UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

DEC 11 2014

MEMORANDUM

SUBJECT: Clean Water Act Section 316(b) Regulations for Cooling Water Intake Structures at Existing Facilities: NPDES Permitting Process When Federally-Listed Threatened and Endangered Species and/or Designated Critical Habitat Are or May be Present

FROM: Deborah G. Nagle, Director
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TO: Water Division Directors, Regions I – X

This memorandum addresses implementation of the U.S. Environmental Protection Agency's (EPA) recently promulgated regulation for cooling water intake structures. It is a summary of the rule and the coordination processes in it and is intended to be an aid to the Regions and State National Pollutant Discharge Elimination System (NPDES) Directors. It is not intended to add any new requirements, procedures or interpretations beyond the rule and preamble and documents cited therein. **We respectfully request that you share this memorandum with the State NPDES Directors in your Region.**

The EPA promulgated a Clean Water Act (CWA) section 316(b) regulation on August 15, 2014, that establishes standards for cooling water intake structures. 79 Fed. Reg. 48300-439 (Aug. 15, 2014). The regulation establishes best technology available standards to reduce impingement and entrainment of aquatic organisms at existing power generation and manufacturing facilities and it became effective on October 14, 2014.

The 316(b) rule includes a number of provisions specifically designed to ensure that the rule as it is implemented is not likely to jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of designated critical habitat pursuant to the Endangered Species Act of 1973, as amended (ESA). The NPDES permit process to establish 316(b) controls for cooling water intake structures (CWIS) under this rule provides a framework for addressing and minimizing adverse environmental impacts that may include adverse effects to threatened and endangered species and designated critical habitat. The rule also establishes requirements that build on existing CWA requirements to coordinate with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively, the Services) prior to issuing these NPDES permits. The rule provides facilities, State NPDES Directors (Directors) and the Services the opportunity in the permitting process to identify

potential impacts that CWISs may have on threatened and endangered species and designated critical habitat and to identify control measures, and associated monitoring and reporting requirements, that may be included in NPDES permits in light of the presence of listed species and designated critical habitat.

The EPA consulted on the 316(b) rule with the Services under the provisions of section 7 of the ESA that require Federal agencies to insure that any agency action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. The EPA completed consultation with the Services, and on May 19, 2014, received a joint Biological Opinion[1] that concluded the 316(b) rule is not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of designated critical habitat. The Biological Opinion includes an incidental take statement[2] that exempts EPA from the take prohibitions in section 9 of the ESA and regulations issued pursuant to section 4(d) of the ESA, and eight terms and conditions the EPA must meet in order to be afforded this take exemption.

The fourth term and condition of the Biological Opinion specifies that the EPA will provide State Directors an instructional memorandum describing the technical assistance process between the Directors and the Services described in the rule and preamble. Under the term and condition, the memorandum must also explain how Directors are to interpret the various aspects of the rule, consistent with the April 8, 2014, correspondence from the EPA (attached as Appendix A to the Biological Opinion). In accordance with this term and condition, we are providing you with this instructional memorandum and as noted above, respectfully request that you share it with the State Directors in your Region.

This memorandum addresses how to implement the rule where a State is the permitting authority.[3] For State-issued permits the rule provides the Services two opportunities to participate in the permitting process, first by reviewing and commenting on the permit application, and later by reviewing and commenting on the draft permit. Under these provisions, the Services have the opportunity to recommend that the Director require site-specific and species-specific control measures and monitoring and reporting requirements, including measures to minimize incidental take, reduce or remove more than minor detrimental effects on listed species and designated critical habitat, and avoid jeopardizing federally-listed species and destroying or adversely modifying designated critical habitat.

