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# Part II

## Environmental Protection Agency

## Department of the Interior

### Fish and Wildlife Service

## Department of Commerce

### National Oceanic and Atmospheric Administration

### 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 Endangered Species Act; Notice

**ENVIRONMENTAL PROTECTION AGENCY**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**[FRL–6937–6]**

## 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 Endangered Species Act

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

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service have signed a Memorandum of Agreement (MOA) addressing interagency coordination under the Clean Water Act and Endangered Species Act. This notice discusses comments received on a draft of the MOA published by the Agencies on January 15, 1999, describes the changes we have made to the draft, and publishes the final MOA.

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**SUPPLEMENTARY INFORMATION:** On January 15, 1999, the Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published for public comment a draft Memorandum of Agreement (MOA) addressing coordination under the Clean Water Act (CWA) and Endangered Species Act (ESA). 64 Fed. Reg. 2742. We have considered all the public comments submitted on the draft MOA, made revisions, and signed a final version of the document. Today's notice discusses comments we received on the draft MOA, summarizes the changes we have made, and publishes the final MOA.

The MOA is designed to enhance coordination between our agencies so that we can best carry out our responsibilities under the CWA and ESA. In recent years, we have increasingly sought to integrate our programs. For example, EPA now consults with the Services under section 7 of the ESA on EPA's promulgation and approval of water quality standards under section 303(c) of the CWA and approval of State National Pollutant Discharge Elimination System (NPDES) permitting programs under section 402(b). The MOA seeks to enhance the efficiency and effectiveness of consultations on these actions in the future by providing guidance to our regional and field offices and establishing an elevation process to resolve quickly issues that may arise. The MOA also seeks to enhance coordination at the national level by, among other things, establishing a joint national research plan that will prioritize research on the effects of water pollution on endangered and threatened species. We believe that the MOA will help make our work together more productive and timely, to the benefit of endangered and threatened species and the aquatic environment generally, as well as the regulated community and State and Tribal coregulators.

The provisions of the ESA, CWA and our regulations described in the MOA contain legally binding requirements. The MOA itself does not alter, expand, or substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States,[1] Tribes,[2] or the regulated community. Rather, the MOA contains internal procedural guidance to our staff to assist us in carrying out existing legal requirements. Based on experience in implementing the MOA, we may change the MOA in the future.

### 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, ensure 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 conferencing 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

[1] For purposes of the MOA, "States" mean States, Territories and Commonwealths that qualify as States for the programs covered by the Agreement.

[2] For purposes of the MOA, "Tribes" mean those Tribes that are authorized for treatment as States for the programs covered by the Agreement. See CWA 518(e).

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. Overview of Public Comments

EPA and the Services received comments from individuals, private industry, environmental organizations and other governmental agencies on the draft MOA. We have not attempted below to summarize or address the detailed contents of each of the public comments. We have, however, considered each of the comments in developing the final MOA. We address in this notice the major themes and concerns raised by the public comments.

Many commenters supported the MOA's goal of fostering early input by the Services into decision-making under the CWA standards and permitting programs. These commenters believed integrating the Services early into existing regulatory processes would help ensure species protection issues are addressed effectively and in a timely manner. Many commenters expressed concern, however, that the MOA would increase burdens on States and viewed the MOA as seeking to shift EPA's section 7 consultation responsibilities to States. Some commenters supported our proposed plan to conduct national programmatic consultations on water quality criteria and permit oversight procedures as likely to reduce the redundancy of State-by-State consultation. Others commenters believed that these programmatic consultations would be inappropriate and inconsistent with the requirements of the ESA. Finally, some commenters believed that the MOA failed to focus adequately on EPA's responsibility under section 7(a)(1) of the ESA to utilize its authorities to carry out programs for the conservation of listed species.

We continue to believe that early involvement of the Services in CWA activities is important to ensuring that species protection concerns are addressed effectively in the water quality standards and permitting programs. The Services have substantial expertise that can help improve decision-making by EPA, States and Tribes. Obtaining their expertise early in the regulatory process helps ensure that their views are meaningfully considered, and that the broadest range of management options are available to ensure the protection of species.

