



---

Friday  
January 15, 1999

---

**Part V**

**Environmental Protection  
Agency**

**Department of the Interior**  
Fish and Wildlife Service

**Department of Commerce**  
National Oceanic and Atmospheric  
Administration

---

**Draft 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 the Endangered  
Species Act; Notice**

---

**ENVIRONMENTAL PROTECTION  
AGENCY****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric  
Administration**

[FRL-6219-4]

**Draft 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 the  
Endangered Species Act**

**AGENCIES:** Environmental Protection Agency, Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service are publishing for public comment a draft Memorandum of Agreement describing procedures for enhancing coordination regarding the protection of endangered and threatened species under section 7 of the Endangered Species Act and the Clean Water Act's Water Quality Standards and National Pollutant Discharge Elimination System programs.

**DATES:** Comments must be received or postmarked by midnight March 16, 1999.

**ADDRESSES:** An original and 4 copies of written comments should be submitted to W-98-32, ESA Comment Clerk, Water Docket (MC4101), USEPA 401 M Street SW, Washington, DC, 20460. Commenters who want EPA to acknowledge receipt of their comments should enclose a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted. Comments may also be submitted electronically to ow-docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Electronic comments must be identified by docket number W-98-32. Comments will also be accepted on disks in WP 5.1, WP 6.1, or ASCII file format.

The record for this draft Memorandum of Agreement has been established under docket number W-98-32, and includes supporting documentation as well as printed, paper

versions of electronic comments. The record is available for inspection from 9 to 4 p.m., Monday through Friday, excluding legal holidays at the Water Docket, EB 57, USEPA Headquarters, 401 M Street, Washington, D.C. For access to docket materials, call 202-260-3027 to schedule an appointment.

**FOR FURTHER INFORMATION CONTACT:** Barbara McLeod, Office of Water, Environmental Protection Agency (telephone 202-260-5681); Margaret Lorenz, Endangered Species Division, National Marine Fisheries Service (telephone 301-713-1401); or Richard Hannan, Division of Endangered Species, Fish and Wildlife Service (telephone 703-358-2171).

**SUPPLEMENTARY INFORMATION:** The Environmental Protection Agency (EPA), and the Fish and Wildlife Service and the National Marine Fisheries Service (the Services, referring to each Service individually or jointly, as appropriate), have developed a draft Memorandum of Agreement (MOA, or Agreement) describing how we will cooperate in implementing our respective responsibilities under the Clean Water Act (CWA) and the Endangered Species Act (ESA). Specifically, the draft MOA addresses the protection of endangered and threatened species under the Water Quality Standards and National Pollutant Discharge Elimination System (NPDES) programs established by sections 303(c) and 402 of the CWA, respectively.

EPA and the Services believe that a national agreement detailing how these programs protect an important component of the aquatic environment—endangered and threatened species—will help achieve the complementary goals of the CWA and the ESA. Section 101(a) of the CWA states that the goal of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. One important indicator of biological integrity is the extent to which the waters provide for the "protection and propagation of fish, shellfish and wildlife." CWA section 101(a)(2). Conversely, a water body whose quality is contributing to a species' risk of extinction is not fulfilling the CWA's objectives or meeting the objectives of the ESA. Paying attention to the needs of endangered and threatened species as EPA implements the CWA will help achieve the goals of the CWA as well as the ESA's objective of providing "a means whereby the ecosystems upon which endangered species and

threatened species depend may be conserved." \* \* \* ESA 2(b).

In recent years, EPA and the Services have increased efforts to achieve greater integration of CWA and ESA programs. These activities have included ESA section 7 consultations on EPA's actions approving State and Tribal water quality standards and NPDES permitting programs. These consultations have generally been conducted by our regional and field offices on a case-by-case basis. We have found, however, that certain issues repeatedly arise in these consultations. These issues include: the extent to which water quality criteria are protective of listed species; the protection of non-aquatic wildlife; the appropriate scope of reasonable and prudent measures for minimizing incidental take of listed species; research needs to address areas of uncertainty; and interagency coordination with regard to EPA oversight of NPDES permits issued by States or Tribes. A coordinated national approach would help ensure an appropriate level of protection for listed species and greater regulatory predictability for States, Tribes, and the public. Enhanced cooperation among the agencies, by more effectively ensuring that effects from pollutants on listed species are addressed under existing authorities, should also help avoid the need to list new species under the ESA and facilitate recovery of species so that they no longer require protection under the ESA.

The draft MOA also seeks to make ESA section 7 consultations more timely and efficient. Some consultations between the EPA and the Services have been protracted (the average water quality standards consultation has, for example, taken approximately eighteen months), consuming considerable EPA and Service resources. By providing guidance to our field offices, enhancing coordination, and establishing procedures for resolving disagreements, the draft MOA seeks to streamline the consultation process, helping us and interested parties that depend on timely decision-making by the Federal government.

The draft MOA is a procedural document that addresses how EPA and the Services intend to exercise our existing statutory and regulatory authorities in a coordinated manner. A final MOA will be guidance to our field office staff that does not alter, expand, or substitute for applicable legal requirements. Therefore, development of the MOA is not subject to the notice and comment rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 553. However, we believe that

these procedures would benefit from public input, and we will consider all public comments received prior to the date in the **DATES** section above.

EPA and the Services have also been engaged in discussions regarding the development of procedures for coordination with regard to State/Tribal permitting programs under sections 404 and 405 of the CWA, and we plan to continue our discussions in these areas.

### **I. Statutory Background**

Section 7 of the ESA imposes substantive and procedural obligations on Federal agencies. Section 7(a)(1) of the ESA requires Federal agencies, in consultation with and with the assistance of the Services, to utilize their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed threatened and endangered species. Section 7(a)(2) of the ESA states that Federal agencies shall, in consultation with, and with the assistance, of the Services, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat that has been designated as critical for the species. Section 7(a)(4) of the ESA also requires that Federal agencies confer with the Services on any agency action that is likely to jeopardize the continued existence of any species proposed for listing, or result in the destruction or adverse modification of proposed critical habitat. Regulations outlining the process for section 7 consultation and conference are codified at 50 CFR part 402.

The ESA also makes it unlawful for any person to "take" any fish or wildlife species that is listed under the Act. ESA 9(a)(1)(B). "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. 1532(19). However, the Services may provide an exemption to the prohibition on take that is incidental to otherwise legal activity through a statement that is attached to a biological opinion. The incidental take statement specifies the terms and conditions necessary to carry out reasonable and prudent measures that will minimize the incidental take.

EPA's authorities under the water quality standards and NPDES permitting programs are contained in sections 303(c), 304(a) and 402 of the CWA. Under section 303(c), the development of water quality standards is primarily the responsibility of States and Tribes qualified for treatment in the same manner as States, with EPA exercising

an oversight role. Water quality standards consist of three components: (1) the designated uses of waters, which can include use for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial and other uses; (2) water quality criteria, expressed in numeric or narrative form, reflecting the condition of the water body that is necessary to protect its designated use, and (3) an antidegradation policy that protects existing uses and provides a mechanism for maintaining high water quality. States and Tribes are required to review their standards every three years and any revisions or new standards must be submitted to EPA for approval. Section 303(c) contains time frames for EPA to review and either approve or disapprove standards submitted by a State or Tribe, and requires EPA to promulgate Federal standards to supersede disapproved State or Tribal standards. In addition, section 303(c) authorizes EPA to promulgate Federal standards whenever the Administrator determines that such standards are necessary to meet the requirements of the CWA. Regulations implementing section 303(c) are codified at 40 CFR part 131.

Under section 304(a) of the CWA, EPA from time to time publishes recommended water quality criteria that serve as scientific guidance for use by States or Tribes in establishing and revising water quality standards. These criteria are not enforceable requirements, but are recommended criteria levels that States or Tribes may adopt as part of their legally enforceable water quality standards. States or Tribes may adopt other scientifically defensible criteria instead of EPA's recommended criteria (see 40 CFR 131.11(b)).

The NPDES permitting program is established by section 402 of the CWA. Any person that discharges a pollutant (other than dredged or fill material) into waters of the United States from a point source must obtain an NPDES permit. See CWA section 301(a). (Dischargers of dredged or fill material must obtain a permit under section 404 of the CWA from the Army Corps of Engineers or an authorized State.) EPA issues permits under section 402 unless a State or Tribe has been approved by EPA to administer the permitting program. Any NPDES permit must contain limitations to reflect the application of available treatment technologies, as well as any more stringent limitations needed to ensure compliance with water quality standards. CWA 301(b). EPA has promulgated regulations governing the administration of the NPDES program. See 40 CFR parts 122, 124-125.

The CWA authorizes States or Tribes to administer the NPDES program provided the program meets the conditions specified in section 402(b) of the Act and EPA regulations. See 40 CFR part 123. Currently, 43 States and the U.S. Virgin Islands have received approval from EPA to operate the NPDES program. Authorized States and Tribes are required to maintain their programs consistent with minimum statutory and regulatory requirements. When EPA approves State or Tribal authority to administer an NPDES program, EPA maintains oversight responsibility, including the authority to review, comment on and, where a permit is "outside the guidelines and requirements" of the CWA, object to State or Tribal draft permits. CWA section 402(d)(2). If EPA objects to a State or Tribal permit and the State or Tribe fails to revise the permit to satisfy EPA's objection, the authority to issue the permit is transferred to EPA. Section 402(c) of the CWA authorizes EPA to withdraw the State's or Tribe's permitting authority if EPA determines the program is not being administered in accordance with the Act.

### **II. Public Outreach and Comments Received by EPA and the Services**

EPA and the Services have developed this draft MOA after approximately two years of discussions. In addition, EPA communicated with stakeholders (e.g., States, Tribes, industry and environmental groups) about the MOA, and gave copies of a July 31, 1997, version of the draft MOA to each of the 50 State environmental agencies, several industry trade associations, environmental groups and any other party requesting a copy. We also invited these parties to provide comments on the draft and received approximately 90 comments. We recognize that other interested parties may not have had an opportunity to provide comments to the agencies, and therefore are providing an opportunity for comment on this draft. Below we have responded to some general concerns that were raised in comments we received to date. We hope that this discussion will help clarify the purpose and intent of this draft, and help the public in formulating comments.

