for discharges from its wastewater treatment plants which contain permit provisions regulating the disposal of sewage sludge. PCWWM requests that EPA in a response to comments explain how these types of already issued permits, which contain regulatory program elements that may be delegated as well as program elements that will not be delegated, will be jointly administered by EPA and ADEQ. PCWWM specifically requests that EPA explain how these permits will be administered in relation to drafting permit changes, providing public notice, issuing, authorizing, denying, reissuing, suspending, revoking, receiving reports, enforcement, and performing facility inspections. PCWWM also asks that EPA clarify the process that must be used to make application for obtaining a new permit where both delegated and non delegated program elements must be included within an application.

Response: EPA is approving ADEQ's program to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. However, as the commenter states, EPA will continue to administer the sewage sludge regulatory program in Arizona, in accordance with 40 C.F.R. part 503. EPA will oversee the program through review of draft and/or proposed permits for all major facilities including the sewage sludge management portions in addition to taking enforcement actions for violations of 40 C.F.R. part 503. Furthermore, EPA will administer and enforce those portions components of the federal sludge management program that are "self-implementing," i.e., which are directly applicable to entities not subject to NPDES permits, such as sludge haulers, land applicators, etc. ADEQ does yet not have EPA approval for its own sludge management program that would allow it to administer and enforce these components under the CWA.

Nevertheless, ADEQ will have certain responsibilities for sewage sludge use and disposal requirements imposed and implemented through NPDES permits. In order for EPA to approve Arizona's NPDES program, the State was required to have authority to impose standards for sewage sludge use and disposal in NPDES permits that are equivalent to federal standards adopted pursuant to Section 405 (d) of the CWA. (40 C.F.R. § 122.44(b)(2).) Arizona has demonstrated that it has such authority, which it will fully exercise in issuing AZPDES permits. This includes the authority to draft permit changes, provide public notice, issue, authorize, deny, reissue, suspend, revoke, receive reports, enforce, and inspect based on that authority. Thus, permittees that have either an NPDES or AZPDES permit with sewage sludge conditions should submit applications for permit renewal to ADEQ.

Because of the federal and state laws, preparers are required to submit annual reports to EPA and ADEQ.

ADEQ has informed EPA that it has revised and sent its formal application for approval of its sludge management program. The period of time during which EPA retains regulatory authority for the sewage sludge management program while ADEQ implements biosolids requirements in permits may thus be only a matter of a few months.

VII. Category: Continuing Planning Process

Comment: Navajo Nation

Program Description, Page 2, 7th paragraph, III. Organization and Structure: According to 40 C.F.R. § 123.25(b), “State NPDES programs shall have an approved continuing planning process under 40 C.F.R. § 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.” The program description in the AZPDES program submission refers to a “...continuing planning process submission of 1993 or more recent additions sent to EPA.” Has the 1993 or any recent addition of Arizona’s continuing planning process been received and approved by EPA for consistency with the CWA? The Navajo Nation submitted its initial continuing planning process in 1996 but has since made required changes to its process document.

Response: EPA approved Arizona’s Continuing Planning Process (CPP) submitted in 1993.

VIII. Category: Jurisdiction for Private Lands within Boundaries of Navajo Reservation

Comment: Navajo Nation

Program Description, Page 1, 2nd paragraph, II. Scope of the Program: The State of Arizona intends to apply its rules of the NPDES program “...to discharges that are within Arizona, but not in ‘Indian Country’” For the Navajo Nation, there are several facilities located on private lands (“islands”) within the exterior boundaries of the Navajo reservation (i.e., Cameron, Sanders, etc.) that may lead to misunderstandings on who possesses actual NPDES program authority. It is the full understanding of Navajo EPA that these islands are subject to tribal jurisdiction.

Response: EPA has approved the State of Arizona to administer both the NPDES permit program covering point source dischargers to State waters and the pretreatment program covering industrial sources discharging to publicly owned treatment works in all areas within the State, except for in Indian country. EPA retains authority to issue permits, and will continue to be the permitting agency, for any facility in Indian country, including facilities located on private lands within the exterior boundaries of reservations.

IX. Category: Request for Public Comment Extension

Comment: Bruce Nigel

Finally, due to the complexity of the issues surrounding the proposed delegation agreement and the blatant inadequacy of environmental protection proposed by ADEQ, it is requested that the period of public comment be extended until 31 October 2002 at earliest. This will allow those whose resources are seriously limited in comparison to the vested interests, who stand to profit from the proposed delegation (e.g., mining construction, and timber industries), to continue to

investigate and submit cogent comments on the proposed delegation.

Response: Under Section 402(b) of the Clean Water Act, States may apply to EPA to administer the NPDES program. EPA must approve a State's application unless EPA determines that the State program fails to meet certain specified statutory requirements. Further, the statute provides that not later than ninety days after the date on which a State submits an application to administer the NPDES program, EPA's authority to issue permits in that State is suspended, unless EPA disapproves the State's application. In making its best effort to meet this deadline, EPA must, among other things, consider, summarize and respond to significant public comments received on the State's application.

EPA takes very seriously its responsibility to provide the public with the opportunity to meaningfully participate in the decision making processes. In this instance, EPA must balance this with its responsibility to make a concerted effort to meet the statutory deadline. After weighing these responsibilities and reviewing its public participation efforts, EPA believes that the forty-five day public comment period that was afforded on this matter provided the public with an opportunity to meaningfully participate. Accordingly, EPA is denying the request for an extension.

X. Category: Ocean Discharge Criteria Pursuant to Section 403 of the CWA

Comment: Navajo Nation

Statement of the Attorney General, Page 5, 3. Authority to Apply Federal Standards and Requirements to Direct Discharges: The State of Arizona Attorney General verifies that State laws provide authority to apply applicable federal effluent standards and limitations including "Ocean discharge criteria pursuant to Section 403 of the CWA." Section 403 applies to "...the territorial sea, the waters of the contiguous zone, or the ocean..." Are there such waters in the State of Arizona?

