United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In Reply Refer To:
FWS/AES/DCHRS/050349

FEB 10 2012

Mr. Cliff Rader
Acting Director
NEPA Compliance Division
U.S. Environmental Protection Agency
Washington, DC 20460

RE: Request for Concurrence that the Construction General Permit is Not Likely to Adversely Affect Listed Species or Critical Habitat

Dear Mr. Rader:

This responds to your September 28, 2011, letter requesting the U.S. Fish and Wildlife Service's (Service) concurrence that the proposed Construction General Permit (CGP) is not likely to adversely affect any listed species or critical habitat pursuant to section 7 of the Endangered Species Act of 1973, as amended (ESA). This consultation is based upon your November 2011 *Biological Evaluation: Reissuance of the Construction General Permit*, the January 2012 draft CGP, and additional correspondence between November 2011 and February 2012.

The Environmental Protection Agency (EPA) proposes to reissue the Clean Water Act (CWA), National Pollution Discharge Elimination System (NPDES) general permit that authorizes the discharge of pollutants in storm water from new and existing sources associated with construction sites greater than 1 acre where the EPA is the permitting authority. The EPA is the permitting authority in Idaho, Massachusetts, New Hampshire, New Mexico, the District of Columbia, Puerto Rico, and other U.S. territories (except U.S. Virgin Islands); and for Federal facilities in Colorado, Delaware, Vermont, and Washington; most Indian lands; and for other activities in other states. The attached Table 3 from the BE lists the number of permits issued by state for each year from 2005-2010. Covered activities occurred in as many as 35 states or territories

The CGP focuses primarily on managing erosion and discharge of sediment into waters of the U.S., but also covers other pollutants that could originate from the site, including use or storage of materials on the construction site. The CGP specifically authorizes use of cationic polymer flocculants, such as polyacrylamide, to manage sediment discharges. Controls of pollutant discharges are implemented through required "best management practices" (BMPs) with requirements for achieving State water quality standards, any "total maximum daily loads" that may apply, and protection of threatened and endangered species and critical habitats.

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The EPA's CGP requires operators to include measures for inspecting, monitoring, and maintaining storm water management features, taking corrective action, as appropriate, and reporting. If the disturbed area is 10 acres or less, operators need only conduct visual inspections of BMPs and water quality. If necessary, corrective actions must be taken to ensure stormwater controls are operable. Reporting is required only in the event of a prohibited discharge or if stormwater management measures are not sufficiently effective for the discharge to meet applicable water quality standards. If construction activity will disturb more than 10 acres at one time and discharges will enter a waterbody that is impaired for sediment or a sediment-related parameter (e.g., total suspended solids or turbidity) and/or nutrients, then benchmark monitoring is required. If benchmarks are exceeded, then corrective actions are required. In all cases, corrective actions must be reported to the EPA; and all benchmark monitoring results must be reported to the EPA.

The EPA requires entities seeking coverage under the CGP to prepare a StormWater Pollution Prevention Plan (SWPPP) that serves as both a plan and repository of the administrative record for the life of the permit. The SWPPP identifies the site operators, the type of action to be implemented, any materials to be stored on-site, a description of control measures (i.e., BMPs) to reduce pollutant discharges, and documentation of permit eligibility. Permittees are required to maintain an updated SWPPP, including a log of: construction and grading activities, implementation of stabilization measures, monitoring and inspections, revisions to the plan, and the stormwater management controls (i.e., BMPs) implemented.

Operators seeking coverage under the CGP must meet eligibility requirements or seek a separate Individual Permit under the CWA. Eligibility requirements include compliance with section 7 of the ESA. Operators must determine their activities will have no effect or are not likely to adversely affect listed species and critical habitats; or demonstrate that any potential adverse effects of their activities have been addressed in a separate section 7 consultation or Habitat Conservation Plan completed pursuant to the ESA.

Operators seeking coverage under the CGP self-certify their compliance with the ESA and must document their eligibility in the SWPPP. Self-certification must be completed prior to posting an electronic-Notice of Intent (eNOI) to be covered by the CGP. Once the eNOI is posted, operators must wait at least 14 days prior to being covered by the permit. When an eNOI is uploaded to the EPA's online system, the system sends a notification email to the appropriate Service field office based on the location of the action. The notification sent to Service offices will contain a site map. If requested, the SWPPP will be made available for Service review. The Service office receiving the email has 14 days to review the eNOI. During this period, the Service may request that EPA place a "hold" delaying coverage under the CGP pending further consultation between EPA, the Service, and operator. This further consultation can result in the EPA releasing the hold on coverage if ESA compliance is confirmed, or the EPA determining the operator does not qualify for coverage under the CGP. If the Service does not request a "hold" on coverage of the operator, then the operator is covered automatically after 14 days.

During the permit term, the EPA will, in consultation with the Service, conduct two compliance evaluations. The first includes reviewing a targeted sample of SWPPPs. The purpose of this evaluation, the "SWPPP Study," will be to determine operator compliance with the ESA eligibility requirements, to identify problems, if any, and to develop proposed solutions, as needed. The second evaluation focuses on the effectiveness of BMPs used among sites covered under the 2012 CGP. The objective of the "Construction Stormwater BMP Effectiveness Analysis" will be to determine whether field experience from the EPA enforcement staff can shed light on where improvements can be made to the stormwater control requirements in the 2012 CGP.

The proposed CGP may affect endangered and threatened species and critical habitats that occur in upland and aquatic environments. These species and habitats may be affected by construction activities and stormwater control activities that temporarily or permanently remove habitat and/or result in discharges of pollutants that diminish the quality of habitat to an extent that diminishes the fitness of individuals. In the CGP, the EPA has incorporated requirements that applicants self-certify their ESA eligibility. Operators that do not self-certify ESA eligibility would have to seek a separate, Individual Permit under the Clean Water Act (CWA).

Based upon our review of the proposed general permit, BE, and compliance evaluations, we have concluded: that the activities covered under the EPA's CGP "may affect" but "are not likely to adversely affect" listed species and critical habitats; or that any activities potentially causing adverse affects will be in compliance with a section 7 consultation completed on some other Federal agency action or HCP.

Finally, given the volume and scope of activities the EPA will be issuing under its various general permits, we believe it would be mutually beneficial to collaborate on developing a more efficient and interactive online system for reviewing the individual actions covered by these general permits and identifying those in need of further consultation.

We appreciate the collaboration your staff has provided. If you have any question please contact Don Morgan of my office at (703) 358-2171.

Sincerely,

Richard E. Sayers

Richard E. Sayers
Chief, Division of Consultation,
HCPs, Recovery and State Grants

Enclosure