In addition, Attachment A of this memorandum describes the responsibilities of facilities in implementing the regulation when threatened and endangered species listed under the ESA and/or their designated critical habitat are or may be present. Note that nothing in the rule changes the existing, independent ESA obligations of a facility subject to this rule. Particularly, compliance with the 316(b) rule does not provide an exemption from the prohibitions on "take" of listed species contained in section 9 of the ESA

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[1] Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act. http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/upload/Final-316b-Biological-Opinion-and-Appendices-May-19-2014.pdf

[2] ESA Section 9 prohibits the "take" of endangered species of fish and wildlife. "Take" is defined in ESA Section 3(19) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Incidental take statements exempt action agencies from the take prohibition if they comply with the reasonable and prudent measures and the implementing terms and conditions of incidental take statements.

[3] EPA issuance of an NPDES permit is a Federal action. Thus, for EPA-issued NPDES permits with 316(b) provisions for existing facilities, as is the case with EPA-issued NDPES permits generally, the EPA must consult with the Services in appropriate circumstances consistent with section 7 of the ESA.

and regulations issued pursuant to section 4(d) of the ESA. Section 11 of the ESA provides for civil and criminal penalties for violating these prohibitions and also provides for citizen lawsuits.

Finally, in Attachment B of this memorandum, the EPA describes its longstanding commitment to oversee the operation of state NPDES programs to ensure protection of listed species and designated critical habitat through existing regulatory processes.

What is the timing of the submission of information required in permit applications under the 316(b) rule?

The requirements in this rule will be implemented in NPDES permits as the permits are issued. The EPA realizes that, in some cases, a facility may already have been in the middle of a permit proceeding at the time of promulgation of this rule. In other cases, the Director may have, prior to promulgation of the new rule, already obtained much of the same information from the facility required by the new rule. In addition, there may be circumstances, in the case of the renewal of already issued permits with 316(b) conditions, where existing information may be adequate for determining whether or not to modify existing 316(b) permit conditions. Therefore, the rule includes several provisions that provide flexibility for the Director in determining what specific permit application requirements apply to such applicants. How the rule treats permit application requirements in several different circumstances is described below.

If the Director began a permit proceeding prior to October 14, 2014, the Director may issue a permit based on the information supplied by the applicant so long as the permit is issued prior to July 14, 2018.[4] See 40 C.F.R. 125.95(a)(2) and 125.98(g). However, the Director has the discretion to require additional information from the applicant where necessary for determining appropriate permit conditions, including additional information on threatened and endangered species and designated critical habitat that may be affected by the cooling water intake structures. See 40 C.F.R 122.21(r).

In the case of any permit expiring prior to July 14, 2018, under 40 C.F.R. 125.95(a)(2), a facility may request that the Director establish an alternate schedule for submission of some of the permit application information required by 40 C.F.R. 122.21(r), based on a showing by the owner or operator of the facility that it could not develop the information for which such an alternate schedule is requested by the time required for submission of the permit renewal application. If the Director subsequently chooses to allow a delay for the submittal of any of the information required under 40 C.F.R. 122.21(r), the Director should establish a schedule requiring submission of the required information as soon as practicable.

In the case of any permit expiring on or after July 14, 2018, under 40 C.F.R. 125.95 the facility must submit a permit application that includes all the information required in 40 C.F.R. 122.21(r) with its next NPDES permit renewal application.

Where a facility's permit application was submitted on or after October 14, 2014 and the facility submitted the 122.21(r) permit application studies, the Director may approve an applicant's request to reduce information required for subsequent permit applications, if conditions at the facility and in the waterbody remain substantially unchanged since the previous application. However, if conditions at the

[4] As described in the preamble to the 316(b) rule, the EPA has determined that for many facilities, it may take as long as 39 months to plan, collect, and compile the data and studies required to be submitted with the permit application. The rule therefore specifies that July 14, 2018 (39 months after the rule's effective date) reflects the date after which all permit application requirements must be submitted as specified at 40 C.F.R. 125.95.