While some commenters supported the basic approach in the MOA, most commenters expressed concerns that the draft MOA would significantly disrupt State CWA programs and undermine State and Tribal authorities under sections 303 and 402 of the CWA. Some commenters believed that the draft MOA raises significant legal issues regarding the applicability of section 7

consultation requirements to State, as opposed to Federal, water quality management activities. We believe that these comments misunderstand the intent and effect of the MOA, which is to make the existing coordination and consultation process between EPA and the Services more efficient and effective, not to impose any burdens on States or Tribes.

The draft MOA does not change our current policy of conducting section 7 consultations on EPA's actions approving water quality standards and NPDES permitting programs that may affect a listed species. Neither does the draft MOA alter the fact that section 7 of the ESA applies only to Federal agencies, not to States or Tribes. Rather, the draft MOA simply contains commitments by EPA and the Services about how we will work together in carrying out our own responsibilities under the ESA and the CWA.

EPA and the Services recognize that carrying out section 7 consultations on EPA approval of State and Tribal water quality standards and permitting programs presents special challenges. In most section 7 consultations, the Federal agency consults regarding its own activities or authorization of actions by third parties that affect listed species. Here, EPA is consulting with the Services on EPA's approval of State or Tribal programs that will, in turn, authorize activities potentially affecting listed species on an ongoing basis. The draft MOA seeks to facilitate Service involvement at the State and Tribal level, rather than only at the time the State or Tribal action has been completed and is being reviewed by EPA. Dialogue among EPA, the Services and States and Tribes through existing State or Tribal CWA procedures will best ensure that both CWA and ESA requirements are met.

The draft MOA would not override traditional State or Tribal authority or fundamentally alter relationships between the States, Tribes and EPA. The CWA gives States and Tribes primary responsibility for administration of the water quality standards and NPDES permitting programs, with EPA playing a carefully delineated oversight role. The draft MOA seeks to ensure that EPA's oversight takes into account the needs of listed species, but does not augment EPA's existing oversight authorities under sections 303(c) or 402 of the CWA.

Some commenters concluded that the draft MOA would give the Services the power unilaterally to "veto" State or Tribal NPDES permits or require changes to water quality standards. EPA is the agency vested with decision-

making oversight authority under the CWA over State and Tribal water quality standards and permitting programs, and the MOA does not alter or diminish this authority. Under the MOA, EPA would continue to exercise its own independent judgment whether to object to a State or Tribal permit or to approve or disapprove State or Tribal water quality standards, based on all the available information, including the advice and recommendations of the Services. One commenter recognized that EPA would retain decision-making authority, but asserted that the practical effect of the draft MOA would be to give the Services veto power because EPA would want to avoid a disagreement with the Services. The MOA recognizes that EPA and the Services may not always agree, and the elevation procedures in the MOA will help resolve differences of opinion. However, the draft MOA does not diminish each agency's ultimate authority to make final decisions under its statutory authorities.

One commenter asserted that EPA and the Services have not demonstrated that the current "system" is inadequate and needs to be replaced with one that is more cumbersome. This comment appears to misunderstand the status quo. As discussed previously, section 7 of the ESA gives the Services a consultative role when EPA takes actions approving State and Tribal water quality standards and NPDES programs that may affect listed species. The MOA does not change or extend this role, but rather seeks to ensure consultations are carried out effectively and efficiently.

### III. Summary of the Draft MOA

The major components of the MOA are summarized below. These components are (1) procedures for interagency coordination and elevation, (2) national level water quality standards activities, (3) review of State and Tribal water quality standards, and (4) oversight of State and Tribal NPDES permitting programs. In addition to summarizing these aspects of the draft MOA, we address below significant comments about each section submitted on the July 31, 1997, draft of the MOA.

#### A. Interagency Coordination and Elevation

The draft MOA provides that EPA and the Services will establish interagency coordinating teams at the regional and field office level to foster early and recurring collaboration on various CWA and ESA activities. Among other things, these teams will meet regularly and identify priority areas of concern and upcoming workload requirements.

Enhancing the collaborative working relationships among our regional and field offices will mean more efficient allocation of our limited resources and more timely completion of section 7 consultations.

The draft MOA also contains an elevation procedure that we will use to resolve issues that may arise among EPA and the Services. Under this procedure, we will elevate areas of disagreement to regional office senior managers and, if necessary, to managers in our headquarters offices under specified time lines. This elevation procedure should help avoid delays in resolving issues, and speed the completion of section 7 consultations. The elevation procedures recognize, however, that each agency is responsible for final decisions implementing its own statutory authority. We intend to follow the elevation process contained in the draft MOA on an interim basis before finalizing the MOA to help assess the effectiveness of the process.

#### B. National Level Water Quality Standards Activities

The draft MOA describes several activities that EPA and the Services will undertake at the national level to facilitate consideration of endangered species issues in the water quality standards program. First, the MOA states that EPA will propose to amend its water quality standards regulations (40 CFR part 131) to require that water quality not likely jeopardize the continued existence of Federally-listed species or destroy or adversely modify designated critical habitat. The proposed rule would also require that State or Tribal policies authorizing the granting of mixing zones or variances not likely result in jeopardy, and require adoption of site-specific criteria where determined to be necessary to avoid the likelihood of jeopardy. A similar approach was taken by EPA in regulations promulgated for the Great Lakes basin. See 40 CFR 132.5(h); 56 FR 15384 (March 23, 1995).

EPA believes that the proposed rule essentially would codify existing protection for endangered and threatened species under the CWA since, in EPA's judgment, water quality that is so degraded that it will likely cause jeopardy to the continued existence of a species would generally not be consistent with protections provided by the Clean Water Act. Standards adopted by the State or Tribe to protect water quality. The proposed rule would be subject to public notice and opportunity for comment.

Many States commented that EPA should consult with the Services on

EPA's recommended water quality criteria published under section 304(a). The States believed that such consultations on a national level would be more efficient than consulting on criteria adopted by individual States, many of which are based on EPA's recommended criteria. EPA and the Services have engaged in further discussions in light of these comments. We recognize that the aquatic life criteria published by EPA only constitute guidance to the States, Tribes and the public regarding pollutant levels that EPA believes would protect aquatic life. These criteria are not binding on the States or Tribes, which may adopt EPA's criteria or any other criteria that are "scientifically defensible." See 40 CFR 131.11(b). Moreover, water quality criteria published by EPA, because they are only guidance, do not establish legally enforceable requirements. Nonetheless, we believe it would be more efficient for us to consult once nationally on EPA's recommended criteria, rather than repeat the process on a case-by-case basis.

The draft MOA therefore provides that EPA and the Services will conduct a national consultation on EPA's recommended aquatic life criteria published under section 304(a) of the CWA. The agencies will undertake the consultation in a collaborative fashion and will endeavor to complete it within eighteen months of final adoption of the MOA. After this consultation is completed, separate consultations by EPA will not be required when approving State or Tribal aquatic life criteria that are identical to or more stringent than the recommended criteria, except where new species are listed that may be affected. Conducting this national consultation will help streamline EPA's compliance with section 7 of the ESA when approving State or Tribal water quality standards. During this national consultation, if a State or Tribe adopts and submits to EPA aquatic life criteria that are identical to or more stringent than the current 304(a) criteria, consultation on those criteria will take place through the national consultation and EPA will proceed with its approval of those criteria, subject to the understanding that EPA's action would be revised as appropriate based on the results of the national consultation.

This consultation process, as well as other consultations among EPA and the Services, may identify research that would facilitate our understanding of the effects of pollutants on endangered and threatened species. EPA and the Services recognize our joint interest in,

and responsibility for, funding and conducting research related to the effects of water pollution on endangered and threatened species. The agencies' resources for conducting such research are limited, however, and the agencies must focus their efforts on pursuing research that can be carried out given budgetary constraints and will provide the greatest benefit to at-risk species. The agencies will therefore develop a national research and data gathering plan, which will make recommendations regarding consolidation and prioritization of any research and data gathering efforts identified by the agencies through section 7 consultation on the aquatic life criteria, or any other CWA consultation or coordination between the agencies. The agencies will work to incorporate the plan into their respective budgets and to achieve economies of scale and increased effectiveness in the use of limited funds by coordinating efforts wherever possible. The plan may also include recommendations about the development of new criteria (e.g., criteria to protect non-aquatic wildlife) by the agencies.

#### *C. State and Tribal Water Quality Standards*

The draft MOA contains guidance to regional and field offices regarding section 7 consultations on EPA's approval of new or revised water quality standards. The draft MOA seeks to facilitate early involvement of the Services in the State and Tribal water quality standards development process, since the most effective time for the Services to become involved is before and during the State's or Tribe's development of the standards. Therefore, the draft MOA provides that EPA and the Services will meet to discuss the scope of upcoming triennial reviews by States and Tribes and that the Services will provide input in the standards development process. The draft MOA also provides that, where available information supports a determination that existing standards are not adequate to avoid causing jeopardy to a listed species, EPA will work with the State or Tribe to obtain revisions to the standards in the triennial review process.

One commenter raised the concern that the draft MOA imposed an obligation on States and Tribes to improve the quality of the environment, whereas section 9 of the ESA only prohibits a take of listed species unless an exception has been made. Again, the draft MOA is solely a procedural document that does not impose any obligations on any party, including

States and Tribes. Moreover, the CWA charges EPA, States and Tribes with protecting the chemical, physical and biological integrity of the Nation's waters. We believe our statutory responsibilities are carried out by ensuring that water is of sufficient quality to ensure the protection of endangered and threatened species.

Other commenters raised the concern that the draft MOA would elevate endangered species considerations above all other considerations under the CWA, and undermine the flexibility currently exercised by States and Tribes to establish use designations that take into account socioeconomic factors or otherwise do not necessarily maximize protection of fish and wildlife. Nothing in the draft MOA, however, modifies any existing statutory and regulatory authorities of EPA, the Services or States and Tribes, including the flexibility available to States and Tribes in establishing water quality standards. The draft MOA is solely an internal procedural document about how CWA and ESA requirements interrelate. We do not share the assumption that expressly integrating endangered species concerns into the water quality standards program would lead to irreconcilable conflicts.