This does not mean, however, that the MOA calls for States and Tribes to "consult" with the Services under section 7 of the ESA, or that burdens in administering their programs will be increased. The MOA cannot, and does not, impose any requirements of section 7 on States and Tribes. Those requirements apply solely to Federal agencies, and EPA continues to be responsible for fulfilling any applicable requirements of section 7 in its administration of the CWA. (While States and Tribes may choose to function as "non-federal representatives" for purposes of informal consultation pursuant to 50 CFR 402.18, the responsibility for compliance with section 7 remains with EPA.)

Moreover, the MOA does not address in any way the obligations of States and Tribes under the CWA or the ESA, other than to note in a few instances requirements of existing laws and regulations. See, e.g., section IX.A. paragraph 2 (noting State/Tribal obligation under EPA CWA regulations to provide copies of draft NPDES permits to the Services). Thus, while the MOA should facilitate greater interaction between the Services and States/Tribes, it does not change the legal requirements that States or Tribes must meet in adopting water quality standards or in issuing NPDES permits, and does not require States or Tribes to perform any information-gathering or other analyses that would not be required under existing legal requirements. Rather, the MOA is intended to enhance communication between the Services, EPA and States/Tribes about how to ensure that water quality standards and NPDES permits will protect endangered and threatened species. In response to comments that the national consultations are inappropriate or inconsistent with the ESA, we will conduct the consultations in accordance with all applicable requirements of the ESA and 50 CFR part 402.

Finally, we agree with the comment that the MOA should put greater emphasis on the development of programs by EPA, in consultation with the Services, for the conservation of listed species under section 7(a)(1) of the ESA. The CWA is a powerful vehicle for improving the quality of the aquatic environment on which many endangered and threatened species depend. EPA's mission under the CWA includes reducing the risks to aquatic

life and wildlife due to water quality degradation. Reducing those risks can also help facilitate the recovery of listed species. While the MOA will help ensure that EPA actions meet the substantive requirements of section 7(a)(2) of the ESA, we believe the MOA should also help identify affirmative steps under section 7(a)(1) of the ESA that EPA can take pursuant to its CWA authorities to facilitate the recovery of listed species. We have made appropriate additions to the MOA in this respect, which are noted in the discussion below.

## III. Summary of the Final MOA

We have retained in the final MOA the following basic components of the January 1999 draft MOA: (1) Interagency coordination and elevation; (2) national level activities; (3) oversight of State and Tribal water quality standards; (4) State and Tribal NPDES permitting programs. Each of these is addressed below.

### *A. Interagency Coordination and Elevation*

One of the most important objectives of the MOA is to institutionalize strong working relationships among our regional and field offices who have day-to-day responsibility for administering our programs. Ongoing planning and collaboration at the regional/field level are essential to carrying out our programs effectively. Therefore, the MOA directs our staff to establish local/regional review teams that will meet periodically to identify upcoming priorities and workload requirements and generally ensure close coordination on the full range of activities involving water quality and endangered/threatened species protection. These teams will also develop procedures for working with States and Tribes on these matters. We have added language to the MOA stating that the regional review teams should also provide assistance to the interagency oversight panel in conducting a proactive conservation review that will identify ways in which EPA can more fully utilize its authorities for the conservation of listed species.

We also believe that effective coordination among senior managers at the regional level is vital to maintaining effective working relationships. Therefore, in addition to directing regional staff and day-to-day managers to meet on a regular basis through the regional review teams, we have added to the MOA a directive that EPA and Service regional senior managers (e.g., Regional Administrator or Division Director from EPA, Regional Director or Assistant Regional Director from the FWS, Assistant Regional Administrator for NMFS) meet at least annually to review on a programmatic basis ongoing work between our agencies. These meetings will focus on establishing overall priorities, assessing resource needs and providing direction to mid-level managers and staff.

