August 26, 2020

Supplemental Response to Comments on Federal Register Notice: "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Consultation" 85 Fed. Reg. 30953 (May 21, 2020)

Introduction

On May 21, 2020, EPA initiated a 45-day public comment period through an announcement in the Federal Register entitled "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Nondiscretionary for Purposes of Endangered Species Act Section 7 Consultation" (Docket ID No. EPA-HQ-OW-2020-0008). The public comment period closed on July 6, 2020, and EPA received comments from a variety of stakeholders. The memorandum from Assistant Administrator for Water David P. Ross entitled "Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals" includes the Agency's overall response to many of the substantive comments received on the Federal Register Notice. This comment response document supplements the information contained in that memorandum.

Comment: Some commenters argued that Endangered Species Act (ESA) Section 7 does not apply to EPA's decision whether to approve a state or tribal Section 404 program and argued that the statutory requirement that EPA make this decision within 120 days (see CWA Section 404(h)) is an indicator that ESA consultation is not intended to apply. Some commenters stated that a requirement to conduct ESA Section 7 consultation would cause EPA to miss the 120-day deadline and result in automatic transfer of CWA Section 404 programs to states and tribes.

> **Agency Response:** The commenters are correct that formal ESA consultation may take more than 120 days in some circumstances, and that the ESA regulations allow for 135 days to complete ESA consultation and for the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) (collectively, "the Services") to draft a biological opinion. However, the statute and regulations do not *require* a consultation to last 135 or more days. If they did, then the legal concern raised by commenters may have merit, although the Agency would still need to evaluate the specific and competing statutory mandates to determine which takes precedence or whether they can be reconciled. EPA need not perform that analysis in the current instance, as the statutory and regulatory timeframes do not present unavoidable tension.
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> Formal consultation concludes *within* 90 days after its initiation" according to existing ESA regulations. 50 CFR 402.14(e) (emphasis added). Those regulations also add that "*within* 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant." 50 CFR 402.14(e)(3) (emphasis added). These deadlines establish the maximum time the Services have to respond to Section 7 consultation requests, not the minimum. While that maximum timeframe is longer than the 120 days EPA has to act on a state or tribal Section 404 program assumption request, it does not prohibit the Services from working within the legal timeframes applicable to their federal agency partners. In fact, EPA can engage with the Services as the state or tribe is developing its program for submittal to EPA to prepare for consultation in order to make the consultation process more efficient and meet EPA's deadlines. Finally, under EPA's regulations, the state and EPA may extend the statutory review period by agreement. 40 CFR 232.15(c). Thus, if EPA and the Service(s) require more time to complete ESA consultation beyond the 120-day statutory review period and a state or tribe

agrees to the extension, there is an opportunity for EPA to gain more time to make its approval decision in order to complete ESA consultation.

Comment: Some commenters pointed out that CWA Section 404(g)(2-3) requires that EPA seek and consider comments from FWS on a state or tribe's CWA 404 program request submittal. The commenters asserted that the opportunity for comment does not equate to ESA Section 7 consultation and FWS is not required to comment. In addition, the commenters stated that the omission of NMFS from the statutory requirement further indicates that Congress did not intend for EPA to consult under ESA Section 7 with both Services.

Agency Response: EPA agrees that the requirement to seek comment from FWS is not the same as a specific statutory mandate requiring ESA consultation with the Services and that the statute does not explicitly require EPA to seek comment from NMFS. EPA views Congress' requirement that EPA consider FWS comments and therefore impacts to listed species and designated critical habitat as simply evidence of Congress' intent that EPA may consider impacts to listed species and designated critical habitat in deciding whether to approve a state or tribal Section 404 program. Unlike in *Nat'l Ass'n of Home Builders v. Defenders or Wildlife*, 551 U.S. 644, 671 (2007), where the Supreme Court found that CWA Section 402(b) did not authorize EPA to consider protection of threatened or endangered species as an end in itself when evaluating a CWA 402 program transfer application, CWA Section 404 does authorize EPA to consider protection of listed species. Ultimately, by requiring EPA to consider any comments submitted by FWS and therefore impacts to listed species and designated critical habitat, Congress in this instance provided EPA with discretion to consult under the ESA with the Services.

Comment: Some commenters argued that EPA's current position allows for EPA to use its oversight authority to object to certain permits, which causes jurisdiction over the permits to revert to the Corps. The commenters supported EPA's use of its oversight authority to ensure certain permits receive ESA consultation instead of consulting on the program approval.

Agency Response: EPA has the option to use its oversight authority found in the regulations at 40 CFR 233.50. EPA's authority under its regulations to conduct oversight on state-issued permits is outside the scope of the question of whether the Agency has the discretion to consult under the ESA. The legal issues raised for comment in the Federal Register notice are different than the scope and application of EPA's oversight authority.

Comment: Some commenters requested that EPA address certain implementation and procedural questions, such as whether EPA can consult on the approval of a state or tribal Section 404 permitting program, and if incidental take coverage for the state or tribal permits will include extensive conditions and requirements because of the consultation. These commenters asserted that an ESA consultation on the program approval does not facilitate the issuance of state-issued permits compared to a habitat conservation plan process. Other commenters indicated that statewide incidental take statements derived from consultation on assumption applications would undermine Congress' intent in developing Section 10 of the ESA and would not provide sufficient protections for ESA-listed species. The commenters expressed that even after a state assumes authority over a 404 program, 404 permit applicants whose actions would result in a take must continue to obtain incidental take permits through the ESA Section 10 process.