#### *D. State and Tribal Permitting Programs*

The draft MOA establishes a framework for EPA and the Services to coordinate with regard to permits issued by States or Tribes under section 402 of the CWA. All State and Tribal programs must meet the same minimum requirements under section 402 of the CWA and EPA regulations, and EPA's authorities for overseeing State and Tribal permitting decisions are uniform in all States. See 40 CFR part 123, subpart C. To date, EPA and the Services have developed coordination procedures on a case-by-case basis, and these procedures have been fundamentally similar. Given this similarity, we believe that the procedural framework for interagency coordination regarding State and Tribal programs can and should be established on a national basis. Doing so ensures a consistent, appropriate level of protection for listed species, and avoids the need to continue developing procedures on a case-by-case basis. These procedures are sufficiently flexible to address the full range of circumstances that may arise in any particular permit proceeding.

Under these procedures, EPA would ensure that States and Tribes, in accordance with existing CWA requirements, provide copies of permits to the Services for their review. The

EPA and the Services would work with the State or Tribe where EPA or the Services believed a permit is likely to adversely affect a listed species. EPA would coordinate with the Services and State or Tribe to ensure that the permit complies with all applicable CWA requirements. If the issue still cannot be resolved, the draft MOA states that EPA may object to the State or Tribal permit if EPA determines the permit is likely to adversely affect listed species and the permit is subject to objection under section 402(d) of the CWA as being "outside the guidelines and requirements" of that Act. If EPA determines, based on analysis by EPA or the Services, that the permit is likely to jeopardize the continued existence of the listed species, EPA will use the full extent of its CWA authority to object to the permit.

EPA and the Services also plan to conduct a national programmatic consultation on whether the establishment of these procedures is sufficient to avoid the likely jeopardy of listed species due to discharges authorized under State and Tribal NPDES programs. Because these procedures can be applied to any State or Tribe that administers the NPDES program, we believe that a single programmatic consultation would be the most efficient means of ensuring that programs throughout the country are protecting endangered and threatened species in accordance with the requirements of the CWA. We anticipate that the consultation will cover existing State and Tribal NPDES programs and any program submitted after issuance of the biological opinion where the agreed-upon coordination procedures will be followed.

EPA and the Services believe that this approach ensures that any issues regarding listed species will be adequately addressed. We recognize that the Congress intended administration of the NPDES permitting program to be primarily the responsibility of States and Tribes, with EPA playing only an oversight role in most instances. EPA and the Services do not believe that the procedures contained in the draft MOA would upset the CWA's carefully crafted balance between Federal and State authorities. We anticipate that the need for EPA objections to State and Tribal permits will continue to be rare. Where EPA believes a permit is not in accordance with CWA requirements and impacts to listed species are of serious concern, however, EPA is committed to using its CWA authorities to ensure that listed species are protected.

One comment on the July 1997 draft of the MOA asserted that the

"coordination" called for in the draft MOA is, in fact, informal consultation under section 7 of the ESA, with the possibility of formal consultation to follow. "Consultation" under section 7(a)(2) of the Endangered Species Act (ESA) is a process that imposes certain procedural obligations on the Federal agency consulting with the Services (see 50 CFR part 402). The MOA does not adopt those procedures, but instead directs EPA and the Services to share information and recommendations with each other and States and Tribes. The draft MOA does not impose any obligations, procedural or otherwise, on any State or Tribe, which would continue only to be required to meet their procedural and substantive obligations under the CWA. The draft MOA uses the word "coordination" precisely to make clear that the section 7 consultation process is not being applied to State or Tribal-issued NPDES permits.

One court case, *American Forest and Paper Association v. EPA*, 137 F.3d 291 (5th Cir. 1998) has addressed the scope of EPA's authority to ensure protection of listed species in its approval and oversight of a State NPDES program. In that case, EPA, the Services and the State of Louisiana entered into Memoranda of Agreement describing the coordination that would occur with regard to State NPDES permits. The Court found, contrary to EPA's views, that EPA had required the State of Louisiana to consult with the Services before issuing permits as a condition for program approval. The Court held that EPA is not authorized to add any requirements for a State permitting program beyond the nine specific criteria enumerated in section 402(b) of the CWA, and invalidated the endangered species coordination procedures.

While EPA believes that this case was wrongly decided, the procedures in the draft MOA are within EPA's authorities under the *AFFPA* Court's reading of the CWA. First, unlike the Louisiana procedures, the draft MOA is an agreement solely among Federal agencies. It would impose no obligations or commitments on any State or Tribe administering the NPDES program, nor would it place any conditions on EPA's approval of NPDES programs, which would continue to be based on the criteria enumerated in section 402(b) of the CWA. Moreover, unlike some of the procedures agreed to in Louisiana, the draft MOA makes clear that EPA would retain the ultimate authority for determining whether to object to a State or Tribal permit, and

that EPA would do so pursuant to its authorities under the CWA.

Dated: December 9, 1998.

**J. Charles Fox,**

*Assistant Administrator for Water, U.S. Environmental Protection Agency.*

Dated: January 7, 1999.

**Donald J. Barry,**

*Assistant Secretary for Fish, Wildlife and Parks, U.S. Department of the Interior.*

Dated: December 15, 1998.

**Rolland A. Schmitt,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.*

The text of the draft Memorandum of Agreement follows:

Draft Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and the Endangered Species Act.

#### Table of Contents

- I. Purpose
- II. Goals and Objectives
- III. Guiding Principles
- IV. Authorities
  - A. Fish and Wildlife Service and National Marine Fisheries Service Authorities
  - B. Environmental Protection Agency Authorities
  - C. Reservation of Authorities
- V. Provisions and Understandings
  - A. Procedures to Facilitate Interagency Cooperation
    1. Local/Regional Coordinating Teams
    2. Interagency Elevation Process
    3. Oversight Panel
    4. Sub-Agreements
    5. Guidance/Training
  - B. Summary—Section 7 Consultation Process
    1. Scope
    2. Data and Information Requirements
    3. Information Sharing
    4. Effects of an Action
    5. Biological Evaluation
    6. Timeliness of Actions
    7. EPA Responsibility at the Conclusion of Section 7 Consultation
    8. Reinitiation of Formal Consultation
  - C. Proposed Species and Proposed Critical Habitat
  - D. Recovery Program
    1. Conservation Recommendations to Assist Recovery
    2. Recovery Planning
    3. Recovery Implementation
  - E. Candidate Conservation Activities
- VI. National Level Activities to Ensure Protection of Species
  - A. National Rule-making
  - B. Development of New Water Quality Criteria Methodological Guidelines
  - C. National Consultation on CWA Section 304(a) Aquatic Life Criteria
    1. Overview
    2. Procedures for Consultation
- VII. Joint National Research and Data Gathering Plan and Priorities

- A. Existing and New Water Quality Criteria
- B. Work Group Report to Agreement Signatories
- C. National Research and Data Gathering Plan
- D. Consultation on State and Tribal Water Quality Standards
- VIII. Consultation on Water Quality Standards Actions
  - A. Development of New or Revised State or Tribal Water Quality Standards
    - 1. Scoping of Issues to be Considered During the Triennial Review Process
    - 2. Development of State or Tribal Standards
    - 3. Adoption and Submittal of State or Tribal Standards
    - 4. EPA Develops Biological Evaluation
    - 5. EPA Determination of "No Effect" or "May Affect"
    - 6. Services' Review of "Not Likely to Adversely Affect" Determination
    - 7. Formal Consultation
    - 8. EPA Action on State or Tribal Standards
  - B. Existing Water Quality Standards
  - C. Consultation on EPA Promulgation of State or Tribal Water Quality Standards
- IX. Permitting Program Activities
  - A. Programmatic Section 7 Consultation
  - B. Coordination Procedures Regarding Issuance of State or Tribal Permits
  - C. Issuance of EPA Permits
  - D. Watershed Planning
- X. Support in Administrative and Judicial Proceedings
- XI. Revisions to Agreement
- XII. Reservation of Agency Positions
- XIII. Obligations of Funds, Commitment of Resources
- XIV. Nature of Agreement
- XV. Effective Date; Termination
- XVI. Signatories

## I. Purpose

This Agreement is designed (1) to improve coordination of the agencies' compliance with the Endangered Species Act (ESA) for actions authorized, funded, or carried out by EPA under sections 303(c) and 402 of the Clean Water Act (CWA), and (2) to provide clear and efficient mechanisms for improved interagency cooperation, thereby enhancing protection and promoting the recovery of threatened and endangered species and their supporting ecosystems, and reducing the need for future listing actions under the ESA. Throughout this Agreement, "Service" or "Services" shall refer to the Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS), as appropriate. In this Agreement "States" refers to States, Territories and Commonwealths that qualify as States for the programs covered by this Agreement.

## II. Goals and Objectives

This Agreement is intended to accomplish the following:

- Use a team approach at the national, regional, and field office levels to

restore and protect watersheds and ecosystems to achieve the goals of the ESA and CWA;

- Improve the framework for meeting responsibilities under section 7 of the ESA;
- Enhance the existing process in place to protect and recover Federally-listed and proposed species and the ecosystems on which they depend;
- Improve methods for coordinating compliance with sections 303(c) and 402 of the CWA and section 7 of the ESA;
- Streamline the Federal agency coordination process to minimize the regulatory burden, workload, and paperwork for all involved parties;
- Ensure a nationally consistent coordination process that allows flexibility to deal with site-specific issues;
- Develop mechanisms for EPA participation in the development and implementation of recovery plans for Federally-listed species threatened by physical, chemical or biological impairment of waters of the United States;
- Provide mechanisms for the Services' participation in development of water quality criteria and standards recognizing any unique requirements for listed and proposed species and designated and proposed critical habitat;
- Identify a collaborative mechanism for planning and prioritizing future CWA/ESA actions and resolving any potential conflicts or disagreements through a structured time-sensitive process at the lowest possible level within the agencies.