The draft MOA also included a procedure for elevating issues that may arise among our regional and field offices. We have included the elevation procedure in the final MOA with certain revisions. First, one commenter believed that the proposed elevation process applied only to disagreements that may arise in formal section 7 consultations, and requested clarification of the scope of issues addressed by the elevation procedure. We did not intend to use the elevation process solely for issues arising in formal section 7 consultations. It is available to resolve disagreements arising in formal or informal consultations, or other areas of cooperation, such as EPA oversight of State/Tribal NPDES permits. Moreover, because the elevation procedure is generic, we intend to make it available for any issues arising with regard to section 7 consultations on EPA actions under the CWA in areas not specifically addressed by the MOA. The purpose of the elevation procedure is to help us reach informed and timely decisions, and making this procedure available whenever we are engaged in the section 7 process with regard to EPA actions under the CWA will help achieve this objective. The procedures may be used to review matters such as the content or supporting analyses of biological evaluations prepared by EPA or biological opinions prepared by the Services. However, the elevation process does not impair in any way the ultimate authority of EPA or the Services to issue decisions or render determinations that are within each agency's authority under the CWA and the ESA.

Also, to make the elevation process more workable, we have reduced the number of steps involved in the elevation at the regional level. In the final MOA, the first step in any elevation will be to raise an issue to our regional directors/administrators, rather than requiring an intermediate step of elevating the issue to mid-level managers. This revision recognizes that mid-level managers are typically involved in issues on an ongoing basis, and that these managers should seek to resolve issues informally if possible. By eliminating a step in the elevation process, the final MOA will also help speed resolution of issues should elevation be necessary. Much of the MOA is designed, however, to enhance early and ongoing collaboration among our agencies. We continue to believe that issues should be resolved at the lowest levels possible, and enhanced coordination should reduce the likelihood that elevation will be needed.

Some commenters suggested that the results of decisions in an elevation be documented so that they could serve as guidance in other similar circumstances. The agencies will memorialize the results of the elevation in writing where determined to be appropriate (e.g., where the results of the elevation would provide useful guidance to agency staff).

We have also retained in the final MOA an oversight panel that will consist of regional and headquarters personnel to provide oversight and coordination on all aspects of the agreement. In addition, we have amended the draft MOA to specify that the oversight panel, with input from the regional review teams will conduct a "proactive conservation review" (see section V(A)(3)(7)) under section 7(a)(1) of the ESA regarding EPA's authorities and identify ways that EPA can more fully utilize those authorities to carry out programs for the conservation of listed species.

### *B. National Level Activities*

The draft MOA included four national level activities to help better integrate our programs: (1) A water quality standards rulemaking; (2) development of new water quality criteria methodological guidelines; (3) national consultations on EPA's section 304(a) aquatic life water quality criteria recommendations and on procedures to ensure State/Tribal NPDES permits protect listed species, and (4) a joint national research and data gathering plan. The final MOA retains these components basically as contained in the draft MOA, with some changes, in particular with regard to the national consultations, and those changes, as well as relevant public comments, are discussed below.

#### 1. Water Quality Standards Rulemaking

The draft MOA indicated that EPA would propose to amend EPA's water quality standards regulations to provide that water quality shall be not likely to jeopardize the continued existence of a listed species. We stated that such a rule would essentially codify existing protection for endangered and threatened species under the CWA since water quality that is so poor it would likely jeopardize a listed species or destroy or adversely modify critical habitat fails to meet the fundamental requirements of the CWA.

Several commenters believed that this rule would be inconsistent with the CWA because it would remove the flexibility of States and Tribes under section 303(c)(2)(A) to establish use designations based on the uses that are attainable in the waterbody. EPA and the Services do not believe that flexibility will be removed from the States and Tribes to change use designations with use attainability analyses. Any changes in use designations must comply with the long-standing requirements in 40 CFR part 131. Further, any changes in use designations must be approved by EPA under section 303(c) of the CWA. These approvals are subject to the requirements of section 7 of the ESA. With the early coordination envisioned by the Services and EPA to address listed species needs during triennial reviews, more species-specific and site specific information and expertise will complement defensible use attainability analyses performed by the States and Tribes. Justifiable changes can be still made after taking into account the needs of listed species.