Agency Response: These comments raise issues that are different than and generally outside the scope of the questions posed for public comment in the Federal Register notice – whether EPA has the requisite discretion under CWA Section 404 to consult on the approval of a state or tribe's assumption of the 404 program. The content of any incidental take statement and terms and conditions within the incidental take statement are determined by the Service(s) for each individual biological opinion. While the legal applicability of ESA Section 10 is outside the scope of EPA's statutory authority, EPA does not agree that a programmatic Section 7 consultation on a state or tribal Section 404 assumption request would not adequately protect ESA-listed species or that individual permit applicants would still need to follow the ESA Section 10 process following issuance of a state or tribal Section 404 permit for the reasons stated in the accompanying memorandum.

Comment: Some commenters stated that ESA Section 10 is the proper mechanism for take protection for Section 404 permits and suggested that FWS and (collectively the Services) should reform the habitat conservation plan process instead of EPA engaging in ESA consultation on the Section 404 program approval. At least one commenter stated that restrictions developed during ESA consultation would be more burdensome than the requirements developed during the take permitting process. Other commenters asserted that EPA should reduce burdens on states and tribes seeking assumption by working with FWS on model permits and states should prepare habitat conservation plans for individuals or groups of species that cover state permitting actions.

Agency Response: The legal applicability of ESA Section 10 is outside the scope of EPA's Clean Water Act statutory authority, and beyond the scope of the issues raised for comment in the Federal Register notice. Reform suggestions for the Section 10 process, including the development of habitat conservation plans, are better-directed to the Services. EPA also defers to the expertise of the Services regarding comments related to the relative stringency of conditions designed to protect ESA-listed species under Section 7 and Section 10. EPA recognizes that there could be methods to streamline the consultation and state permitting process, but those methods are outside the scope of the issues raised in the Federal Register notice. EPA will, however, consider all suggestions to streamline the process as applied to its statutory authorities and its work in partnership with the Services and will consider the feasibility of model permitting suggestions in the future.

Comment: Some commenters stated that the CWA and ESA recognize the values of federalism and states that EPA should minimize federal interference by interpreting EPA's authority under CWA Section 404(h) as nondiscretionary.

Agency Response: EPA recognizes the CWA's cooperative federalism approach to protecting water quality and respects the primary responsibilities and rights of states to regulate their land and water resources. See 33 U.S.C. 1251(b); see also the Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,269 (Apr. 21, 2020). The Agency disagrees that its interpretation that the Agency's approval of a state or tribal request to assume the Section 404 permit program involves an exercise of discretion warranting ESA section 7 consultation undermines cooperative federalism. Congress involved the FWS in the CWA Section 404 program approval by providing the Service the opportunity to submit comments on the state program submission. ESA consultation on the program approval, and involvement of the Services at that stage, does not undermine cooperative federalism but furthers Congress' intent that EPA consider ESA-listed

species and designated critical habitat when reviewing a state's program submission. Rather than undermining cooperative federalism, a programmatic consultation approach will ensure that species are protected while providing a path to avoid potentially extensive and onerous ESA Section 10 processes notwithstanding Section 404 program assumption.

Comment: Some commenters point out that reinitiation of ESA consultation may be required if new information comes to light (e.g. if a new species is listed) after any formal ESA consultation on a CWA Section 404 program approval. Other commenters questioned how the reinitiation triggers would be determined, and what affect a reinitiated consultation would have on permits Florida has already issued.

Agency Response: EPA recognizes that the ESA regulations state that, "[r]einitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: 1) if the amount or extent of taking species in the incidental take statement is exceeded; 2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; 3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or 4) if a new species is listed or critical habitat designated that may be affected by the identified action." 50 CFR 402.16.

EPA acknowledges that reinitiation of ESA consultation may be required if one of the reinitiation triggers under the ESA regulations are met or if a state's CWA Section 404 program is revised. However, in its Federal Register notice, EPA posed the question of whether EPA has the discretion to consult on the initial program approval. Questions concerning whether reinitiation will be required in the future are separate from the legal question posed. Whether reinitiation is required in a particular circumstance must be assessed in light of the legal requirements and facts at that time.

Comment: Some commenters from industry groups stated that the transfer of Section 404 authority has no direct consequences on listed species or their critical habitat. The commenters stated that, because the agency action is statutorily compelled, the Agency need not consider under Section 7 alternatives that it has no statutory authority to promulgate. The commenters indicated that the consultation and no-jeopardy/no-critical habitat destruction provisions of ESA Section 7(a)(2) do not apply when a federal action is not the direct cause of any potential harm to protected species. The commenters expressed that EPA's transfer of Section 404 authority does not directly cause effects on listed species. A few of these commenters raised that, in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court determined that there must be a direct cause-and-effect relationship between the federal action and the prohibited result. See 541 U.S. at 767-68.

Agency response: The question of whether EPA has the discretion to consult under the ESA is a threshold question of whether the ESA applies to EPA's action. See 50 CFR 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."). Once it has been determined that EPA has the requisite discretion and therefore the ESA applies, EPA must determine if there are effects to listed species or designated critical habitat. If the federal agency determines that an action will not affect listed species or designated critical habitat, ESA Section 7 consultation is not required. An effects determination will occur prior to any ESA consultation.

Comment: Some commenters stated that it was important to coordinate and communicate with tribes and other commenters requested that EPA conduct government-to-government consultation with tribes.

> **Agency response:** EPA recognizes the importance of coordinating and communicating with tribes about EPA's potential policy changes. EPA did seek tribal input during the public comment period. The Agency circulated the Federal Register Notice to tribal environmental directors, tribal organizations and other tribal contacts, and it met with groups upon request, such as the Region 10 RTOC, to discuss this effort. EPA did not engage in formal government-to-government consultation for the issues identified in the Federal Register notice because the questions involved a purely legal interpretation regarding EPA's discretionary authority within the meaning of ESA Section 7, but EPA anticipates consulting with tribes on individual state or tribal Section 404 program assumption requests.