Response: There are no such waters. The language cited in this comment is the language from the Clean Water Act. As explained on page 6 of the Attorney General Statement under Remarks of the Attorney General: "... Since Arizona has no ocean boundary, we would not interpret the statutory authority to mandate the application of useless standards or criteria; thus, the adopted rules do not provide for ocean discharge criteria per CWA § 403."

XI. Category: Stringency of State NPDES Regulatory Authority

Comment: Bruce Nigel

For the reason stated below EPA should reject the authorization request.

The Code of Federal Regulations at Section 122.44 (d) allows, water quality standards and State

requirements more “stringent than ... [the] Clean Water Act [CWA] ... to achieve water quality standards established under section 303 of the CWA.”

The State legislative authority allowing the ADEQ authorization for the NPDES program, HB 2426, explicitly disallows any NPDES regulatory authority to be more stringent than the CWA.

This is clearly a conflict. The citizens of Arizona deserve the environmental protection that would be offered to them by regulations more stringent than the CWA. Further, a state government may not rescind the rights given to its citizens by Congress. The citizens of Arizona should not be forced to accept anything less than the full environmental protection offered by the CWA. Anything less than full protection would violate the “equal protection” clause of the Constitution.

The rejection of Arizona’s request to administer the NPDES program is required. Accordingly, EPA should reject the Arizona application to be authorized for the NPDES protection.

The intent of this comment is to request that EPA deny Arizona’s application for NPDES permit issuing authority.

Response: EPA disagrees with the comment. HB 2426 requires ADEQ to adopt by rule, a permit program that is consistent with, but no more stringent than, the requirements of the Clean Water Act for the point source discharge of any pollutant or combination of pollutants into navigable waters. 40 C.F.R. § 122.44(d) requires that, under certain conditions, NPDES permits include requirements in addition to, or more stringent than, promulgated effluent guidelines under sections 301, 304, 306, 307, 318, and 405 of the CWA. The Attorney General of the State of Arizona has certified that in her opinion the laws of the State provide adequate authority to carry out the NPDES program. The Attorney General states that A.R.S. § 49-203(A) (which codifies HB 2426) authorizes the Director of ADEQ to adopt rules and include permit provisions consistent with the requirements of the Clean Water Act. In addition to noting that ADEQ has incorporated by reference 40 C.F.R. § 122.44(d), the Attorney General concludes in her statement that ADEQ has the authority among other things to establish permit conditions, discharge limitations and standards of performance, including case by case effluent limitations. Therefore, EPA believes that ADEQ has the requisite authority to include permit conditions that are in addition to or more stringent than promulgated effluent limitation guidelines or standards.

XII. Category: Endangered Species

Comment 1; Arizona Center for Law in the Public Interest

EPA Must Complete Formal Section 7 Consultation Prior To Any Decision Approving AZPDES Program.

Every federal agency must, “in consultation with and with the assistance of the [U.S. Fish and Wildlife Service], 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 . . .” Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2). In furtherance of these obligations, each federal agency is required to complete formal section 7 consultation with the U.S. Fish and Wildlife Service (“FWS”) whenever an agency undertakes an action that “may affect listed species or critical habitat,” unless the FWS determines “that the proposed action is not likely to adversely affect any listed species or critical habitat.” 50 C.F.R. § 402.14(a)-(b). “Effects” of an action include “. . . the direct and indirect effects of the action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action . . .” 50 C.F.R. § 402.02. Furthermore, once the section 7 consultation has been initiated, the consulting federal agency is prohibited from making any “irreversible or irretrievable commitment of resources with respect to the agency action . . .” 16 U.S.C. § 1536(d).

There is no doubt that EPA’s consideration and approval of the AZPDES program is an action mandating formal consultation under section 7 of the ESA. Indeed, EPA has acknowledged that approval of the AZPDES program may affect numerous federally-listed species and designated critical habitats in Arizona and therefore, EPA requested initiation of formal consultation with FWS.[See Letter from Terry Oda to David Harlow dated June 21, 2002] However, formal section 7 consultation must be completed prior to any decision by EPA regarding the AZPDES program.

Response: EPA completed formal consultation with the U.S. Fish and Wildlife Service (FWS or Service) under section 7 of the Endangered Species Act (ESA), and considered the biological opinion of the Service, prior to making its determination to approve the AZPDES program.

Comment 2; Arizona Center for Law in the Public Interest

EPA Has Failed to Initiate Formal Section 7 Consultation.

Notwithstanding EPA’s acknowledgment that it has a duty to formally consult with FWS regarding the AZPDES program, EPA has not yet properly initiated formal section 7 consultation. On August 20, 2002, FWS properly rejected EPA’s request to initiate formal consultation based on EPA’s failure to provide FWS with the basic information necessary, and required by law, for preparation of a Biological Opinion (“BO”). [See Letter from Brian Hanson to Terry Oda dated August 20, 2002 (hereafter referred to as “August 20th Letter”).] The ESA and its implementing regulations require that written requests to initiate formal consultation must include, among other information, a “description of the specific area that may be affected by the action,” and a “description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects.” 50 CFR 402.14(c)(2,4). As noted in the August 20th Letter, EPA failed to meet these minimum requirements. [See August 20th Letter stating, “We will initiate formal consultation on the AZPDES program as soon as we receive the information necessary to prepare a complete analysis as outlined in the regulations governing interagency consultations (50 CFR 402.14).”] Indeed, EPA’s Biological Evaluation for Endangered Species Act Consultation on USEPA’s Proposed Approval of the State of Arizona’s NPDES Program, dated June 21, 2002, (hereafter referred to as “EPA’s BE”) is woefully deficient in several respects.