2. Development of New Water Quality Criteria Methodological Guidelines

The final MOA provides that the Services will participate in EPA's development of new methodological guidelines for the development of aquatic life criteria under section 304(a) of the CWA. We received no significant comments on this provision, which is unchanged from the January 1999 draft MOA.

3. National Consultations

The draft MOA described national consultations that EPA and the Services intended to undertake regarding EPA's water quality criteria for the protection of aquatic life that EPA has published under section 304(a) of the CWA, and on procedures in the MOA to ensure that State/Tribal NPDES permits will protect listed species. As discussed further below, we have decided to delete the provision for a national permits consultation from the MOA, and have modified in certain respects the discussion of the national criteria consultation.

With regard to the national permits consultation some commenters questioned whether the granting of an exemption from incidental take prohibitions would be appropriate through an incidental take statement issued at the national level without consideration of site-specific circumstances. Other commenters were unclear as to the effect that such a consultation would have on existing state NPDES programs, and were concerned that the agencies not "reopen" those programs through the national consultation.

We have considered these comments and have had further interagency discussions of the merits of this programmatic consultation on the permitting procedures. We have decided to delete the discussion of that consultation from the final MOA and, at this time, do not intend to undertake such a consultation on permitting procedures. Our decision not to conduct a national programmatic consultation does not affect our commitment to follow the procedures in section IX of the MOA for coordination with regard to oversight of State/Tribal NPDES permits. Those procedures are designed to share information that will assist permitting authorities in meeting CWA requirements, including the protection of listed species. They describe those circumstances where EPA would use its oversight authorities to ensure these requirements and objectives are met.

EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species. We will continue to conduct such consultations on a case-by-case basis. Where formal consultation is undertaken, a biological opinion issued by the Service(s) would include an incidental take statement in accordance with section 7 of the ESA and 50 CFR Part 402. In addition, as discussed elsewhere in today's notice and in the final MOA, EPA consults with the Services regarding its approval of new and revised water quality standards that may affect listed species, and any biological opinion issued as a result of such a consultation would include an incidental take statement in accordance with section 7 of the ESA and 50 CFR Part 402.

With regard to the national criteria consultations, States generally supported our undertaking such consultations as it would streamline the water quality standards adoption and approval process at the State level, and avoid duplication of effort involved in consulting on a State-by-State basis. Other commenters stated that EPA should not consult on the section 304(a) criteria because they are not an agency "action" under section 7. Still others believed that national consultations on aquatic life criteria would not be based on the "best available information" as required by section 7 of the ESA. EPA and the Services have agreed, however, that it is appropriate to conduct these consultations pursuant to section 7(a)(2) for 304(a) aquatic life criteria to ensure the protection of listed species. Moreover, we fully intend to base consultations on the "best available information," as required by section 7, and do not believe that this requirement precludes us from conducting the consultations on a national basis.

Some commenters contended that we should not consult on existing aquatic life criteria, since they are based on old methodologies and that EPA should consult instead only on new criteria. We believe that consulting on EPA's existing section 304(a) aquatic life criteria is warranted because these criteria have been adopted by many States in their water quality standards, and this consultation will assist us in determining whether these criteria are protective of endangered and threatened species. EPA will consider the results of the consultation in deciding whether more stringent criteria would be warranted to protect certain endangered or threatened species. EPA also intends to integrate the national consultation process with ongoing revisions to existing criteria that are underway, as well the development of new criteria.

Commenters raised the additional concern that a national consultation was likely to lead to the development of overly stringent water quality criteria and that consultations should, therefore, continue to take place on a State level. We disagree, since EPA would revise the criteria if it determines that more stringent criteria were in fact needed to protect endangered and threatened species, regardless of whether the consultation occurred on a national or State/Tribal level. Moreover, revisions to the criteria guidance could be targeted to the waters within the geographic range of species of concern (e.g., through recommendations to adopt site-specific criteria). In this way, other waters not needing the additional level of protection would not be affected by the revisions.