facility or in the waterbody have in fact changed substantially since the previous permit application, the Director will need to review and revise the data collection expectation where necessary. The presence of any designated critical habitat, or threatened and endangered species, designated or listed after issuance of the current permit (whose range of habitat or designated critical habit includes waters in the vicinity of CWIS), constitutes potential for a substantial change that must be addressed by the owner/operator in subsequent permit application, unless the facility received from the Services an exemption pursuant to 16 U.S.C. 1536(o) or a permit pursuant to 16 U.S.C. 1539(a), or the Services have informed the owner/operator there is no reasonable expectation of take. See 40 C.F.R. 125.95(c), 79 Fed. Reg. 48358 (Aug. 15, 2014).

What are the responsibilities of the Director regarding listed species and designated critical habitat?

The rule requires the Director to take certain actions relevant to threatened and endangered species and designated critical habitat during the development of NPDES permits with 316(b) requirements.[5] These actions, listed below, will assist the Director in developing the record necessary to support the inclusion of any protective measures and requirements for listed species and designated critical habitat in the permit:

I. The Director Must Transmit the Permit Application to the Services. Pursuant to 40 C.F.R. 125.98(h), upon receipt of an NPDES permit application for an existing facility subject to the rule, the Director must forward a copy of the permit application to the appropriate Field Office of the U.S. Fish and Wildlife Service and/or Regional Office of the National Marine Fisheries Service for a 60-day review.

As noted earlier, in the case of permit proceedings begun prior to the effective date of today's rule, the Director may require additional information from the applicant pursuant to 40 C.F.R. 122.21(r). Upon receipt of such additional permit application information requested under 40 C.F.R. 122.21(r), the Director must forward a copy of that information to the Services. In the case of any permit expiring prior to July 14, 2018, the Director can choose to allow a delay for the submittal of any of the information requirements of 40 C.F.R. 122.21(r), but should require submittal as soon as practicable. Upon receipt of the additional delayed information under 40 C.F.R. 122.21(r), the Director must forward a copy of that information to the Services.

The EPA expects that the Services will respond within 60 days of receipt of the complete application and provide to the Director:

A. Any corrections to the list of federally-listed threatened and endangered species and critical habitat included in the permit application,

B. Any measures the Services recommend for inclusion in the permit (including monitoring and reporting requirements) for the protection of federally-listed species and designated critical habitat, including measures that would minimize any incidental take of listed species, and/or

[5] The ESA provisions of the rule extend to all federally-listed endangered and threatened species (not just fish and shellfish) and the Director may require additional control measures, monitoring requirements, and reporting requirements to protect federally-listed endangered and threatened species and designated critical habitat. See 40 C.F.R. 125.94(g); 125.98(b)(2).

avoid likely jeopardy to a listed species or destruction or adverse modification of critical habitat, and/or

C. Notification that the Service(s) have no corrections to the list of species and critical habitat and/or that the Service(s) do not recommend any control measures.

See 79 Fed. Reg. 48381 (Aug. 15, 2014).

II. The Director's Processing of the Permit Application and Development of a Draft Permit

The Services' 60-day review period of the application under the new rule is not expected to constrain the Director's ability to process the applicant's permit application in a timely manner.

A. The Director, however, may not propose or publish the draft permit until the 60-day review period has ended, unless the Director has received the Services' response prior to that time. This is a modification to the usual NPDES permit development process.

B. The Services may make recommendations to the Director after as well as during the 60-day period for the Services' review of the permit application.

C. In developing the draft as well as the final permit, the Director should be guided by the following:

The rule generally applies to impingement and entrainment of fish and shellfish. However, as explained in the preamble, the ESA provisions of the rule extend to all federally-listed threatened and endangered species. The Director's authority to establish additional measures to protect listed species and designated critical habitat from direct and indirect effects broadly encompasses all taxa of federally-listed species and all critical habitat and is not limited to fish and shellfish.