For example, EPA's BE fails to adequately assess the manner in which approval of the AZPDES program may affect listed species or critical habitat in Arizona. EPA asserts that "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 process for consultation will no longer apply." [EPA's BE at 15 (emphasis added).] The procedural and substantive requirements of section 7 of the ESA are among the most fundamental and important protections afforded to listed species and critical habitat under the ESA. There is no question that NPDES permitting decisions have in the past and will, in the future, result in substantial negative impacts to listed species and critical habitat. Terminating section 7 consultations on NPDES permitting actions in Arizona will have monumental impacts on listed species and critical habitat. Yet, EPA's BE fails to analyze these likely impacts whatsoever. Indeed, EPA's BE fails to analyze the impacts of this action for even one of the 60 federally-listed species that EPA identified as likely to be affected. Instead, EPA simply concludes that "any potential adverse effects to Federally-listed species or critical habitat" resulting from transfer of NPDES permitting authority to Arizona "would be insignificant and/or discountable." EPA's BE at 16. This conclusion is not only legally defective on its face – there is no "insignificant and/or discountable" exception for adverse effects under the ESA – but is completely unsupported by any meaningful analysis.

EPA's BE is also legally deficient because it fails to undertake any analysis of cumulative effects as required by the ESA. ESA implementing regulations define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. If the AZPDES program is approved by EPA, there is an absolute certainty that in the future, hundreds of state NPDES permits will be issued annually with the potential of causing substantial negative impacts to listed species and critical habitat. Yet, EPA's BE contains no discussion, let alone analysis, of even basic information essential to accurately assess these cumulative effects including, for example, how many NPDES permits are likely to be issued by the State of Arizona on an annual basis, what specific species and critical habitats are likely to be impacted by such permits, and how the specific species or critical habitat may be affected.

Response: EPA disagrees with the commenter. EPA believes that it has met all the requirements of ESA section 7 with respect to its proposed approval of the AZPDES program, including initiating section 7 consultation and providing appropriate information to the FWS to conduct an ESA section 7 consultation. As indicated above, EPA and the FWS have completed the formal section 7 consultation process.

In requesting ESA section 7 consultation, EPA prepared a biological evaluation (BE) and provided information to the FWS that met the requirements of the ESA, including, among other things, a description of the area that may be affected by the action, a description of the manner in which EPA's action may affect any Federally-listed threatened or endangered species (listed species) or their designated critical habitat, and an analysis of any cumulative effects, as demonstrated in its June 21, 2002 submittal and EPA's follow-up letter to the FWS dated August 22, 2002 explaining how its June 21 submittal provided the necessary information.

First, EPA provided a description of the area and species that might be affected by the action. Part VII of the BE states (and EPA's August 22, 2002 letter reiterates), "As the location of future discharges cannot be anticipated, for purposes of this BE, the USEPA has determined that all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters may be affected by this action." A list of such species was provided in Appendix C to the BE. EPA also provided to the FWS by attachment to the August 22 letter a list of all NPDES permits authorized in the State of Arizona (excluding NPDES permits in Indian country) and, for each such permit, the facility address and the name of the receiving water if available.

Second, while the commenter may disagree with the analysis and conclusions in EPA's BE, the BE and EPA's August 22 letter clearly and adequately analyze effects of EPA's proposed approval action on listed species and critical habitat, and explain the basis for EPA's conclusions about such effects. Among other things, the continuing requirements of the CWA, the requirements of the AZPDES program, and EPA's oversight of the AZPDES program will provide ongoing protection to listed species and critical habitat in Arizona following EPA's approval of the AZPDES program. For example, as discussed in detail in the BE, EPA and the FWS have signed a Memorandum of Agreement describing the manner in which EPA and the FWS will work together to ensure that States administering the NPDES program protect listed endangered and threatened species. *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* dated February 22, 2001 (National MOA). In the National MOA, EPA has agreed to utilize its oversight authority in a specific manner to protect listed species and critical habitat. Implementation of the MOA procedures will ensure, among other things, that the FWS has an opportunity to review and comment on draft AZPDES permits and work with ADEQ and EPA to address potential effects to listed species and critical habitat associated with the permits. As indicated in the BE, EPA is committed to following the procedures in the National MOA to continue to ensure the protection of listed species after our approval of the AZPDES program. As explained in detail in the BE, in light of these continuing protections, EPA concluded that its proposed approval action would be insignificant and discountable and therefore its approval action was not likely to adversely affect listed species or critical habitat.⁴

Third, EPA's biological evaluation included an appropriate level of description and analysis of

⁴ EPA notes that its determination that its proposed approval action was not likely to adversely affect listed species or critical habitat was appropriate in light of its finding that any effects would be insignificant or discountable. FWS has determined that an action is not likely to adversely affect listed species where effects on species are insignificant or discountable. See, e.g., *Endangered Species Consultation Handbook, Procedures for Conducting Section 7 Consultations and Conferences*, U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998, at pp. xv-xvi, 3-12.

cumulative effects. EPA's BE explained that loss and degradation of habitat continues to occur in Arizona through home development on private land, commercial development, and other methods, that State lands continue to experience different actions such as mining, livestock grazing, recreational use that diminish the quality and quantity of habitat, and that these actions are not likely to decrease or cease in the future.

Fourth, to ensure that FWS had the benefit of reviewing information pertaining to endangered species presented by other parties interested in EPA's proposed program approval, EPA forwarded to FWS, by letters dated October 15, 2002 and October 25, 2002, all ESA-related comments received during the public comment period on EPA's proposed approval of the AZPDES program. Thus, the FWS considered the information in those comments during the consultation.

Last, EPA agrees with the commenter that ESA section 7 does not apply to State permitting actions, but disagrees that EPA's approval action will result in monumental impacts on listed species and critical habitat. EPA notes that on December 3, 2002, FWS issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of affect listed species or designated or proposed critical habitat, thereby concluding the formal consultation process. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS, the Federal expert agency on listed species and their critical habitat, in proceeding with its approval action. See response to Comment 3 immediately below.

Comment 3; Arizona Center for Law in the Public Interest

EPA's Approval Of The AZPDES Program Will Jeopardize The Continued Existence Of Dozens Of Federally-Listed Species And Result In The Destruction Or Adverse Modification Of Critical Habitat.