## III. Guiding Principles

The ESA sets forth the goal of protecting and recovering threatened and endangered species and the ecosystems upon which they depend. It places responsibility on all Federal agencies, including EPA and the Services, to meet that goal. The Clean Water Act (CWA) sets forth a goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Sections 303(c) and 402 of the CWA (as well as other provisions) are directed toward achieving this goal.

EPA and the Services find the goals of the CWA and ESA compatible and complementary, and are entering into this Agreement to form a partnership to enhance the realization of the goals of both Acts. This partnership will also seek to efficiently and effectively fulfill the requirements of section 7 of the ESA.

The primary principle underlying this Agreement is cooperative partnership.

The ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources. As a result of this Agreement, the signatory agencies will better coordinate their efforts and will make it easier for the regulated community and other partners to work with them in achieving the purposes of the CWA and ESA.

While States and Tribes play a critical role in the administration and implementation of sections 303(c) and 402 of the CWA, they are not signatories to this agreement, which only applies to Federal actions subject to section 7(a)(2) of the ESA. The Services and EPA remain committed to working with the States and Tribes collaboratively at all levels to ensure that both the CWA and ESA are implemented in a manner that fulfills the goals of both statutes in a timely and efficient manner.

## IV. Authorities

### A. Fish and Wildlife Service and National Marine Fisheries Service Authorities

This Agreement relates to the following authorities of the Services:

- Section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

### B. Environmental Protection Agency Authorities

This Agreement relates to the following authorities of EPA:

- Sections 303(c), 304(a) and 402 of the Clean Water Act, as amended, 33 U.S.C. 1251–1387.

### C. Reservation of Authorities

This Agreement does not modify existing Agency authorities by reducing, expanding, or transferring any of the statutory or regulatory authorities and responsibilities of any of the signatory agencies.

## V. Provisions and Understandings

### A. Procedures to Facilitate Interagency Cooperation

EPA and the Services intend to work cooperatively to achieve their mutually shared objectives of protecting the quality of waters of the United States and species that depend on those waters. To facilitate collaboration among agency field and regional staff for planning and prioritizing future CWA/ESA actions and resolving any potential conflicts or disagreements through a structured, time-sensitive process at the lowest possible level, the agencies will follow the coordination and elevation procedures described below.

### 1. Local/Regional Coordinating Teams

The regional offices of EPA and the Services will establish coordinating teams, including representation from field offices, to foster early and recurring collaboration on various activities related to the CWA and the ESA. These teams will, as appropriate:

- a. Meet at least annually;
- b. Identify upcoming workload requirements. This dialogue will allow signatory agencies to become aware of and provide input on upcoming activities such as annual work plans, triennial water quality standards reviews, recovery plan preparation, proposed State or Tribal program assumptions, proposed listings, or proposed habitat conservation planning efforts;
- c. Identify high priority areas of concern and opportunities for cooperation.
- d. Assist one another in determining which categories of NPDES permits should be identified for review by EPA and the Services for endangered species concerns, including waters of high concern in each State that should be priorities for EPA oversight;
- e. Identify current and future research needs and determine which of these research needs are appropriate to convey to the research coordinating committee and which are appropriate for local or regional accomplishment;
- f. Identify training needs; and
- g. Identify ways to reduce the impacts of proposed agency actions on endangered and threatened species.

Each of these local/regional coordinating teams should develop mechanisms to facilitate streamlining of various work activities as appropriate to the local circumstances. Such streamlining should facilitate early exchange of information, early prioritization of workload, and early identification of potential problems. Each local group should develop mechanisms to work with States and Tribes, as appropriate, concerning such things as candidate conservation agreements, recovery planning, triennial reviews, and annual CWA priorities. Local/regional coordinating teams may develop mechanisms to involve other Federal agencies such as the U.S. Army Corps of Engineers, the Forest Service, the Federal Energy Regulatory Commission, and non-Federal stakeholders whose actions and interests may impact the CWA/ESA issues.

### 2. Interagency Elevation Process

The following procedures shall be utilized to elevate any conflict or

disagreement between the agencies. While decisions by all levels, including decisions to elevate, will be made by consensus to the greatest extent practicable, any one agency can initiate the elevation process. Each agency retains its statutory and regulatory authority to make final decisions within its jurisdiction. Elevation should be initiated so that all applicable deadlines may be met, taking into account subsequent levels of review. In any elevation, the agencies will jointly prepare an elevation document that will contain a joint statement of facts and succinctly state each agency's position and recommendations for resolution. If the agencies are aware of a dispute, they will defer taking final action, where consistent with applicable legal deadlines, to allow the issue to be resolved through the elevation process.

The time periods specified below are intended to facilitate expeditious resolution of the issues. These time periods should be shortened when necessary for any agency to meet applicable legal deadlines. The time periods begin to run on the date that the elevating agency or agencies notify the next level of the elevation request. All prescribed time frames in the elevation process can be waived by the mutual consent of the participants at any level when the participants believe that progress is being made and that resolution at that level is still possible.

a. *Level 1:* The Level 1 review team consists of staff personnel from EPA and FWS and/or NMFS. The overall goal is to design actions to minimize adverse impacts to listed species by jointly working on biological evaluations, concurrences and biological opinions for such actions. General functions include those specified in section V.A.1.

Any contentious issues will be discussed with an attempt to resolve them without elevation. If disputes cannot be resolved among the Level 1 team members, the issue will be raised with the Level 2 review team as soon as possible.

b. *Level 2:* The Level 2 review team consists of field unit line officers or staff supervisors, (i.e., for NMFS, branch/division chiefs; for EPA, branch chiefs; and for FWS, field office supervisors). General functions are to oversee and coordinate activities, including those specified in section V.A.1.

The Level 2 team will make their best efforts to resolve any issues elevated to them. Where resolution is not possible at this level, the Level 2 team will elevate the issue to the Level 3 team no later than 14 days after notification by the Level 1 team, or sooner as agreed upon or mandatory deadlines require.

c. *Level 3:* The Level 3 review team consists of all regional executives (i.e., for NMFS and EPA, regional administrators; and for FWS, regional directors). Their function is to resolve any elevated disputes within 21 days of notification of elevation by Level 2 teams, or sooner as necessary to meet mandatory deadlines, and serve as key advisors on policy and process. If issues are not resolved by the Level 3 team, the issue will be elevated for Headquarters Review.

d. *Headquarters Review:* This review consists of the Director of NMFS (Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, NOAA), the Director of FWS, and the Deputy Assistant Administrator of Water at EPA or their representatives who shall attempt to resolve disputes elevated by the regional executives. Agency administrators shall attempt to issue a decision resolving the issue within 21 days after elevation. Decisions will be binding upon the agencies' field staffs. Agency administrators or their designees shall make every attempt to resolve the dispute before elevation, where necessary, to the Assistant Secretaries of the Departments of Interior/Commerce and the Assistant Administrator of EPA. The responsible Assistant Secretary(s) and Assistant Administrator shall resolve any issues within 21 days of elevation. At this resolution level, the decision must rest with the agency exercising the statutory or regulatory authority in question.

### 3. Oversight Panel

The Oversight Panel consists of regional and headquarters personnel from each individual agency. The panel provides oversight and coordination for all aspects of this agreement. Its functions include, but are not limited to:

- (1) Maintaining and updating process guidance;
- (2) Addressing issues about process implementation;
- (3) Incorporating/identifying improvements and revisions into the process;
- (4) Convening interagency scientific/technical reviews, as appropriate;
- (5) Facilitating reaching consensus on particular issues at any level upon requests by personnel at that level; and
- (6) Reviewing and evaluating, at least on an annual basis, the Agreement and its implementation by the three agencies.

### 4. Sub-Agreements

Regional and field level Federal sub-agreements further implementing this Agreement may be executed by



appropriate EPA/Services programs. Any such sub-agreements which clarify roles, procedures, and responsibilities are encouraged. This includes any efforts to protect species and water quality on a watershed or ecosystem basis. Sub-agreements must be consistent with this Agreement and must be approved by Regional offices and reviewed by Headquarters.

#### 5. Guidance/Training

EPA and the Services will hold joint training sessions with regional and field staff to facilitate staff's understanding and implementation of the Agreement, with a goal of providing such training to all relevant personnel within eighteen months. The agencies may issue guidance individually or jointly to assist in carrying out this Agreement.

#### B. Summary—Section 7 Consultation Process

##### 1. Scope

The regulations that interpret and implement section 7 of the ESA establish a framework for efficient and consistent consultation between Federal agencies regarding listed species and critical habitat.

##### 2. Data and Information Requirements

EPA agrees to include in any biological assessment or evaluation the best available scientific and commercial information. EPA and the Services will exercise their scientific judgment to determine the relevance and validity of the available scientific and commercial information. The Level 1 review teams will provide a venue for collaborating among the agencies on these issues.

##### 3. Information Sharing

The Services will initially provide EPA with a consolidated list of Federally-listed and proposed species and designated and proposed critical habitat by State. The Services agree to provide to EPA any additions of species or other relevant information as proposed or final rule-making occurs. EPA will provide and update copies of Federal section 304(a) water quality criteria and applicable State and Tribal water quality standards to the Services.

EPA and the Services will share information and analyses used to make decisions under this Agreement when requested, including analyses supporting biological evaluations and biological opinions. The Services will provide to EPA copies of all draft jeopardy biological opinions and draft no jeopardy biological opinions with incidental take statements, unless EPA specifically requests that a draft not be provided.

##### 4. Effects of an Action

All "effects of the action" and "cumulative effects" will be considered in the Service's biological opinions (50 CFR 402.14(c), 402.14(g) (3) and (4), and 402.14(h)). The "effects of an action" include all direct as well as indirect effects that are reasonably certain to occur, even at a later time. Effects of an action include effects of interrelated and interdependent actions associated with the proposed action in question. Cumulative effects include future State or Tribal and private actions that are reasonably certain to occur in the action area that do not involve Federal activities. Water quality criteria and State or Tribal water quality standards establish levels of pollutants from all sources, and so would account for all such effects insofar as water quality is concerned. Since NPDES permits are established to achieve water quality standards, they will account for point source effects insofar as water quality is concerned.