Other commenters raised the question whether, under section 7(d) of the ESA, EPA and States could continue to implement existing CWA requirements while the national consultations are ongoing. Section 7(d) prohibits federal agencies and a permit or license applicant, after initiation of consultation, from making an irretrievable or irrevocable commitment of resources that would preclude the formulation or implementation of alternatives identified in the consultation required to meet the requirements of section 7(a)(2) of the ESA. We disagree that the initiation of the national consultations on criteria would limit the ability of EPA, States or

Tribes to continue implementing existing requirements under the CWA. The water quality criteria guidance does not involve any irretrievable or irrevocable commitment of resources. The criteria guidance can, and will, be revised if as a result of the consultations a determination is made that revisions are necessary to comply with section 7(a)(2) of the ESA. Moreover, if in the future EPA proposes to undertake an action that is covered by the national consultations prior to the conclusion of these consultations (e.g., approval or promulgation of an aquatic life criteria identical to or more stringent than EPA's guidance value), EPA will make a determination of compliance with section 7(d) at that time based on the particular facts, recognizing that EPA retains the authority to require revisions to water quality and standards, and promulgate them if necessary. Finally, the aquatic life criteria guidance is fundamentally designed to ensure protection of the aquatic environment and we do not believe that section 7(d) of the ESA would impede their implementation pending completion of consultation.

Since the draft of the MOA was published in January 1999, EPA and the Services have undertaken a series of meetings that have resulted in a broad agreement on the scientific and technical procedures for conducting the consultations. These meetings have led to a realistic assessment of the resources and time necessary to conduct the consultation, and to an understanding that the consultation should be phased and that priorities should be set to deal with the most important pollutants and issues first. As a result, the final MOA states that the consultation will be completed in an expedited manner, rather than the less flexible strict timetable of eighteen months contained in the draft MOA.

4. Joint National Research Plan

The final MOA retains the draft MOA's provisions for the Agencies to establish a joint national research and data gathering plan for prioritizing and funding research on the effect of water pollution on listed species. We received no significant comments on this portion of the MOA, which is unchanged from the 1999 draft.

*C. Oversight of State and Tribal Water Quality Standards*

We did not receive extensive comments on the provisions in the MOA related to oversight of State/Tribal water quality standards. Some commenters contended that EPA approval of water quality standards is not subject to section 7 of the ESA because EPA approval is non-discretionary. EPA disagrees, since our decision as to whether a particular standard meets the requirements of the CWA involves the exercise of considerable judgment. We believe that where approval of new or revised standards may have an effect on a listed species or designated critical habitat, consultation under section 7(a)(2) is required. Other commenters argued that EPA should consult not only on new and revised standards, but also on existing water quality standards. EPA and the Services have agreed that where information indicates an existing standard is not adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if necessary, revise the standards through the promulgation of federal water quality standards under section 303(c)(4)(B) of the CWA. Some commenters said that it is not appropriate for EPA to compel a State to reopen an existing water quality standard to avoid "jeopardy" because that threshold is not contained in the CWA, and nothing in the CWA requires that water quality be improved whenever doing so would benefit listed species. Again, water-dependent endangered and threatened species are an important component of the aquatic environment that the CWA is designed to protect, and steps to ensure the protection of those species are well within the scope of the CWA.

After consideration of public comments on this aspect of the MOA, we have decided to retain the language of the 1999 draft MOA with no major substantive changes.

*D. State/Tribal Permitting Programs*

The final MOA addresses the procedures that we will follow in overseeing the operation of State/Tribal NPDES permits to ensure that listed species and critical habitats are protected. Several commenters raised concerns that the coordination process described in the MOA was equivalent to the section 7 consultation process. This is incorrect. Section 7 consultations are governed by the specific procedures contained in 50 CFR part 402. The coordination procedures in the MOA do not track the consultation process. Rather, the coordination procedures simply outline the interaction that we envision between EPA, the Services and the State/Tribe should a particular permit raise issues of concern for listed species. The MOA also makes clear that EPA's oversight of State/Tribal permits will continue to be governed by EPA's CWA authorities. For example, EPA may only object to a permit that is "outside the guidelines and requirements" of the CWA as provided in section 402(d) of the CWA. We are confident that EPA's CWA authorities are sufficiently broad and the MOA sufficiently flexible to address the broad range of situations that arise in the NPDES program.