EPA's approval of the AZPDES program is no small procedural matter for the approximately sixty endangered and threatened species in Arizona. As already noted, it is EPA's position that transferring the NPDES program to the State of Arizona will terminate application of the requirements of section 7 of the ESA with respect to NPDES permitting, thus eliminating one of the most important legal protections for these species and their habitats. Nonetheless, EPA asserts that such action will have at most "insignificant and/or discountable" impacts on listed species and critical habitat. One need look no further than the substantial impacts that have and continue to occur to listed species and critical habitat in Arizona from EPA-issued NPDES permits, where the requirements of section 7 of the ESA are in effect, to understand that EPA's claim is simply incorrect.

Stormwater discharge and point source discharge permits for residential and commercial urban development projects often result in significant adverse impacts to listed species and critical habitat. Obvious adverse effects of such NPDES permitting include the elimination of

listed species, destruction of occupied and unoccupied habitat, and adverse modification of designated critical habitat. These effects are often significantly multiplied when considered alongside impacts resulting from Clean Water Act section 404 permits. Other NPDES permit impacts include increased domestic water consumption, degradation of watershed and water quality conditions, and resulting harm to riparian or aquatic listed species and designated critical habitat, often many miles away from the permitted development.

The cactus ferruginous-pygmy owl (“pygmy owl”) is one of dozens of species in Arizona impacted by projects and activities authorized by EPA’s NPDES program. The pygmy owl is threatened primarily by past and ongoing destruction and fragmentation of habitat, particularly within the Tucson Basin, from urban and commercial development, much of which is authorized by NPDES permits. The harmful effects of NPDES permitting is also apparent in the San Pedro River basin where increased pollution is threatening the species that depend on that water-based ecosystem for survival. The FWS has detailed a number of concerns with regard to NPDES permitting in and around the San Pedro River basin including the impacts of the effects of consumptive water use from urban development. [See Letter to Alexis Strauss from U.S. FWS dated April 27, 2000.] According to the FWS, annual groundwater withdrawals exceed replacement in the Sierra Vista subwatershed by roughly 7,000 acre-feet, and are ultimately expected to diminish or eliminate baseflow in the river. Listed species such as the southwestern willow flycatcher, Huachuca water umbel, spikedace and loach minnow, and their critical habitats, will all be affected by any such baseflow reduction. Groundwater pumping for new urban development is clearly an indirect effect of NPDES permitting in this region.

FWS has also detailed a number of harmful indirect effects of urban development in the Verde River basin of central Arizona. For example, in its December 26, 2001 Biological Opinion on the NPDES permit for the “Homestead at Camp Verde,” a development project, the FWS found that: Urbanization near the Verde River has reduced the ability to establish dense riparian vegetation. Development has created and maintained the demand for domestic and industrial water use resulting in increased groundwater pumping and flood control structures that alter stream hydrology and also increases bridges, roads, vehicles, sand and gravel mining and other industrial and commercial uses detrimental to riparian habitat. Urbanization has also increased the demand for recreational use of remaining riparian areas for trails, campgrounds and use of river areas for off-road vehicles, etc. Developments and recreation increase trash, lawns, bird feeders, and habitat fragmentation, and as a result, an increase of predators or passerines such as cowbirds house cats, grackles, and ravens . . .

[Biological Opinion, Homestead at Camp Verde NPDES Permit, December 26, 2001.] Overuse of groundwater in the Verde River basin is also a major concern. According to FWS, “the extent of groundwater overdraft (water resources that are not being replenished) in [Chino and Verde valleys] . . . was considered critical . . .” *Id.* [Furthermore, urbanization also results in watershed degradation, including increased runoff, erosion, altered hydrogeomorphology, incision, lowered water table, and resulting losses of riparian vegetation. These indirect effects of NPDES permitting adversely affect Verde River basin riparian and aquatic habitats, and dependent

federally listed species, including the Bald eagle, Southwestern willow flycatcher, loach minnow, spikedace, razorback sucker and their designated critical habitats.

The examples above are merely a sampling of the negative impacts that are likely to result from EPA approval of the AZPDES program. At present, these impacts must, at least, be examined through the ESA's section 7 consultation process. Once the program is transferred to the State, it is apparently EPA's position that section 7 consultation will rarely, if ever, occur, thereby substantially increasing the likely impacts of AZPDES permits on listed species and critical habitat. Notwithstanding EPA's claims to the contrary, neither the provisions of the Clean Water Act, Arizona's water quality standards, or EPA's proposed oversight of the AZPDES program are adequate substitutes for section 7 consultation under the ESA. In short, without a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program.

Response: EPA agrees that the substantive and procedural requirements of ESA section 7 do not apply to State NPDES permits issued pursuant to State law. EPA disagrees that its approval of the AZPDES program will jeopardize the continued existence of listed species and result in the destruction or adverse modification of their critical habitat. EPA also disagrees with the commenter's assertions that "[w]ithout a commitment to maintain the existing substantive and procedural protections of section 7 consultations concerning individual NPDES permits that may affect listed species or critical habitat, EPA must disapprove of the AZPDES program."

On December 3, 2002, FWS, the expert Federal agency on listed species and critical habitat, issued a biological opinion concluding that EPA's proposed approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat. The FWS also stated in its biological opinion that it does not anticipate that EPA's action will incidentally take listed species. EPA considered the opinion of the FWS in proceeding with its approval action. As stated above, during the consultation process, EPA forwarded to FWS for consideration all ESA-related comments received during the public comment period on its proposed approval of the AZPDES program. EPA believes that FWS appropriately considered all relevant information regarding the effects of the approval action on listed species and designated and proposed critical habitat in arriving at its conclusion, including a broad range of direct and indirect effects of EPA's approval action. The objections of the commenter relate primarily to the commenter's judgments concerning the effects of the AZPDES program approval on various species. We believe that no information has been submitted which would indicate that the conclusions in FWS's biological opinion are incorrect.

Section 7 of the ESA and its implementing regulations require that EPA consult with FWS regarding the effects of its actions where EPA's action may affect listed species or critical habitat, and that EPA comply with the substantive requirements of ESA Section 7. EPA has complied with the ESA and its regulations in this regard.