##### 5. Biological Evaluation

Although section 7(c) of the ESA refers to a biological assessment as an element of the consultation process, a biological assessment is required only in the case of a major construction activity, as defined at 50 CFR 402.02. The purpose of a biological assessment is to enable an agency to determine whether a proposed action is likely to adversely affect Federally-listed species and designated critical habitat. A biological assessment also assists an agency in complying with potential ESA "conference" requirements for proposed species and critical habitat under 50 CFR 402.10. For EPA actions that are not major construction activities, an alternative document that may be used for decision-making is a biological evaluation. While a biological evaluation is not required by regulation, EPA will develop such an evaluation where the Agency determines it would be appropriate for determining whether listed species may be affected by the proposed action and for assisting consultation with the Services. The Services recognize that the content and format of the biological evaluation are to be determined by EPA.

A biological evaluation is an analysis of the potential effects of a proposed action on listed species or their critical habitat based upon the best available scientific or commercial information. The biological evaluation will vary in extent and rigor according to the certainty and severity of an action's deleterious effect. For example, a biological evaluation may be very brief

if the expected result of an action is straightforward, is beneficial, or is of little or no consequence. If, on the other hand, the potential effects are severe, large in scope, complex or uncertain in terms of outcome, the analysis would need to be more extensive and rigorous.

A biological evaluation can be used for decision-making prior to and throughout section 7 consultation and for a possible conference on proposed species or critical habitat. The evaluation can be used to make a "may effect" or "no effect" determination, or to support a judgment that the proposed action is or is not likely to adversely affect listed species or their critical habitat.

If early or formal consultation is initiated, a biological evaluation or biological assessment can be used by the appropriate Service in rendering a preliminary or final biological opinion.

##### 6. Timeliness of Actions

In informal and formal consultation, EPA and the Services agree to adhere to time frames set forth in 50 CFR part 402 and supplemental guidance provided in this Agreement, in order to enable EPA to meet statutory and regulatory deadlines under the CWA. EPA will strive to provide advance notice to the Services concerning anticipated consultations, to provide thorough biological evaluations, to comment promptly on draft opinions and to provide, where appropriate, additional available information requested by the Services.

If during informal consultation EPA determines that the action is not likely to adversely affect listed species or critical habitat, then EPA will notify the Service in writing. The Service will respond in writing within 30 days of receipt of such a determination, unless extended by mutual agreement. The response will state whether the Service concurs or does not concur with EPA's determination. If the Service does not concur, it will provide a written explanation that includes the species and/or habitat of concern, the perceived adverse effects, supporting information, and a basic rationale.

The Services may request that EPA initiate consultation on a Federal action. The Services do not have the authority, however, to require the initiation of consultation. The Services' written explanation of the request shall include the species and/or critical habitat of concern, manner in which there may be an effect, supporting information, and a basic rationale.

The Services will strive to issue biological opinions within 90 days of an initiation of formal consultation unless

the Services and EPA agree to extend the consultation period. The timing of activities during consultation may be further expedited as necessary taking into account legal deadlines for EPA action and the agencies' programmatic needs. EPA, where appropriate, will enter into early consultation with the Services in order to ensure that EPA meets its statutory CWA deadlines for decision-making. In addition, EPA and the Services agree to make every effort to provide prompt and responsive communications to ensure States, Tribes, and permit applicants do not suffer undue procedural delays.

#### 7. EPA Responsibility at the Conclusion of Section 7 Consultation

Following issuance of a biological opinion, EPA will determine whether and in what manner to proceed with the action in light of its CWA and section 7 obligations. If a jeopardy opinion is issued, EPA will notify the Services of its final decision on the action.

#### 8. Reinitiation of Formal Consultation

The section 7 regulations define conditions under which EPA or the Services will request reinitiation of formal consultation at 50 CFR 402.16. The Services and EPA will work cooperatively to evaluate any new information to determine if reinitiation is necessary.

#### C. Proposed Species and Proposed Critical Habitat

The Services will identify proposed species and proposed critical habitat to EPA Regional offices. EPA will evaluate any CWA activities it authorizes, funds, or carries out that are subject to section 7 and determine if they are likely to jeopardize proposed species or result in the destruction or adverse modification of proposed critical habitat. If so, EPA will confer with the Services using the procedures under 50 CFR 402.10. The Services may also initiate a request for conference on a particular action.

#### D. Recovery Program

Section 7(a)(1) of the ESA provides that Federal agencies shall utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation and recovery of threatened and endangered species. Section 7 consultation and the recovery planning and implementation process are two primary mechanisms that EPA can use as guides to identify actions that EPA or the Services believe are needed to protect and recover Federally-listed species.

#### 1. Conservation Recommendations to Assist Recovery

The section 7 consultation process is primarily intended to ensure that EPA's actions are not likely to jeopardize the continued existence of Federally-listed species or adversely modify their critical habitat. However, biological opinions may contain discretionary conservation recommendations to promote the recovery of the subject species. (50 CFR 402.02 defines conservation recommendations as suggestions of the Services regarding the development of information or discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat.) Implementation of these conservation recommendations would help conserve and recover listed species.

Frequent and informal contact between the Services and EPA is encouraged during all stages in the development of conservation recommendations. During section 7 consultation, the Services will work closely with EPA to identify conservation recommendations and evaluate the feasibility of their implementation.

#### 2. Recovery Planning

Recovery plans are developed in three stages: (a) Technical drafts that are intended to provide agencies an opportunity to assist the Services in developing biologically sound recovery plans; (b) Agency drafts which outline the various tasks the Services feel may be within the jurisdiction of other agencies and are circulated for public comment (the Technical and Agency Draft are sometimes combined into one document to save time); and (c) the final plan.

The Services will invite EPA to serve as members of Recovery Teams where water quality is a concern or EPA has particular expertise, provide to EPA copies of all draft recovery plans that contain water quality related recovery tasks, and actively solicit EPA's involvement during all phases of recovery plan development. The Services will also solicit State or Tribal involvement, where appropriate. EPA will provide the Services with comments related to water quality threats, recovery issues, and will suggest areas where plans could be modified to include specific actions to support the species recovery effort.

#### 3. Recovery Implementation

EPA and the Services will hold recovery planning/implementation

discussions or meetings, on at least an annual basis. The members of this group and the geographic area covered by this group will vary among Regions, depending on the geographic range and number of species impacted by water quality. The meetings could be organized on a watershed or ecosystem basis and involve field and/or Regional personnel. These groups will discuss current and upcoming water quality/ listed species related activities, and provide input for prioritizing watersheds (e.g., the number of listed species, the seriousness of threats, and the opportunities for conservation/ recovery success) for potential future coordinated activities.

#### E. Candidate Conservation Activities

The Services and EPA will develop watershed and ecosystem based initiatives to identify and remove those conditions that may lead to future listings. Efforts should focus on candidate species and other species of concern and their associated ecosystems. The local/regional coordinating teams will identify specific focus areas.

### VI. National Level Activities to Ensure Protection of Species

EPA will take the following steps at the national level to ensure that State and Tribal permitting programs and water quality standards provide protection for endangered and threatened species.

#### A. National Rule-making

EPA will propose amendments to its national water quality standards regulations (40 CFR part 131) to include provisions to ensure the protection of endangered and threatened species within 24 months following the execution of this Agreement. EPA will propose to require that water quality not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat, including a prohibition of mixing zones or variances that would be likely to cause jeopardy, and a requirement that States or Tribes adopt site-specific water quality criteria (tailored to the geographic range of the species of concern) where determined to be necessary to avoid a likelihood of jeopardy.

After consideration of public comment, EPA will adopt appropriate provisions in a final regulation.

### *B. Development of New Water Quality Criteria Methodological Guidelines*

EPA will continue to invite the Services to be represented on EPA's Aquatic Life Criteria Guidelines Committee. EPA has charged this committee with revising and updating EPA's methodological guidelines for issuance of new 304(a) water quality criteria guidance values. As members of the committee, the Services and EPA will ensure that these methodological guidelines take into account the need to protect Federally-listed species. The Services will assist EPA to (1) develop and have peer reviewed a list of surrogate and target endangered and threatened species that could be used in pollutant toxicity testing and (2) assist in the development of biocriteria for streams, rivers, lakes, wetlands, estuaries or marine waters that contain endangered and threatened species or designated critical habitat.

These methodological guidelines are subject to peer review, public notice and comment prior to being finalized. Prior to the public comment period, the Directors will provide the Services' views regarding the guidelines so that the public will have the benefit of the Services' views during the comment period. The Services will also be invited to participate in the peer review process for the development of new criteria values under section 304(a), and will designate technical experts to provide the Services' views during the peer review process.

### *C. National Consultation on CWA Section 304(a) Aquatic Life Criteria*

#### 1. Overview

Under section 304(a) of the CWA, EPA from time to time publishes water quality criteria that serve as scientific guidance to be used by States or Tribes in establishing and revising water quality standards. These criteria are not enforceable requirements, but are recommended criteria levels that States or Tribes may adopt as part of their legally enforceable water quality standards. States or Tribes may, however, adopt other scientifically defensible criteria in lieu of EPA's recommended criteria (see 40 CFR 131.11(b)). EPA has to date published criteria for the protection of aquatic life for 45 pollutants. EPA has developed an interim-final "Water Quality Criteria and Standards Plan" (EPA, June 1998) to guide the development and implementation of new or modified 304(a) criteria in the coming years.

The objective of EPA's criteria program is to provide scientific information to States and Tribes that

will best facilitate the overall protection of the aquatic ecosystem. A better understanding of the effects of water pollution on endangered and threatened species will help achieve this objective. Therefore, EPA and the Services will conduct a section 7 consultation on the aquatic life criteria to assess the effect of the criteria on listed species and designated critical habitat. EPA and the Services will also conduct a conference regarding species proposed for listing and proposed designated critical habitat. EPA will consider the results of this consultation as it implements and refines its criteria program, including decisions regarding the relative priorities of revising existing criteria and developing new criteria.

