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

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OFFICE OF WATER

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Dear Mr. Brown and Ms. Christie:

Thank you for your letter of December 6, 2010, regarding the applicability of the Endangered Species Act (ESA) §7 consultation requirements to EPA's approval of a state or tribe's (hereafter "state") application to assume Clean Water Act (CWA) §404 permitting authority

You have asked whether or not EPA needs to engage in a §7 consultation with the US Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) (hereafter "the Services") when it authorizes a transfer of §404 permitting authority pursuant to §404(g) and (h) to a qualified state. A 2007 US Supreme Court decision, *National Association of Home Builders v. Defenders of Wildlife,* sheds considerable light on this matter. 551 US 644 (2007). In this decision, the Court held that, "[s]ince the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in §402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger §7(a)(2)'s consultation and no-jeopardy requirements." *Id.* at 673.

Although there are some differences between §402(b) and §404(h), EPA believes that the Court's rationale in the *Defenders* case applies to EPA's transfer of the §404 permitting program. In making the finding, the Court upheld the FWS and NMFS regulations that limit §7 applicability to "discretionary federal actions." *Id.* at 665-71. The Court held that EPA is not acting with discretion when it transfers a §402 program to a state that meets the statutory criteria under §402(b) (2) and, therefore, §7 consultation is not required. The Court noted that "[w]hile EPA may exercise some judgment in determining whether a state has demonstrated that it has the authority to carry out §402(b)'s enumerated statutory criteria, the statute clearly does not grant it

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the discretion to add another entirely separate prerequisite to that list." *Id.* at 671. The Court also noted that "[n]othing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.*

Like §402(b), §404(h) (2) (A) requires EPA to "approve" the state's application to transfer the permitting program if the state has the requisite authority. Under §404(h), EPA is only permitted to evaluate the specified criteria and does not have discretion to add to the list. If criteria are met, then EPA's approval must be given. The legislative history clarifies Congress's intent to make program transfer under §402 and §404 essentially the same.

While there are some differences between §402(b) and §404(h), these differences do not transform EPA's action approving a state 404 program into a "discretionary federal action." Therefore, EPA believes that its action to transfer §404 permitting authority is not a discretionary federal action and thus the Agency need not engage in a §7(a) (2) ESA consultation.

Although §7 consultation is not required, a number of important safeguards exist in the CWA and EPA's regulations which work to ensure that endangered species issues are addressed in authorized state permitting programs. State programs must issue §404 permits that comply with the 404(b) (1) Guidelines. 40 CFR 233.20(a). This includes the Guidelines' requirement not to issue a permit that "[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in the likelihood of the destruction or adverse modification of...critical habitat...." 40 CFR 230.10(b)(3). In addition, EPA's regulations require that EPA review permits for "[d]ischarges with reasonable potential for affecting endangered or threatened species as determined by FWS." 40 CFR 233.51(b) (2). For these permits, EPA must transmit a copy of "each public notice, each draft general permit, and other information needed for review of the application to" the Corps of Engineers, FWS, and the NMFS for comment. 40 CFR 233.50 (b).

EPA remains committed to working with states and the Services on development of effective processes to facilitate the review of state permits for discharges with reasonable potential to affect endangered species. One such approach is the development of an agreement among the state, EPA, and the Services regarding the process for review of these permits; the Memorandum of Agreement between the State of New Jersey, FWS, and EPA provides an example.

If you have further questions on this issue, please contact David Evans, Wetlands Division Director, at (202) 566-0535.

Sincerely,

Peter S. Silva
Assistant Administrator