The CWA authorizes States to administer the NPDES program under State law provided the State program meets the conditions specified in section 402(b) of the Act and EPA regulations. Section 402(b) states that EPA shall approve each submitted State program unless EPA determines that the State does not have adequate authority to meet the criteria in that section, which pertain to protection of water quality, permitting procedures, and enforcement. EPA has determined that the State of Arizona has met all such criteria. In addition, the FWS has concluded that EPA's approval of the AZPDES program is not likely to jeopardize the continued existence of listed species or designated or proposed critical habitat, or result in the incidental take of listed species. EPA concurs with this conclusion. Thus, EPA's program approval is appropriate.

Comment 4; Arizona Center for Law in the Public Interest

Unless and until the deficiencies described [in Comments 1 to 3 immediately above] are remedied, EPA lacks the authority to approve the AZPDES program.

Response: EPA disagrees. See response to Comments 1 through 3 immediately above.

Comment 5; Bruce Nigel

Examination of the delegation agreement and its concomitant documentation reveal that the ADEQ will offer no protection to endangered species or critical habitat if that department is allowed to issue its own NPDES permits. If the State of Arizona is allowed to issue its own NPDES permits, those permits will be at variance with the objectives of the CWA. The CWA specifically states as one of its goals to ensure the protection and propagation of species. Endangered species is obviously a subset of all species. Therefore, without protection for the endangered segment of "species," as the delegation agreement currently allows, any authority granted to the state would be in violation of the CWA. The CWA, in its delegation to states language, allows that any delegation should result in authority no less stringent than the Clean Water Act. The delegation request from Arizona should be rejected because the results of that delegation would translate into a state authority that is less stringent than the CWA. This would be due to the deficiency of protection offered to endangered species, resulting in a negative effect upon species propagation. Further, federal law requires all permits issued under the authority of the CWA to cause no adverse effect or "taking" upon an endangered or threatened species. This is effective when, in the parlance of those who are experienced with endangered species litigation, a "nexus" exists with a federal action. As the ADEQ proposes to accept, and EPA proposes to offer, federal funds for this program, a nexus will exist. Therefore, EPA should reject the application for NPDES program delegation because the ADEQ will fail to provide that endangered and threatened species are not subject to a taking or affected adversely by the issuance of NPDES permits, or the activities authorized by those permits, even though a nexus indisputably will exist.

Response: EPA disagrees with the commenter that approval of the AZPDES program is not consistent with CWA requirements. As described above, the CWA authorizes States to

administer the NPDES program under State law provided the State program meets the criteria specified in section 402(b) of the Act and associated EPA regulations. EPA has determined that the State of Arizona has met all such criteria, and the State's program therefore meets the requirements of the CWA. The commenter has not indicated which, if any, of these criteria he believes are not met by the State program.

EPA also notes that listed species and critical habitat are in fact provided with protection under the State's NPDES program. The CWA's goal to ensure the protection and propagation of species is carried out through numerous CWA programs, including, among others, the NPDES permitting program. By carrying out the NPDES permitting program under State law, ADEQ will in fact be providing protection to listed species by ensuring continued protection of water quality throughout the State. Also, we note that the State will provide notice to the FWS of proposed AZPDES permits, and has the authority to consider the views of the Service in appropriate cases. 40 C.F.R. §§ 124.10(c)(1)(iv)), 124.59(b) and (c).

It is not clear which "Federal law" the commenter refers to in the comment that "Federal law requires all permits issued under the authority of the CWA to cause no adverse effect or 'taking' upon an endangered or threatened species." If the commenter is referring to the ESA, we disagree with the commenter's interpretation of the statute. For example, the commenter's interpretation fails to take into account that section 7(o) of the ESA creates exceptions to the prohibitions against "take" found in section 9 of the ESA. If the commenter is referring to the CWA, the approval criteria in CWA 402(b) do not require that the State of Arizona protect listed species or that AZPDES permits cause no adverse effect or "taking" upon an endangered or threatened species, regardless of how the permitting program is funded. In any event, the FWS has determined that EPA's approval action is not likely to jeopardize any listed species or result in the destruction or adverse modification of designated or proposed critical habitat, and does not anticipate that EPA's approval action will result in incidental take of listed species. EPA believes that its approval action is consistent with the requirements of the ESA and the CWA.

See also response to Comments 1 through 4 immediately above.

Comment 6; The State of Arizona Game and Fish Department

With the approval of this program, ADEQ's permitting actions would not be subject to Section 7 consultation under the Endangered Species Act. However, the department understands that Endangered Species Act issues have been addressed in the Memorandum of Agreement (66 FR 11202) between the EPA and U.S. Fish and Wildlife Service. This agreement will serve as a guideline for EPA, FWS, and the State of Arizona to ensure that NPDES permits will not negatively impact endangered and threatened species.

The Department has worked cooperatively with ADEQ and applicants during the preliminary review of NPDES permit applications to ensure that potential impacts to special status species and other fish and wildlife resources are considered and addressed (avoided or minimized) early-

on during the permitting process. We look forward to continuing this level of cooperation between our agencies, and to seek opportunities for potential habitat restoration or enhancements projects that benefit fish and wildlife in Arizona.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 7; Greater Phoenix Chamber of Commerce and Arizona Chamber of Commerce

The Effects of Approving ADEQ's Application on Endangered Species and Historic Property Are Exaggerated and in Any Event Do Not Provide a Basis for Denying or Delaying Approval of ADEQ's Application.

Concerns have been raised about the implications of EPA approval of ADEQ's program on endangered species and historic properties. We believe these concerns are exaggerated and in any event do not provide a basis to deny or delay approval of Arizona's program. EPA is required under 33 U.S.C. § 1342(b) to approve Arizona's program if it meets the statutory elements set forth in the Clean Water Act. This expresses Congress' decision to allow a state to take the lead role in protection of the waters within its boundaries if it can establish an adequate program to do so.