EPA and the Services have gained considerable experience in evaluating the potential effects on endangered and threatened species of pollutants for which EPA has published recommended aquatic life criteria under section 304(a) of the CWA. For example, the Services have issued biological opinions as a result of section 7 consultations on aquatic life criteria approved by EPA in water quality standards adopted by the States of New Jersey, Alabama, and Arizona, and promulgated by EPA for the Great Lakes Basin. EPA is currently conducting consultation with the Services regarding aquatic life criteria being promulgated by EPA for toxic pollutants for certain waters in California. These opinions have evaluated (or are evaluating) the effects of criteria pollutants on 87 aquatic species, which constitute approximately 42% of listed aquatic species in the country. Grouped by taxonomic family, these consultations have evaluated the effects of criteria pollutants on one or more species in approximately 65% of those families to which listed aquatic species belong. In addition to these comprehensive formal consultations, EPA and the Services have also conducted informal consultations on State water quality standards approval actions which have covered water quality criteria contained in the standards.

EPA and the Services recognize, however, that conducting consultations on a State-by-State basis is not the most efficient approach to evaluating the effects of water pollution on endangered and threatened species throughout the country. A national consultation will ensure a consistent approach to evaluating the effects of pollutants on species and identifying measures that may be needed to better protect them. A national consultation will also ensure better consideration of effects on species whose ranges cross State boundaries.

#### 2. Procedures for Consultation

The consultation will be conducted in accordance with the procedures in 50 CFR part 402 and the guidance contained in the Services' Consultation Handbook. EPA and the Services also anticipate that the consultation will follow the basic approach described below. The agencies will endeavor to streamline their processes to complete this consultation within eighteen months.

EPA and the Services anticipate that the national consultation will focus on aquatic and aquatic-dependent species. The consultation will be conducted on a national basis, and therefore, will not be waterbody-specific. In addition, given the numbers of species involved in the consultation, the effects on species will be evaluated to the maximum extent possible based on groupings of species believed to be affected in a similar manner.

The agencies will take a collaborative approach to evaluating the effects of the criteria pollutants on listed species, and joint teams will be established to conduct the consultation. With input from the Services, EPA will prepare a biological evaluation based on the best scientific and commercial data available, and will provide a rationale for any findings regarding the effects of the criteria pollutants on listed species. EPA will make "effects determinations" based on the direct and indirect effects of the 45 pollutants on listed species. EPA will evaluate the effects of pollutants on species in the water column based upon the available toxicological data, principally the data assembled in EPA's criteria development documents as well as any more recent toxicological information. EPA will consider other exposure scenarios to aquatic and aquatic-dependent species and provide available information to the Services.

The Services will work collaboratively with EPA in developing their biological opinion, including the development of any reasonable and prudent measures or alternatives to minimize anticipated incidental take or to avoid likely jeopardy to listed species or adverse modification or destruction of designated critical habitat. Any reasonable and prudent measures or alternatives that identify research needs will be mutually developed and will reflect priorities established by the national research and data gathering plan. Should the opinion call for revisions to existing criteria or issuance of new criteria, the opinion will recognize EPA's practice of subjecting new or revised criteria to public notice

and comment and external peer review prior to being finalized. EPA believes that the existing criteria provide a significant degree of protection for the aquatic ecosystem (including listed species). The agencies agree that, until any revisions of criteria are completed, the agencies will, to the maximum extent practicable, maintain the status quo by continuing to implement such criteria in water quality standards programs prior to revisions to the criteria.

Because the effects of the criteria pollutants on certain listed species have already been evaluated in biological opinions issued by the Services, the agencies will rely upon the scientific information and conclusions in those consultations to the maximum extent possible. Such prior opinions will remain in effect unless consultation is reinitiated.

The national consultation will provide section 7 coverage for any water quality criteria included in State or Tribal water quality standards approved, or Federal water quality standards promulgated, by EPA that are identical to or more stringent than the recommended section 304(a) criteria. Therefore, separate consultation on such criteria will not be necessary, subject to requirements related to reinitiation of consultation under 50 CFR 402.16. If, during the national consultation, EPA proposes to take an action approving or promulgating numeric standards that are identical to or more stringent than the existing 304(a) criteria, such action will be covered by the national consultation. EPA and the Services agree that EPA may proceed with its action pending the conclusion of the national consultation. EPA will ensure that its action does not have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives in the national consultation by stating that EPA's action is subject to revision based on the results of the consultation.

#### **VII. Joint National Research and Data Gathering Plan and Priorities**

EPA and the Services will convene a work group of scientific and technical personnel to develop a research and data gathering plan that supports water quality standards protective of species of concern and the ecosystems they inhabit. The goal of the plan is to identify high priority data and information needed to reduce uncertainty concerning the degree to which water quality criteria and permits are protective of endangered or threatened species. The plan also recognizes the agencies' joint interest in,

and responsibility for, funding and conducting research related to endangered and threatened species. The information gathered as a result of this joint plan and the national consultation will be used by EPA in the revision or development of national 304(a) water quality criteria, in review of State and Tribal water quality standards, and the evaluation of permits. Similarly, the Services will use this information in assessing threats and minimizing adverse effects to listed species. The agencies agree that the plan should be completed, if possible, within eighteen months of the signing of this Agreement.

The work group will primarily be concerned with three tasks: (1) development of the research plan, including the components identified below; (2) evaluating and prioritizing research or data gathering needs identified in consultations on EPA's review of specific State and Tribal water quality standards; and (3) overseeing and coordinating the implementation of the national research/data gathering plan.

##### *A. Existing and New Water Quality Criteria*

The national research work group will identify those CWA section 304(a) aquatic life criteria that are the highest priority candidates for additional research based on issues identified in consultations on State and Tribal water quality standards and the national consultation on the aquatic life 304(a) criteria published by EPA under section 304(a) of the CWA.

The work group will also identify the highest priority areas for the development of new national 304(a) water quality criteria to protect listed species. The work group will take into account new criteria development needs identified in consultations on State and Tribal water quality standards including, in particular, the priority to be given to the development of wildlife criteria for areas where such criteria have not been developed (i.e., outside the Great Lakes Basin).

##### *B. Work Group Report to Agreement Signatories*

Within one year of signing this Agreement, the work group will submit a comprehensive report to the signatories of this Agreement (or their successors) that (1) summarizes the range of research options considered by the work group; (2) makes recommendations regarding priority research and data gathering undertakings for existing and new water quality criteria; (3) describes the recommended additional research; (4)

estimates the likely cost of the research; (5) evaluates available funding for completing the research; and (6) establishes a specific time frame for completing the research and data gathering.

##### *C. National Research and Data Gathering Plan*

After taking into account the recommendations of the work group, the signatories of this Agreement (or their successors) will adopt a national research and data gathering plan within eighteen months of the signing of this Agreement. The plan will identify near-term (1–5 years) priorities reflecting the highest priorities identified by the agencies that can be accomplished with available and anticipated funding sources. The plan will also identify longer term (5–10 years) priorities. The agencies will work to incorporate the plan into their respective budgets, and to achieve economies of scale and increased effectiveness in the use of limited funds by coordinating efforts wherever possible. The agencies will also work to coordinate the plan with the White House-sponsored Committee on the Environment and Natural Resources.

##### *D. Consultation on State and Tribal Water Quality Standards*

On an ongoing basis, the work group will provide expertise and assistance to the field/regional offices regarding research/data gathering issues raised in consultations on State and Tribal water quality standards. Where such consultations identify significant research/data gathering priorities, those priorities will be forwarded for evaluation by the work group. With input from the regional/field offices, the work group will determine the priority of such research and data gathering in relation to other needs contained in the national plan. This process will enable the agencies to rationally allocate their resources as new research/data gathering needs arise.

#### **VIII. Consultation on Water Quality Standards Actions**

##### *A. Development of New or Revised State or Tribal Water Quality Standards*

EPA will communicate and, where required under section 7 of the ESA, consult with the Services on new or revised State or Tribal water quality standards and implementing procedures that are subject to EPA review and approval under section 303(c) of the CWA.

If a State or Tribe requests, or upon mutual agreement, EPA may, by

notifying the appropriate Service(s) in writing, designate a State or Tribe to serve as a non-Federal representative to conduct informal consultation in accordance with 50 CFR 402.08.

#### 1. Scoping of Issues To Be Considered During the Triennial Review Process

Section 303(c) of the CWA requires States to adopt and revise standards at least on a triennial basis. The Services and EPA recognize that to accomplish timely implementation of standards that may affect Federally-listed species and designated critical habitat, early involvement and technical assistance by the Services is needed. In an effort to facilitate collaboration and the consultation process, EPA regional offices will provide the Services annually with a list of all upcoming scheduled triennial reviews for the next 5 year period.

The Services will participate in a meeting with EPA and the State or Tribe to discuss the extent of an upcoming review. EPA will take the lead to schedule the meeting near the start of the triennial review process.

#### 2. Development of State or Tribal Standards

EPA will seek the technical assistance and comments of the Services during a State's or Tribe's development of water quality standards and related policies. The Services will provide the States or Tribes and EPA with information on Federally-listed species, proposed species and proposed critical habitat, and designated critical habitat in the State or on Tribal lands. EPA will provide assistance to the Services in obtaining descriptions of pollutants and causes of water quality problems within a watershed or ecosystem. The Services will work cooperatively with the States or Tribes to identify any concerns the Services may have and how to address those concerns. EPA will request the Services to review and comment on draft standards, and to participate in meetings with States or Tribes as appropriate. EPA will indicate which of these requests are of high priority, and the Services will make every effort to be responsive to these requests.

Where appropriate, EPA and the Services will encourage the State or Tribe to adopt special protective designations where listed or proposed threatened or endangered species are present or critical habitat is designated or proposed.

EPA will initiate discussions with the Services if there is a concern that a draft State or Tribal standard or relevant policy may impact Federally-listed species or critical habitat.

#### 3. Adoption and Submittal of State or Tribal Standards

States or Tribes adopt new and revised standards and implementing policies from time to time as well as at the conclusion of the triennial review period.

