

ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711
June 21, 1993

MEMORANDUM

SUBJECT: Endangered Species Act Consultation

FROM: D. Kent Berry, Acting Director
Air Quality Management Division (MD-15)

TO: Raymond Nye
Air Compliance and Permit Section (AT-082)

This is in response to your April 22, 1993 letter to David Solomon requesting concurrence with your understanding that, with respect to prevention of significant deterioration (PSD) permits, only federally-issued permits [or Federal permits issued by a State pursuant to a delegation of authority from the Environmental Protection Agency (EPA)] are subject to the requirements of the Endangered Species Act of 1973 (ESA). The request stemmed from an April 16, 1993 letter from the Fish and Wildlife Service (Service) to you that responds to the State of Alaska Department of Environmental Conservation's (DEC's) request for informal consultation under ESA section 7 for PSD Air Quality Control Permits regarding six turbine upgrade projects on the North Slope of Alaska.

As an initial matter, the Office of Air Quality Planning and Standards does not interpret the Service's letter as a request for EPA consultation with the Service on the permits issued for the six turbine upgrade projects pursuant to ESA section 7. Rather, after discussing this issue with the Office of General Counsel (OGC), we read the letter as providing the Service's opinion that the six turbine upgrade projects identified in its letter are not likely to adversely impact either the listed-threatened peregrine falcons that occur in the general action area, or the proposed-threatened spectacled elders that may nest in the project area. The letter does appear to pose the question about who has the responsibility to consult with the Service in Alaska in the future, if adverse impacts were to be identified.

The regulations promulgated by the Service to implement ESA section 7 state that if the Service provides written concurrence that the action at issue is not likely to adversely affect listed species or other critical habitat, the consultation process is terminated and no further

consultation action is necessary [50 CFR S 402.13]. Consequently, the result of the Service's letter is that any ESA section 7 consultation responsibilities EPA may currently have regarding the six turbine upgrade projects have been presently fulfilled. Even assuming the issuance of a PSD permit under a State implementation plan (SIP)-approved PSD program is within the scope of the ESA (and, as discussed below, this is an unsettled question), EPA would be under no duty to engage in further consultation with respect to these projects unless the air quality around the facilities deteriorates and affects listed species in subsequent years.

With regard to the responsibility for future consultations with the Service on endangered species under an approved State-run PSD program, EPA has not developed a position as to its obligations under the ESA Section 7. The EPA's OGC is currently assessing the Agency's responsibilities under the ESA on a comprehensive basis. As part of this assessment, EPA is considering which of its actions taken pursuant to the Clean Air Act (and resultant regulations) are subject to the ESA section 7 consultative duty. Until the comprehensive policy is developed, particularly with respect to air programs, a statement addressing this question would be premature. In the interim, questions of this nature should be handled on a case-by-case basis.

We believe the appropriate response to the Service at this time should contain the following: a) appreciation for bringing this issue to EPA's attention, b) an acknowledgement of the determination that the turbine projects are not anticipated to cause adverse impacts to the subject species, and c) a statement that EPA will address the issue of the ESA's applicability to SIP-approved, State-run PSD programs in the broader policy under development addressing EPA's responsibilities under ESA. Finally, we agree with your general position that the Service and the State of Alaska may, of course, work together on endangered species issues as these two entities in their discretion deem appropriate.

Thank you for alerting us to the Service's letter and your intended response to it. Please contact Dennis Crumpler of the New Source Review Section at (919) 541-0871 if you wish to further discuss your response to the Service. General questions about EPA's responsibilities under the ESA may be directed to Mike Thrift of OGC at (202) 260-7709.

cc: S. Silva (Fish and Wildlife Service)
M. Thrift (OGC)