The endangered species concerns revolve around the fact that EPA, as a federal agency whose actions are subject to Section 7 of the Endangered Species Act ("ESA"), is now required to consult with the U.S. Fish & Wildlife Service ("USFWS") to ensure that its permitting actions do not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of the critical habitat of such species. ADEQ, as a state agency, will not be required to formally consult with USFWS when it issues permits. As an initial matter, ADEQ is not required to consult because the ESA imposes consultation requirements only on federal agencies taking action, not on state agencies. The other 44 states operating approved NPDES programs, including every other state in Region 9, do not engage in consultation when issuing state NPDES permits. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a state NPDES permit is neither unusual nor unintended.

Moreover, substantial protections for endangered species remain, both within the AZPDES program and outside it:

AZPDES rules require that USFWS and other agencies with an interest in endangered species will be provided with copies of draft permits and invited to comment on those permits. Federal regulations (*see* 40 C.F.R. § 124.10(c)(1)(iii)) require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish and wildlife resources, which would include, *inter alia*, USFWS and the Arizona Game and Fish Department. Federal regulations (*see* 40 C.F.R. § 124.59(b)) also invite these same agencies to submit comments on the draft permits and to advise EPA in writing if the imposition of specified conditions in the

permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. EPA may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. These same requirements are contained in the AZPDES regulations. See A.A.C. R18-9-A907(A)(3)(d) & R18-9-A908(A)(4)(b).

Moreover, EPA's own review of the draft permits presumably will be coordinated with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 Memorandum of Agreement ("MOA") between the agencies entitled *Enhanced Coordination Under the Clean Water Act and Endangered Species Act*. See 66 Fed. Reg. 11202, 11215-16 (Feb. 22, 2001). That MOA applies to coordination between federal agencies under the ESA, and does not require or contemplate that any additional procedures regarding endangered species will be in place at the state level.

Effluent limitations established in AZPDES permits will largely be driven by surface water quality standards established by ADEQ under EPA oversight, since these standards are typically more stringent than technology-based standards for the same pollutants. Surface water quality standards are reviewed every three years. ADEQ just completed its latest triennial review early this year. Surface water quality standards, which are constantly under review as additional data is gathered, are designed to be protective of all species, including threatened and endangered species. Nevertheless, the 2001 EPA/USFWS MOA calls for additional steps to be taken to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria (which form the basis of most states' water quality standards, including Arizona's). See 66 Fed. Reg. at 11212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEQ will not adversely affect listed species.

Many projects that may affect endangered species will continue to be subject to Section 7 consultation because of the continued involvement of a federal agency even after Arizona's NPDES application is approved. The extent of federal control and involvement in this state is pervasive. The federal government owns almost 70% of the land in this state (including tribal lands). Furthermore, many development and discharge activities involve federal permitting or funding (which triggers Section 7 consultation), such as fill activities in watercourses regulated by the Corps of Engineers, energy projects regulated by the Federal Energy Regulatory Commission, or transportation and water projects involving the U.S. Department of Transportation or the federal Bureau of Reclamation.

Private action outside of Section 7 that results in a "taking" (i.e., killing, capturing or harming members of a listed species of wildlife) is prohibited by Section 9 of the Endangered Species Act unless a separate permit is obtained from USFWS. This prohibition applies to all activities, whether associated with a federal permit or not, and will not be affected by the approval of an Arizona program.

Although protections continue to exist for endangered species and historic properties, debating

the sufficiency of those protections misses the point of the current process. EPA is being asked to approve the assumption by ADEQ of a permitting program that, if approved, will significantly strengthen the protection of water quality in the state. For example, ADEQ has historically assisted EPA Region 9's limited permit staff for Arizona (we believe there may only be two) in administering the NPDES program with ten full-time federally funded positions. As noted above, the Arizona Legislature's FY2001-02 and FY2002-03 funding of the AZPDES program has resulted in *nine* additional new FTEs on the ground in Arizona dedicated to AZPDES implementation and enforcement (with EPA Region 9 staff continuing to play an oversight role). The AZPDES program clearly will result in a significant increase in the resources dedicated to water quality protection under the federal NPDES program.

Concerns over endangered species and historic properties are properly addressed within the context of laws designed to protect those resources. Congress has spoken and neither the ESA nor the CWA requires state governments implementing approved programs to consult with USFWS on their permitting actions, and neither the NHPA nor the CWA requires state governments to consult with SHPO. To date, 44 states have been delegated this program and, to our knowledge, none are consulting under these laws. There is no legal or policy reason that Arizona's program should operate under a different standard than those in these other states

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application. See also response to Comment 8 in Category IV above for EPA's response pertaining to NHPA issues.

Comment 8; Withey Anderson & Morris

Identical to comment 7.

Comment 9; Homebuilders Association of Central Arizona

Identical to comment 7.

Comment 10; Arizona Association of Industries

Comment 7 incorporated by reference.

Response to Comments 8, 9, and 10: EPA appreciates the commenters' support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 11; Diamond Ventures Inc.

The U.S. Congress has expressed a strong preference to have states take the lead role in the protection of waters within their boundaries so long as sufficient program support is generated

within states and so long as the statutory elements of the Clean Water Act are satisfied. The AZDES program has been designed consistent with the programs in place in 44 other states relative to the endangered species Act and Section 7 consultations with the U.S. Fish and Wildlife Service. Like other states that administer pollution discharge permits, procedures have been built into the AZDES program to provide the appropriate and legally mandated oversight of the program by EPA and U.S. Fish and Wildlife. The fact that Arizona would not be subject to a Section 7 consultation requirement when issuing a permit under the AZDES program is not unusual and is, in fact, typical.

Response: EPA appreciates the commenter's support. As with all comments submitted, we have considered these comments in making our final determination on the application.