After the final action adopting the standards, the State or Tribe sends its adopted and effective standards to EPA. Once received, EPA is required by the CWA to approve the standards within 60 days or disapprove them within 90 days. Section 7 consultation is required if EPA determines that its approval of any of the standards may affect listed species or designated critical habitat. The time periods established by the CWA require that EPA and the Services work effectively together to complete any needed consultation on a State's or Tribe's standards quickly. In order to provide enough time for consultation with the Services where the approval may affect endangered or threatened species, EPA will work with the State or Tribe with the goal of providing to the Services a final draft of the new or revised water quality standards 90 days prior to the State's or Tribe's expected submission of the standards to EPA. When needed, EPA will prepare a biological evaluation based on the final draft and, where appropriate, request formal consultation. The Services agree to consult on the final draft, and to accommodate minor revisions in the standards that may occur during the State's or Tribe's adoption process. The Services will make every effort to complete consultation and delivery of a final biological opinion within 90 days, or on a schedule agreed upon with the EPA Regional Office.

#### 4. EPA Develops Biological Evaluation

When needed, EPA will develop a biological evaluation to analyze the potential effect of any new or revised State or Tribe adopted standards that may affect Federally-listed species or critical habitat.

#### 5. EPA Determination of "No Effect" or "May Affect"

EPA will evaluate proposed new or revised standards and use any biological evaluation or other information to determine if the new or revised standards "may affect" a listed species or critical habitat. For those standards where EPA determines that there is "no effect," EPA may record the determination for its files and no consultation is required. Although not required by section 7 of the ESA for actions that are not major construction activities as defined by 50 CFR 402.02,

EPA will share any biological evaluation, "no effect" determination, and supporting documentation used to make a "no effect" determination with the Services upon request.

If EPA decides that the new or revised water quality standards "may affect" a listed species, then EPA will enter into informal consultation (unless EPA decides to proceed directly to formal consultation) to determine whether the standards are likely to adversely affect Federally-listed species or critical habitat. If EPA determines that the species or critical habitat is not likely to be adversely affected, EPA will request the Service to concur with its finding.

Where EPA finds that a species or critical habitat is likely to be adversely affected, EPA will consider, and the Services may suggest, modifications to the standards(s) or other appropriate actions which would avoid the likelihood of adverse effects to listed species or critical habitat. If the likelihood of adverse effects cannot be avoided during informal consultation, then EPA will initiate formal consultation with the Service or EPA may choose to disapprove the standard. In addition, if EPA finds that a proposed species is likely to be jeopardized or proposed critical habitat adversely modified by EPA approval of a new or revised State or Tribal standard, EPA will confer with the Services under 50 CFR 402.10.

#### 6. Services' Review of "Not Likely to Adversely Affect" Determination

Within 30 days after EPA submits a "not likely to adversely affect" determination, the Services will provide EPA with a written response on whether they concur with EPA's findings. The Services will provide EPA with one of the three following types of written responses: 1) concurrence with EPA's determination (this would conclude consultation), 2) non-concurrence with EPA's determination and, if the Service cannot identify the specific ways to avoid adverse effects, a request that EPA enter into formal section 7 consultation (see 7 below), or 3) a request that EPA provide further information on their determination. If it is not practicable for EPA to provide further information, the Services will make a decision based on the best available scientific and commercial information.

#### 7. Formal Consultation

Formal consultation on new or revised standards adopted by a State or Tribe will begin on the date the Services and EPA jointly agree that the information provided is sufficient to initiate consultation under 50 CFR

402.14(c). The consultation will be based on the information supplied by EPA in any biological evaluation and other relevant information that is available or which can practicably be obtained during the consultation period (see 50 CFR 402.14 (d) and (f)).

If the Service anticipates that incidental take will occur, the Service's biological opinion will provide an incidental take statement that will normally contain reasonable and prudent measures to minimize such take, and terms and conditions to implement those measures. Reasonable and prudent measures can include actions that involve only minor changes to the proposed action, and reduce the level of take associated with project activities. These measures should minimize the impacts of incidental take to the extent reasonable and prudent. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the proposed action. 50 CFR 402.14(I)(2).

Appropriate minor changes can include, for example, a condition stating that the EPA Regional Office will work with the State or Tribe to obtain revisions to the water quality standards in the next triennial review. Where either of the Services believe that there is a need for the standards to be revised more quickly, the Service should work with EPA and the State or Tribe to determine whether any revisions could be developed more quickly than the next anticipated triennial review. Because reasonable and prudent measures should not exceed the scope of EPA actions, reasonable and prudent measures in a water quality standards consultation should not impose requirements on other CWA programs unless agreed to by both EPA and the Service(s).

The Services may include research or data gathering undertakings as conditions of an incidental take statement contained in a biological opinion where it determines that the way to minimize future incidental take is through research and data gathering. However, to the maximum extent possible, the Services will work with EPA to identify research needs that will be addressed in the National Research and Data Gathering Plan. The Plan identifies high priority data and information needed to reduce the uncertainty inherent in the degree to which water quality criteria would protect listed species. Research and data identified in the Plan has the goal of

minimizing any incidental take associated with water quality standards.

Where site specific research or data are needed that are not addressed in the National Plan, the biological opinion will explain how the research or data gathering will minimize such take while not altering the basic design, location, scope, duration, or timing of the action.

Where a regional EPA office finds that it is not practicable to complete the research or data gathering requested in the draft opinion, but the Services believe that inclusion of the research condition is important to minimizing incidental take, the Services may elevate the issue in accordance with the procedures in section V.A. of this Agreement. During the elevation process, the agencies will evaluate the need for the research identified by the Service in the water quality standards consultation in light of available resources and the National Plan.

Reasonable and prudent measures and terms and conditions should be developed in close coordination with the EPA and the State or Tribe, to ensure that the measures are reasonable, that they cause only minor changes to the proposed action, and that they are within the legal authority and jurisdiction of the Agency to carry out. If the Service(s), EPA, and the States or Tribe cannot reach agreement on appropriate reasonable and prudent measures or terms and conditions at the level the consultation is being conducted, the decision can be elevated by the procedures discussed in section V.A.

As a general matter, EPA disapproval of a State or Tribal water quality standard is not a minor undertaking because it triggers a legal duty on the part of EPA to initiate promptly Federal rule-making unless the State or Tribe revises the standard within 90 days (see CWA 303(c)(3) and (4)). Where the Services and EPA agree, however, disapproval of a State or Tribal water quality standard may be included as a condition of incidental take authorization.

The Services will issue a biological opinion that concludes whether any Federally-listed species are likely to be jeopardized or critical habitat adversely modified or destroyed by the State or Tribe's new or revised water quality standards. If either of the Services makes a jeopardy or adverse modification finding, it will identify any available reasonable and prudent alternatives, which may include, but are not limited to, those specified below. EPA will notify the Service of its final decision on the action.

Some possible ideas for development of specific reasonable and prudent alternatives:

a. EPA coordinates with the State or Tribe to adopt (or revise) water quality standards necessary to remove the jeopardy situation.

b. EPA disapproves relevant portions of the State or Tribe's adopted standards (see 40 CFR 131.21) and initiates promulgation of Federal standards for the relevant water body (see 40 CFR 131.22). Where appropriate, EPA would promulgate such standards on an expedited basis.

c. Using its authority under section 303(c)(4)(B) of the CWA, EPA promulgates Federal standards as necessary.

#### 8. EPA Action on State or Tribal Standards

After reviewing the biological opinion, EPA will inform the Service of its intended action.

#### *B. Existing Water Quality Standards*

If the Services present information to EPA, or EPA otherwise has information supporting a determination that existing State or Tribal water quality standards are not adequate to avoid jeopardizing endangered or threatened Federally-listed species or adversely modifying critical habitat or for protecting and propagating fish, shellfish and wildlife, EPA will work with the State or Tribe in the context of its triennial review process to obtain revisions in the State or Tribal standards. Such revisions could include, where appropriate, adoption of site-specific water quality standards tailored to the geographic range of the species of concern. If a State or Tribe does not make such revisions, the EPA regional office will recommend to the EPA Administrator that a finding be made under section 303(c)(4)(B) of the CWA that the revisions are necessary.

EPA will engage in section 7 consultation to ensure that any revisions to the existing standards are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat and to minimize any anticipated incidental take. If EPA and the Services disagree regarding the need for revisions in the State or Tribal standards, the issue may be elevated. Consultation will be consistent with the provisions of 50 CFR 402 and part A above.

#### *C. Consultation on EPA Promulgation of State or Tribal Water Quality Standards*

EPA promulgation of State or Tribal water quality standards is a Federal

rule-making process and EPA will comply with the consultation requirements of section 7 of the ESA with any promulgation.

### IX. Permitting Program Activities

This Agreement establishes a framework for coordinating actions by EPA and the Services for activities under the CWA section 402. These activities are: (1) EPA approval of State or Tribal permitting programs, (2) EPA review of permits issued by States or Tribes with approved permitting programs, and (3) EPA issuance of permits under section 402 of the CWA.

#### A. Programmatic Section 7 Consultation

EPA and the Services will conduct a national programmatic consultation on whether the establishment of the procedures identified in section IX.B below is sufficient to avoid the likely jeopardy of listed species due to discharges authorized under State and Tribal NPDES programs. The consultation will be conducted in accordance with the procedures in 50 CFR part 402 and the guidance contained in the Services' Consultation Handbook.

In its consultation request, EPA will provide the Services with a description of the CWA requirements applicable to the State and Tribal programs and EPA's program oversight authorities that are proposed to ensure that species will be protected, including the identification of State or Tribal water quality standards that ensure the protection of endangered and threatened species.

If the Services anticipate that State/Tribal NPDES permits would cause incidental take of listed species, the agencies anticipate that the Services' opinion will authorize such take, except where the Service believes that the adverse effects of a permit are more than minor and, after elevation to headquarters, EPA chooses not to object to the permit under its CWA authorities. The Services anticipate that any incidental take authorization will apply to discharges authorized under permits issued after issuance of the biological opinion.

The agencies anticipate that the Services' biological opinion will cover all existing State/Tribal NPDES programs and any State/Tribal program submitted after issuance of the biological opinion where EPA makes a written commitment to follow coordination procedures that the Services agree are consistent with the procedures contained in the biological opinion on the national consultation. The agencies will determine whether the opinion should also cover existing

NPDES programs that have been subject to section 7 consultation.

As new species are added to the list of threatened and endangered species, the Services will evaluate the impact of State or Tribal program assumption on the new species and determine whether reinitiation of consultation is warranted.