In situations where a Director determines, pursuant to 40 C.F.R. 125.94(c)(11), that a facility's rate of impingement is so low as to not warrant additional impingement controls, the Services may still consider the detrimental effects of the facility's operation to be more than minor if federally-listed threatened and endangered species are subject to impingement (including entrapment) and recommend additional impingement controls.

When a Director, pursuant to 40 C.F.R. 125.92(s), approves of fish being returned to water sources other than the original source water, the Director is to take into account any recommendations from the Services with respect to endangered or threatened species.

D. Permits subject to the rule must include a permit condition stating "Nothing in this permit authorizes take for the purposes of a facility's compliance with the Endangered Species Act." 40 C.F.R. 125.98(b)(1).

For additional information, see 79 Fed. Reg. 48381-2, 48371-72 (Aug. 15, 2014) and the Services Biological Opinion.

III. The Director's Development of the Draft Permit Fact Sheet

As part of the administrative record for the draft permit, under existing NPDES regulations, the Director must develop a fact sheet that includes certain standard information. 40 C.F.R. 124.8. In addition, 40 C.F.R. 125.98(f)(1-(2) of the new rule requires the Director to include in the fact sheet an explanation of the proposed entrainment determination, including why the Director has rejected any entrainment control technologies or measures that perform better than the selected technologies or measures.

A. The explanation must reflect consideration of all reasonable attempts to mitigate any adverse impacts of otherwise available better performing entrainment technologies. 40 C.F.R. 125.98(f)(1).

B. The rule lists factors that must or may be considered in making the determination, such as the numbers and types of organisms entrained, including the numbers of federally-listed species and designated critical habitat to the lowest taxonomic classification possible. 40 C.F.R. 125.98(f)(2-3).

C. Importantly, the weight given to each factor is within the Director's discretion based upon the circumstances of the facility. 40 C.F.R. 125.98(f)(2).

IV. The Director's Development of a Public Notice of Draft Permit and Request for Comment

Under the existing regulations, the Director must provide public notice and an opportunity for public comment on draft NPDES permits, including notice to Federal and State agencies with jurisdiction over fish, shellfish and wildlife resources. 40 C.F.R. 124.10. The new 316(b) rule at 40 C.F.R 125.98(h) makes these requirements more explicit with respect to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, by requiring that the Director provide to the appropriate Service office a copy of the fact sheet, the permit application, and the draft permit. This review is in addition to the 60 days for the Services to review each complete permit application described above.

Pursuant to 40 C.F.R. 125.98(h), the Director must also provide the Services notice of specific CWIS requirements at 40 C.F.R. 124.10(d)(1)(ix), including requirements applicable to CWISs under CWA section 316(b)), and any specific information the Director has about federally-listed species and critical habitat that are or may be present in the action area[6], including any proposed control measures and monitoring and reporting requirements for such species and habitat.

V. The Director's Issuance of the Final Permit

As with all NPDES permits, the Director must consider comments received during the public comment period on the draft permit, make any appropriate changes, and issue the final permit.

The rule does not compel the Director to include the Services' suggested control measures in the permit; the Director has the discretion to consider the Services' suggestions and include them if the Director deems appropriate based on full consideration of the available data and information.[7] See 40 C.F.R. 125.94(g). However, (as discussed in Attachment B) under the 2001 Memorandum of Agreement signed

[6] "Action area" is described further in Attachment A.

[7] Information provided by the Services to the Director should be included in the administrative record for the permit.

by both the Services and the EPA (66 Fed. Reg. 11202, Feb. 22, 2001), the EPA and the Services have agreed to follow certain coordination procedures with regard to EPA review of State or Tribal permits, including when contacted by the Services, to coordinate with the Services and State or Tribe during the permit process, in order to ensure that the permits comply with all applicable CWA requirements.

Where the Director requires additional measures to protect federally-listed species or designated critical habitat pursuant to the new rule, the Director shall require monitoring and reporting associated with those measures. See 40 C.F.R. 125.95(g), 125.96(g), 125.97(g).