Comment 12; Navajo Nation

The public notice for the AZPDES program submission that appeared in the Federal Register (August 1, 2002, Volume 67, Number 148, Page 49916-49920) states that "EPA will not make a final decision on AZPDES program approval until after: ...(2) completion of the ongoing consultations with the U.S. Fish and Wildlife Service on effects program approval may have on endangered or threatened species and their designated critical habitat; and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places." No documents comprising the AZPDES program submission discuss the AZPDES permit review procedures involving potential effects on endangered or threatened species and their designated critical habitats and historic properties or sites. For the AZPDES program submission, EPA Region 9 initiated formal consultation with the U.S. Fish and Wildlife Service on June 21, 2002. The Federal Register public notice imparts that EPA's action to delegate NPDES program authorization is itself a federal action requiring consultation under the ESA and NHPA but not the "...subsequent AZPDES permit actions...." In the Navajo Nation's development of its own NPDES program submission, Navajo EPA participated in extensive work (meetings, correspondences, teleconferences, etc.) starting in 1995 with the U.S. Fish and Wildlife Service, the New Mexico State Historic Preservation Officer (SHPO), and the Advisory Council for Historic Preservation (ACHP). Navajo EPA subsequently reached closure with ACHP concerning NNPDES permit actions and historic properties and sites. For NNPDES permit actions and endangered or threatened species and their designated critical habitats, EPA opted to progress toward the use of its proposed "national MOA" with the U.S. Fish and Wildlife Service. The intent was to have the "NPDES MOA Between the Navajo Nation and the U.S. Environmental Protection Agency Region 9" spell out how Navajo EPA see to it that NNPDES permit actions have no effect on endangered or threatened species and their designated critical habitat and on the preservation of historic properties. EPA's public notice of the AZPDES program submission without consultations completed with the U.S. Fish and Wildlife Service and the SHPO or without any ESA and NHPA discussion in permitting procedures gives the impression that EPA is utilizing a different (abbreviated) NPDES program approval format for the State of Arizona.

Response: In addition to completing all required procedural requirements for approval of the AZPDES program, and determining that the AZPDES program meets the requirements of CWA section 402(b), EPA has completed a formal consultation process with the FWS under section 7 of the ESA. As discussed in detail in EPA's BE and in the response to Comment 2 immediately above, EPA and the FWS have signed the National MOA which describes the manner in which EPA and the FWS will work together to ensure that States and Tribes administering the NPDES program protect listed endangered and threatened species. EPA will follow this agreement with respect to its oversight of the AZPDES program. EPA believes that the procedures it followed for approving the AZPDES program are consistent with the requirements of the CWA and the ESA. See also response to Comment 7 in Category IV above for EPA's response pertaining to NHPA issues.

XIII. Category; Support for EPA Approval of AZPDES Program

Comment 1; Arizona Chamber of Commerce & Greater Phoenix Chamber of Commerce; Withey, Anderson & Morris; Home Builders Association of Central Arizona

Approval of the ADEQ's Application Will Result in Improved Communication, Better Understanding of Local Conditions, More Efficiency And Enhanced Environmental Protection.

We strongly support ADEQ's application based on the principle that the government closest to the people is the best government. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection.

- Improved communication. It is essential to the operation of any regulatory program that open and constant lines of communication be maintained between the regulated community and the agency. If good communications are maintained, many problems associated with permitting and compliance can be resolved informally, with minimal devotion of resources. An agency such as ADEQ, with offices throughout the state, is in a better position to maintain communication with the regulated community here in Arizona than is an EPA Region based in San Francisco. The opportunities for face-to-face and onsite meetings, so essential to good communications, will be substantially enhanced.
- Increased understanding of local conditions. A state agency is in a better position to understand local conditions and to respond to those conditions in a manner that best enhances environmental protection. Congress recognized this in the Clean Water Act ("CWA") itself by allowing the states to take the lead in setting water quality standards and implementing the TMDL program, and in requiring EPA to step back from administering the NPDES program if a state develops its own program that

meets CWA requirements. This attention to local concerns is highlighted in the AZPDES enabling legislation, which allows the ADEQ Director to “adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article.” Ariz. Rev. Statutes § 49-255.01(B).

More Efficiency. We believe that ADEQ is in a position to administer an efficient program for a variety of reasons. Obviously, locating offices closer to the permittees is inherently more efficient, with less time devoted to travel and the logistics of communicating over long distances. Further, ADEQ has the expertise to administer this program, having had extensive involvement in the NPDES program under EPA’s leadership (ADEQ currently drafts NPDES permits for the majority of facilities in Arizona) and having extensive experience in running its own Aquifer Protection Permit (“APP”) program (which, like the NPDES program, contains both technology-based and standards-based permitting requirements). Finally, the factors discussed previously, improvements in communications and increased sensitivity to local concerns will enhance efficiency. For example, a deeper understanding of local conditions allows resources to be devoted to those areas of greatest local concern. Furthermore, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona’s APP program. Some projects often require both an APP and NPDES permit, and it makes sense to have one agency do both. Moreover, because most existing facilities in Arizona requiring an APP already have that permit, or are in the process of obtaining it,⁵ ADEQ already has a level of familiarity with sites that should help streamline permitting if those sites require an NPDES permit as well.

Enhanced environmental protection. The inevitable result of improvements in communications, sensitivity to local conditions, and program efficiencies is improved environmental performance. We support a clean environment and sound regulatory policies that lead to a clean environment. Transfer of this program to ADEQ, with the increased resources devoted to the program and improved efficiencies, should lead to a cleaner environment for all Arizonans.

II. The State of Arizona Is Committed to the NPDES Program and ADEQ Is Fully Capable of Administering the Program.

Surprisingly, opposition to ADEQ assumption of the NPDES program has arisen in some quarters because of concerns over the State of Arizona’s willingness to support the program and ADEQ’s ability to manage the program. We find these criticisms unfounded.

⁵ State law establishes a deadline of January 1, 2004 for most existing facilities to obtain an APP. *See* Ariz. Rev. Statutes § 49-241(D).

The State of Arizona has shown a solid commitment to the AZPDES program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states. In 2001, the Legislature budgeted \$472,400 and 9 FTE positions in FY2001-02 and \$432,500 and 9 FTE positions in FY2002-03 from the General Fund in order to provide ADEQ the additional resources necessary to fully administer the AZPDES program (the State already had 10 federally funded FTEs devoted to the program). Despite budget cuts of over ten per cent for ADEQ and other state agencies during the last two budget years, the Legislature and the Governor have maintained full funding for the AZPDES program. Although any government program, state or federal, is subject to the vagaries of the budget process in the future, the fact that AZPDES funding survived the state's recent budget cuts is a sign of Arizona's firm commitment to the program.