#### B. Coordination Procedures Regarding Issuance of State or Tribal Permits

EPA has authority and responsibility for overseeing the operation of State/Tribal NPDES programs through, among other means, review of State/Tribal NPDES permits where appropriate. EPA's oversight includes consideration of the impact of permitted discharges on waters and species that depend on those waters. EPA does this by determining whether State or Tribal permits indeed attain water quality standards. The procedures outlined below are designed to assist EPA in fulfilling these CWA oversight responsibilities.

EPA and the Services agree to follow the coordination procedures below with regard to EPA review of State or Tribal permits in all existing and new permitting programs approved by EPA under section 402 of the CWA. Procedures and time lines for EPA review and objection to State or Tribal permits are established by statute and regulation. See CWA section 402(d); 40 CFR 123.44. Where EPA determines that exercise of its objection authority is appropriate to protect endangered and threatened species, the Agency will act pursuant to its existing authorities under the CWA (i.e., where the proposed permit would be "outside the guidelines and requirements" of the CWA. See CWA 402(d)(2)). EPA and the Services will follow the coordination procedures below in a manner consistent with these statutory and regulatory procedures:

1. The Services will provide the States or Tribes with information on Federally-listed species and any designated critical habitat in the States or on Tribal lands, with special emphasis on aquatic and aquatic-dependent species.

2. States are obligated under existing CWA regulatory authority requirements to provide notice and copies of draft permits to the Services. See 40 CFR 124.10(c)(1)(iv) and (e). EPA will exercise its oversight authority to ensure that States and Tribes carry out this obligation. EPA and the Services will work with States and Tribes to share information on permits that may raise issues regarding impacts to threatened or endangered species or designated critical habitat.

3. If the Service or EPA is concerned that a NPDES permit is likely to have an

adverse impact on a Federally-listed species or critical habitat, the Service or EPA will contact the appropriate State or Tribal agency (preferably within 10 days of receipt of a notice of a draft State or Tribal permit) to discuss identified concerns. The Service or EPA will provide appropriate information in support of identified concerns. The Services and EPA will provide copies to each other of comments made to States or Tribes on issues related to Federally-listed species.

4. If unable to resolve identified issue(s) with the State or Tribe, the Service will contact the appropriate EPA Regional Branch not later than five working days prior to the close of the public comment period on the State's or Tribe's draft NPDES permit. Telephone contacts should be followed by written documentation of the discussion with EPA and include or reference any relevant supporting information.

5. If contacted by the Services, EPA will coordinate with the Services and the State or Tribe to ensure that the permit will comply with all applicable CWA requirements, including State or Tribal water quality standards, which include narrative criteria prohibiting toxic discharges, and will discuss appropriate measures protective of Federally-listed species and critical habitat.

6. EPA may make a formal objection, where consistent with its CWA authority, or take other appropriate action, where EPA finds that a State or Tribal NPDES permit will likely have an adverse effect on Federally-listed species or critical habitat.

For those NPDES permits with adverse effects on Federally-listed species or critical habitat that are minor, it is the intention of the Services and EPA that the Services will work with the State or Tribe to reduce the adverse effects stemming from the permit. For those NPDES permits that have adverse effects on Federally-listed species or critical habitat that are more than minor, including circumstances where the discharge fails to ensure the protection and propagation of fish, shellfish and wildlife, and where the State or Tribe and the Services are unable to resolve the issues, it is the intention of the Services and EPA that EPA would work with the State or Tribe to remove or reduce the adverse impacts of the permit, including, in appropriate cases, by objecting to and Federalizing the permit where consistent with EPA's CWA authority.

EPA will use the full extent of its CWA authority to object to a State or Tribal permit where EPA finds (taking into account all available information,

including any analysis conducted by the Services) that a State or Tribal permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

**Note:** EPA may review or waive review of draft State or Tribal NPDES permits (40 CFR 123.24(d)). EPA will work with the Services through the local/regional coordinating teams to help determine which categories of permits should be reviewed for endangered species concerns. If EPA finds that a draft permit has a reasonable potential to have more than a minor effect on listed species or critical habitat, and review of a draft permit has been waived, EPA will withdraw this waiver during the public comment period (see 40 CFR 123.24(e)(1)).

7. If EPA objects to a NPDES permit under paragraph 6 above, EPA will follow the permit objection procedures outlined in 40 CFR 123.44 and coordinate with the Services in seeking to have the State or Tribe revise its permit. A State or Tribe may not issue a permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a NPDES permit, EPA will consult with the Service prior to issuance of the permit (as a Federal action) as appropriate under section 7 of the ESA.

8. In the case of State or Tribal permits that have already been issued, if the Services identify a permitted action which is likely to have an adverse effect on Federally-listed species or critical habitat, then the Services will contact the State or Tribe to seek to remedy the situation. EPA will provide support and assistance to the Services in working with the State or Tribe. Although EPA may, at the time of permit issuance, object to and assume permit-issuing authority for draft NPDES permits, EPA has no authority to require changes to an already-issued State or Tribal permit. EPA or the Services could request that the State or Tribe use State or Tribal authority to reopen an issued permit if it is likely to adversely affect Federally-listed species or critical habitat.

### C. Issuance of EPA Permits

EPA issuance of a permit is an action subject to section 7 consultation if it may affect listed species or critical habitat. EPA will meet ESA requirements as provided in 40 CFR 122.49(c) on the issuance of individual and general NPDES permits, and 50 CFR part 402. If consultation has been completed on State or Tribal water quality standards and the NPDES permit conforms with those standards, then any ESA section 7 review process should be simplified.

EPA will assure that all permits ensure the attainment and maintenance of State or Tribal water quality standards, including those that have been the subject of consultation or have been determined to have "no effect" on listed species and critical habitat.

EPA and the Services agree to coordinate as follows in the review of EPA-issued permits.

1. The Services will provide to EPA, when requested, information regarding the presence of Federally-listed species, critical habitat, proposed species and proposed critical habitat, including species lists, maps, and other relevant information.

2. EPA will review permit applications and other available information (including that previously provided by the Services) to determine if issuance of a permit may affect any Federally-listed species or critical habitat. If EPA makes a "no effect" finding, EPA will document this determination in the permit record before public notice. EPA will also determine whether proposed species are likely to be jeopardized or proposed critical habitat adversely modified. EPA will provide the Services with the public notice of the proposed permit and EPA's determination of no effect. During the 30-day public comment period, the Services may submit comments on EPA's determination. The Services may request initiation of consultation on Federally-listed species or critical habitat or conference on proposed species if it believes the proposed action may affect listed species.

3. If EPA determines that the permitted action may affect Federally-listed species or critical habitat, EPA will initiate either informal or formal consultation. If EPA determines that the permitted action is likely to jeopardize proposed species or adversely modify proposed critical habitat, a conference will be initiated.

4. In consultations involving permits, any reasonable and prudent measures (associated with an incidental take statement) will specify the measures considered necessary or appropriate to minimize takings. The Services will describe such measures. EPA may delegate the terms and conditions of the incidental take statement to permittees. The Services will rely on EPA to retain the responsibility to ensure the terms and conditions are carried out. This approach will be reflected in the Services' incidental take statements. Monitoring reports to ensure implementation of reasonable and prudent measures and terms and conditions will be made available to the

Services by EPA in accordance with the terms of the incidental take statement.

Reasonable and prudent measures and terms and conditions should be developed in close coordination with the EPA to ensure that the measures are reasonable, that they cause only minor changes to the proposed action, and that they are within the legal authority and jurisdiction of the Agency to carry out. If the Services and EPA cannot reach agreement on appropriate reasonable and prudent measures or terms and conditions at the level the consultation is being conducted, the decision can be elevated by the procedures discussed in section V.A.

### D. Watershed Planning

Whenever feasible and appropriate, the Services will participate early on in watershed planning processes. The active participation of the Services as a core stakeholder in the development of watershed or basin plans should reduce or eliminate the need for, or facilitate, consultation on EPA-issued permits and coordination on individual State or Tribal NPDES permits and other site-specific actions that are contemplated in watershed plans. Such participation should save the States, Tribes, EPA and Services time and resources while improving protection and recovery efforts for both listed and unlisted species.

### X. Support in Administrative and Judicial Proceedings

The Services agree to provide support when requested by EPA in defense of any requirements or actions adopted by EPA as a consequence of reasonable and prudent alternatives, measures or conservation recommendations rendered in biological opinions, or reasonable and prudent measures provided in incidental take statements. Such support in administrative and judicial proceedings will be subject to approval by the Department of the Interior's Office of the Solicitor or NOAA General Counsel's Office and EPA's General Counsel's Office.

### XI. Revisions to Agreement

EPA and the Services may jointly revise this document.

### XII. Reservation of Agency Positions

No party to this Agreement waives any administrative claims, positions, or interpretations it may have with respect to the applicability or the enforceability of the ESA or the CWA.



**XIII. Obligation of Funds, Commitment of Resources**

Nothing in this Agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise commit any of the agencies to actions for which it lacks statutory authority. It is understood that the level of resources to be expended under this Agreement will be consistent with the level of resources available to the agencies to support such efforts.

**XIV. Nature of Agreement**

This memorandum is intended only to improve the internal management of

EPA and the Services and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

**XV. Effective Date; Termination**

This memorandum will become effective upon signature by each of the parties hereto. Any of the parties may withdraw from this Agreement upon 60 days' written notice to the other parties; provided that any section 7 consultation covered by the terms of this Agreement that is pending at the time notice of withdrawal is identified by the parties,

and those activities covered by this Agreement that begin the consultation process prior to and within the 60-day notice period, will continue to be covered by the terms of this Agreement.

**XVI. Signatories [Reserved]**

**Note:** It is anticipated the following individuals will sign the final Agreement when it is executed: J. Charles Fox, Assistant Administrator for Water, U.S. Environmental Protection Agency; Donald J. Barry, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior; Terry D. Garcia, Assistant Secretary for Oceans and Atmosphere, U.S. Department of Commerce.

[FR Doc. 99-1029 Filed 1-14-99; 8:45 am]

BILLING CODE 6560-50-P