Some commenters expressed concerns that the permit coordination procedures not be used to "force" States and Tribes to undertake activities not otherwise required by the CWA. As stated previously, the MOA only provides internal procedural guidance for EPA and the Services and does not impose any requirements on States and Tribes. States and Tribes are specifically directed by current EPA regulations under the CWA to provide the Services with copies of draft NPDES permits, and they must consider and respond to any significant comments by any party, including comments provided by the Services. See 40 CFR §§ 124.10(c)(iv) and (e); 124.11; 124.17. See also 40 CFR § 124.59(b) and (c) (addressing consideration of Service comments and coordination between the permitting authority and the Services). The MOA does not augment these existing obligations, but is intended to facilitate the delivery of comments by the Services and EPA to States and Tribes, and the consideration of those comments in the permitting process.

One commenter argued that the MOA was inconsistent with the decision in *AFPA* v. *EPA* 137 F.3d 291 (5th Cir. 1998) because, while it does not place conditions on approval of State NPDES programs, it nonetheless places conditions on "approval" of State permits. This contention is incorrect. First, EPA does not "approve" State/Tribal permits, but rather retains discretionary authority to comment upon and object to permits on a case-by-case basis. The MOA does not change the criteria under which EPA currently exercises that authority—i.e., whether a permit meets applicable CWA requirements—but simply ensures that EPA has the full benefit of the Services' views on potential impacts to Federally listed species and designated critical habitats in determining whether CWA requirements are met.

Several commenters expressed concern that the permit coordination procedures did not recognize the importance of keeping permittees involved in the decision-making process. We believe that the permitting authority should always maintain open

communication with permittees to ensure that they are apprised of, and can provide input on, decisions that affect them. We have, therefore, added a clause in the permit coordination procedures stating that EPA will encourage the permitting authority to facilitate the involvement of permittees and permit applicants in this process.

In addition, the draft MOA referred to potential "adverse effects" to listed species in the permit coordination procedures. We were concerned that the use of this wording, which is an ESA term under section 7, could have been read as suggesting that the section 7 process was being followed with regard to State/Tribal permits, where in fact the MOA establishes a coordination procedure to ensure protection of listed species. To avoid any confusion, we have used the words "more than minor detrimental effects" in place of "adverse effects." Our intent remains to work together and with State/Tribal permitting authorities to ensure that concerns about the impacts of State/Tribal permits on listed species are addressed in the permitting process. As discussed elsewhere, the MOA also helps ensure in a variety of ways that water quality standards adopted by States and Tribes are protective of listed species, and implementation of such standards (i.e., standards that have undergone Section 7 consultation) through NPDES permits will help reduce any negative effects of discharges on listed species.

## IV. Conclusion

We are confident that implementation of the final MOA will improve the effectiveness of our efforts to protect water quality and conserve endangered and threatened species. The ESA and the CWA contain powerful tools that, when integrated effectively, will advance the objectives of both Acts, and the MOA will help us achieve those goals.

Dated: January 10, 2001.

**J. Charles Fox,**

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

Dated: January 17, 2001.

**Jamie Rappaport Clark,**

*Director, U.S. Fish and Wildlife Service.*

Dated: January 18, 2001.

**Penelope D. Dalton,**

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

The text of the final Memorandum of Agreement follows.

## 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

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### 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, and "Tribes" refers to Tribes that qualify for treatment in the same manner as States under section 518 of the CWA.

### 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 affirm 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 addresses EPA's and the Services' responsibilities under section 7 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 twice 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; and how to identify, in cooperation with States and Tribes, the available information for evaluating effects of permitted discharges on species;

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;

g. Identify ways to reduce the impacts of proposed agency actions on endangered and threatened species; and

h. Assist the oversight panel in conducting a programmatic review of EPA's authorities and identifying ways that EPA can more fully utilize those authorities to carry out programs for the conservation of listed species.