ADEQ is fully capable of administering this program. In addition to the expanded resources made available by the Legislature, ADEQ has extensive permitting and enforcement experience under the NPDES and APP programs, as noted above. The APP program in particular has been developed and managed entirely independent of federal direction or oversight.

The above comments were incorporated by reference by the Arizona Association of Industries

Comment 2: Diamond Ventures Inc.

Diamond Ventures, Inc. respectfully requests that EPA approve the application of ADEQ to administer the NPDES program. Support for this application comes from a wide range of "stakeholders" and a wide range of the regulated community. The application is fully supported by the State of Arizona with approval (by 2/3rd margin) by both houses of the Arizona Legislature. The Arizona Governor's Office and Arizona Legislature placed the highest priority upon this application and resulting program by establishing a full funding commitment to ADEQ for the administration of this program even though these are lean years for state government.

Our firm believes that the adoption of the program is good for the State of Arizona and strongly supports the transition of the permitting responsibility from EPA Region IX to ADEQ. The following reasons support this conclusion:

1) Local Control and Understanding of Local Conditions: A state agency is better prepared to understand and respond to local conditions in a manner that will result in improved environmental quality for future generations. The administration of NPDES program by the individual states has been embraced by the U.S. Congress through the Clean Water Act, and implemented in 44 states.

2) Improved Communications: Improved environmental protection is dependent upon the

quality of communication between the regulatory agency and regulated community. ADEQ maintains offices in Phoenix, Tucson, and Flagstaff and is therefore in an advantageous position to maintain the highest quality and direct communication with the regulated community.

3) ADEQ Qualifications: ADEQ has demonstrated that it is fully capable of administering complex environmental programs. With committed resources, as mentioned above, the agency has extensive permitting and enforcement experience under the current NPDES and Aquifer Protection Permit programs. Contrary to certain criticisms leveled at ADEQ relative to the proposed application, ADEQ is fully capable to administer the Arizona Pollutant Discharge Permit program.

Comment 3; Pinnacle West Capital Corporation

Pinnacle West Capital Corporation (PAW) respectfully requests that the United States Environmental Protection Agency (“EPA”) approve the application of the Arizona Department of Environmental Quality (“ADEQ”) to administer the National Pollutant Discharge Elimination System (“NPDES”) program.

We strongly support ADEQ’s application based on the principle that the government closest to the people is the best government. The operation of this principle is demonstrated by the fact that all but six states have been authorized to administer the NPDES program. State administration of the NPDES program through the Arizona Pollutant Discharge Elimination System (“AZPDES”) program will allow for better communication and a better understanding of issues unique to Arizona. For example, the AZPDES enabling legislation allows the ADEQ Director to “adopt rules to reflect local environmental conditions to the extent the rules are consistent with and no more stringent than the Clean Water Act and this article.” Ariz. Rev. Statutes § 49-255.01(B) (in part). In addition, additional operating and budget efficiencies can be achieved through the interaction of the AZPDES program with other state programs, such as Arizona’s Aquifer Protection Permit program.

The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

As an entity regulated under the NPDES program, PAW and its subsidiaries recognize the benefits of working with regulators who can, and have, familiarized themselves with our facilities by visitation and interactions stemming from other regulatory programs. This familiarity increases efficiencies in all respects of permit and compliance management, and it has the potential to increase the effectiveness of program implementation. We believe the ADEQ has prepared itself for AZPDES implementation at the high level.

Comment 4; Robson Communities

We strongly support ADEQ's application. Although we appreciate Region 9's administration of the NPDES program in Arizona, state administration of the NPDES program through the Arizona Pollutant Discharge Elimination System ("AZPDES") program will allow for improved communication, better understanding of local conditions, more efficiency and enhanced environmental protection. At the hearing we provided examples of where ADEQ availability allowed permitting and compliance issues to be resolved efficiently and expeditiously. For example, on one occasion, we received homeowner complaints about effluent discharges in washes near our Saddle Brooke community. With ADEQ assistance, we inspected the situation and were able to document that the discharges were stormwater-only. On another occasion, we had a particularly complicated NPDES permitting issue and a site visit by ADEQ cleared up the matter quickly. Both of these illustrate the value of having a water quality program that is operated at the State level.

We disagree with claims being made that ADEQ lacks the resources or ability to administer the AZPDES program. Rather, ADEQ has exhibited the clear ability to administer complex permitting programs both through its involvement with the NPDES program to date as well as its administration of the Aquifer Protection program, a program developed entirely without federal oversight or direction.

ADEQ will have the necessary resources to carry out this program. The Arizona Legislature has recognized the benefits of state administration of the NPDES program. Both houses of the Arizona Legislature approved the enabling legislation (House Bill 2426) with bipartisan support and by two-thirds margins or more on final passage. In addition, the Legislature has fully funded the NPDES program despite severe budget pressures facing Arizona and most states.

Comment 5; City of Phoenix

Please be advised that the City of Phoenix supports the State of Arizona request to operate the NPDES program within Arizona as outlined in the Federal Register announcement dated August 1, 2002 (67 FR 49916). The City of Phoenix participated in the stakeholder effort to develop the Arizona Pollutant Discharge Elimination System (AZPDES) Permit Program. Based on the level of discussions and communications that occurred during the stakeholder meetings, the City is confident that the State will devote the necessary resources to make the program a success. This obviously includes implementation of a program that meets the requirements of the Clean Water Act but also incorporates flexibility, where it exists, to consider the unique characteristics of the State's water environment.

The first step in this process is the approval to proceed by the United States Environmental Protection Agency (EPA). We respectfully ask that USEPA approval be given to the State of Arizona to proceed without further delay.

Response to Comments 1-5: EPA appreciates the commenters' support. As with all comments submitted, EPA considered them in making its final determination to approve the State of Arizona's submission.