VI. The Director Must Report Certain Information to the EPA During Permit Term

The rule requires that Directors submit certain information annually to the EPA with respect to any take of listed species that is reported to the Director.

Pursuant to 40 C.F.R. 125.98(k), the Director must submit at least annually to the appropriate EPA Regional Office, facilities' annual reports submitted pursuant to 40 C.F.R. 125.97(g), for compilation and transmittal to the Services.

Term and condition #2 of the Services' Biological Opinion (described in more detail below), specifies that EPA will provide to the Services an annual report summarizing any monitoring reports submitted by facilities to state Directors, including data on impacts to ESA-listed species or critical habitat; a table that identifies all ESA-listed species taken by CWIS along with the total number of organisms taken (deaths and injuries) per year at each facility as reported to the EPA by the state Director pursuant to 125.98(k); and the compiled raw data when the State provides such data to the EPA. The EPA will also seek to provide additional raw data from the Director's summarized reports if requested to do so.

Additional Information

The EPA has posted a web page to support 316(b) NPDES permitting for existing facilities titled "Section 316(b) Implementation Guide for Existing Facilities."[8] The web page, designed to help walk Directors and facilities through the 316(b) permitting process, will be updated with new 316(b) permitting assistance materials as they become available.

Please contact Marcus Zobrist at 202-564-8311 (or zobrist.marcus@epa.gov) or Julie Hewitt at 202-566-1031 (or hewitt.julie@epa.gov) should you have any additional questions concerning this memorandum.

[8] See http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/implement.cfm

Attachment A

What are the permit application responsibilities of the owner or operator of an existing facility?

Permit application materials are due to the Director 180 days prior to the expiration date of the existing permit under existing regulations. 40 C.F.R. 122.21(d)(2). Pursuant to existing regulations at 40 C.F.R. 122.22(d) and reiterated in the new regulation at 40 C.F.R. 125.95(g), the owner or operator must certify their application is true, accurate and complete, making its certification in the form provided at 40 C.F.R. 122.22(d) of the NPDES permitting regulations. These 180-day and certification requirements are generally applicable under existing regulations for all facilities required to obtain an NPDES permit and are not unique to facilities subject to the new 316(b) rule.

The contents of the permit application for 316(b) facilities under the new rule will apprise the Director of the presence and extent of threatened and endangered species and designated critical habitat in the vicinity of a facility's intake. Several studies, as noted below, are required to be submitted as part of the facility's permit application under the new 316(b) rule. Although not all of these studies specifically address federally-listed species and designated critical habitat, they serve to characterize important aspects of the aquatic environment and operation of the CWIS. In addition, the new rule establishes new permit application requirements, also described below, that specifically address threatened and endangered species and designated critical habitat.

I. All Existing Facilities Subject to the New Rule Must Submit the Following Information with Their Permit Application.

A. All information received as a result of any communication with the Services (40 C.F.R. 122.21(r)(1)(ii)(H)).

B. All identified federally-listed species and designated critical habitat that are or may be present in the action area. (40 C.F.R. 125.95(f))[1]. As explained in the preamble, the action area can generally be considered the area in the vicinity of the cooling water intake structure. 79 Fed. Reg. 48381 (Aug. 15, 2014). Please note that under the Services' Biological Opinion the term "action area" means "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action," as defined under the ESA's implementing regulations at See 50 C.F.R. 402.02. Therefore, it is important for Directors to note that in individual permit coordinations, the Services may consider all areas to be affected directly or indirectly by the cooling water intake structure and not merely the immediate area involved in the permit action when recommending measures to include in the permit, even though the coordination on the state permit is not a consultation under Section 7 of the ESA. We recommend that applicants engage with the Services when developing species and habitat lists to avoid any misunderstandings.

All identification must be based on readily available information at the time of the permit application. 40 C.F.R. 125.95(f); 79 Fed. Reg. 48381 (Aug. 15, 2014). Readily available information is not limited to information that is in the facility's possession and includes information that is publicly available. A facility, however, is not required to create new information (e.g., new studies or surveys) in order to identify federally-listed threatened and

[1] For information about identifying federally-listed species and designated critical habitat please use the following websites: http://ecos.fws.gov/ecos/home.action; http://www.nmfs.noaa.gov/pr/species/esa/

endangered species and/or designated critical habitat. If a permit applicant has received information from the Services, that information would be considered readily available.

C. Source water baseline biological characterization study (40 C.F.R. 122.21(r)(4)). The source water baseline biological characterization study must identify all species and life stages in the vicinity of the CWIS, including biological and life history information that will help characterize the vulnerability of biota to being impinged or entrained.[2]

D. Cooling water system data (40 C.F.R. 122.21(r)(5)). Cooling water system data include a narrative description of the CWIS operation, the proportion of the design intake flow that is used in the cooling water system and the proportion of the source waterbody withdrawn on a monthly basis. The cooling water system data also include a description of existing impingement and entrainment technologies or operational measures and a summary of their performance, including reductions in impingement mortality and entrainment.

E. The facility's chosen impingement compliance method(s) (40 C.F.R. 122.21(r)(6)). Under 40 C.F.R. 125.94(c), facilities have to comply with one of seven options for minimizing impingement. Additional studies also may be required depending on compliance method selected, such as the Impingement Technology Performance Optimization Study (40 C.F.R. 122.21(r)(6)(i) and (ii)).[3]

F. Any previously conducted studies or studies obtained from other facilities addressing technology efficacy, through-plant entrainment survival, and other entrainment studies (40 C.F.R. 122.21(r)(7)).

G. A description of the operational status of each generating, production, or process unit that uses cooling water (40 C.F.R. 122.21(r)(8)). This includes (for power production or steam generation) descriptions of individual unit operating status, descriptions of current and future production schedules, and descriptions of plans or schedules for any new units planned within the next 5 years, and the Nuclear Regulatory Commission relicensing status of each unit at nuclear facilities.

H. Source water physical data, and cooling water intake structure data (40 C.F.R. 122.21(r)(2)-(3)). This information is the same as that required of new facilities in the Phase I rule (and were also included in the suspended Phase II rule). The source water physical data is focused on the waterbody potentially affected by the data, while the intake structure data is focused on the design of the intake structure and how cooling water is used at the facility. For more detail, see the preamble at p. 48363.

II. Existing Facilities Withdrawing More Than 125 Million Gallons per Day (MGD) Actual Intake Flow Must Submit Certain Additional Information in Their Permit Application.

A. An Entrainment Characterization Study that includes a minimum of two years of entrainment monitoring (40 C.F.R. 122.21(r)(9)). This study should contain identification and documentation of all life stages of fish and shellfish in the vicinity of the CWIS and susceptible to entrainment,

[2] See 316(b) rule preamble, section VIII.C.3. "What Information Will I Be Required to Submit to the Director When I Apply for My NPDES Permit?" for a discussion of the information that must be included in the Source Water Baseline Biological Characterization Study.

[3] http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/implement.cfm.

including any listed species with a habitat range encompassing waters in the vicinity of the CWIS. The study must include a characterization of all life stages of fish, shellfish, and any species protected under Federal, State law, including a description of their abundance and their temporal and spatial characteristics in the vicinity of the CWIS, based on sufficient data to characterize annual, seasonal, and diel variations in entrainment, including but not limited to variations related to climate and weather differences, spawning, feeding, and water column migration. We recommend that applicants engage with the Services when developing this characterization. The facility must provide documentation of the current entrainment of all life stages of fish, shellfish, and any species protected under Federal or State law.

B. A benefits valuation study (40 C.F.R. 122.21(r)(11)) that evaluates the benefits of the candidate entrainment reduction technologies and operational measures. Each category of benefits must be described narratively, and when possible, benefits should be quantified in physical or biological units and monetized using appropriate economic valuation methods.

C. A comprehensive technical feasibility and cost evaluation study (40 C.F.R. 122.21(r)(10)), and a non-water quality and other environmental impacts study (40 C.F.R. 122.21(r)(12)). These two studies constitute the compliance and social cost analysis. The (r)(10) study must include a description of all technologies and operational measures under consideration, and cover the private and social costs of compliance. The (r)(12) study includes information on other effects, including such effects as energy consumption, air pollutant emissions, noise, safety, and grid reliability. For more detail, see Preamble at p. 48367-8.

D. Facilities must also obtain external peer review of the studies called for in 40 C.F.R. 122.21(r)(10) - (12)) per 40 C.F.R. 122.21(r)(13). The peer reviewers must have appropriate qualifications to review the studies. The Director may require disapproval of reviewers or require additional peer reviewers, and the applicant must provide an explanation for any significant reviewer comments not accepted.

Attachment B

The EPA's Commitment to the 2001 MOA with the Services

In addition to the permit requirements summarized above, as part of the EPA's action to promulgate the new 316(b) rule, the EPA reaffirmed in the preamble to the 316(b) rule the EPA's commitment to ensure coordination of the EPA's and Services' programs to protect federally-listed species and designated critical habitat and to follow the procedures in the 2001 MOA, signed by both the Services and the EPA (66 Fed. Reg. 11202, Feb. 22, 2001). The objective of the MOA is to enhance coordination among the agencies and to assist them in fulfilling their respective responsibilities under the CWA and ESA. The MOA reflects, in part, the EPA's longstanding commitment to overseeing the operation of state NPDES programs to ensure protection of federally-listed species and designated critical habitat thorough existing regulatory processes.

The MOA committed the EPA to a number of specific actions that are protective of federally-listed species and designated critical habitat. Under the MOA, the EPA committed, when contacted by the Services, to coordinate with the Services and the State/Tribe during the permit development process, in order to ensure that permits will comply with all applicable CWA requirements. One way in which coordination between the EPA and the Services is facilitated is through the exchange of information about permits. The MOA facilitates such information exchange, as do the EPA's NPDES permit regulations that require the Director to provide public notice and a comment period for draft permits and to notify listed persons including the Services. In addition, the EPA's commitment to coordinate effectively with the Services includes following the procedures in section IX.A.6 and 7 of the MOA. The MOA describes a process whereby if a NPDES permit has minor detrimental effects on federally-listed species or designated critical habitat, the Services will work with the State or Tribe to reduce those detrimental effects. If the permit has more than minor detrimental effects, the Services will work with the State or Tribe and if unable to address the detrimental effects in the permit, the EPA would work with the State or Tribe to remove or reduce the detrimental effects of the permit. This step may include the EPA objecting to the state permit, where consistent with the EPA's CWA authority.

As stated in the preamble and consistent with the MOA, where the EPA finds (taking into account all available information and giving, as appropriate, substantial weight to the views of the Services) that a permit is likely to jeopardize the continued existence of any federally-listed species or result in the destruction or adverse modification of designated critical habitat, the EPA will use the full extent of its CWA authority to object to the permit. The grounds for the EPA's exercise of discretionary authority to object to a draft permit are described in the NPDES regulations at 40 C.F.R. 123.44. If the EPA objects to a permit, the EPA will follow the permit objection procedures outlined in 40 C.F.R. 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 the EPA assumes permit issuing authority for an NPDES permit, the EPA will consult with the Service(s) prior to issuance of the permit (as a Federal action) as appropriate under section 7 of the ESA.

For more details about the MOA and EPA oversight of state-issued NPDES permits to protect threatened and endangered species, see VIII.K.4 of the rule preamble.