Each of these local/regional coordinating teams will 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 arising with regard to the activities addressed by this agreement, including formal or informal section 7 consultations, as well as disagreements arising in section 7 consultations on

EPA actions under the CWA that are not specifically addressed by this agreement. The procedures may be used to review matters such as the content of biological evaluations or supporting analyses prepared by EPA or biological opinions prepared by the Services. However, the elevation process does not impair in any way the ultimate authority of EPA or the Services to issue decisions or render determinations that are within each agency's authority under the CWA and the ESA. 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. 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 and field unit line officers or staff supervisors, (*i.e.*, for NMFS, branch/division chiefs; for EPA, branch chiefs; and for FWS, field office supervisors). The overall goal is to design actions to avoid and/or 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 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 1 teams, or sooner as necessary to meet mandatory deadlines, and serve as key advisors on policy and process. The Level 2 team (*i.e.*, the regional executives) may confer with field unit line officers or staff supervisors (*e.g.*, for NMFS, branch/division chiefs; for EPA, branch chiefs; and for FWS, field office supervisors) in making any decisions on the elevation. If issues are not resolved by the Level 2 team, the issue will be elevated for Headquarters Review.

c. *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. These officials 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. Where determined to be appropriate (*e.g.*, where the results of the elevation would provide useful guidance to agency staff), the decision on the elevation should be memorialized in writing and circulated among Agency staff to serve as guidance for future decisions. Assistant Secretary(s) and Assistant Administrator shall resolve any issues within 21 days of elevation. The authority to render any decision that is subject to elevation rests 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;

(6) Reviewing and evaluating, at least on an annual basis, the Agreement and its implementation by the three agencies; and

(7) As soon as is practicable and no later than one year after signature of the MOA, conducting a proactive conservation review pursuant to section 7(a)(1) of the ESA which will address EPA's authorities under the CWA for carrying out programs for the conservation of listed species.

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. EPA will send the list of species and habitat to States and Tribes. 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 Services' 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. When preparing biological evaluations, EPA will use as guidance the information requirement described at 50 CFR 402.14(c) (initiation of consultation).

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. Therefore, EPA will discuss, as appropriate, the form and nature of the biological evaluation with the Services to ensure that the biological evaluation contains adequate information for evaluating the effects of the proposed action.

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 Services in writing. The Services will respond in writing within 30 days of receipt of such a determination, unless extended by mutual agreement. The response will state whether the Services concur or does not concur with EPA's determination. If the Services do 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. Where EPA prepares a biological evaluation, EPA will attempt to provide the Services a biological evaluation at least 90 days before reaching a decision on a proposed action.

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(a)(2) 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, under the authority provided in section 7(a)(1), 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, to help implement recovery plans or to develop information.) 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 water quality standards provide protection for endangered and threatened species.

*A. National Rulemaking*

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 be 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 provide that mixing zones shall be not likely to cause jeopardy, 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 also conducted consultation with the Services regarding aquatic life criteria promulgated by EPA for toxic pollutants for certain waters in California. 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. National 304(a) consultations will ensure a consistent approach to evaluating the effects of pollutants on species and identifying measures that may be needed to better protect them. National consultations will also ensure better consideration of effects on species whose ranges cross State boundaries.

2. Procedures for Consultations

The consultations 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 consultations will follow the basic approach described below. The agencies will endeavor to streamline their processes to complete these consultations in an expedited manner.

EPA and the Services anticipate that the national consultations will focus on aquatic and aquatic-dependent species. The consultations will be conducted on a national basis, and therefore, will not be waterbody-specific. In addition, given the numbers of species involved in the consultations, 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 consultations. 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 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 incidental take, if anticipated, 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 criteria consultations 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 consultations on the aquatic life criteria published by EPA.

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 other Federal agencies as appropriate.

*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 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. The Services and EPA 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.

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," "May Affect," and "Likely To Adversely 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 Services 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 destroyed or 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 Services 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

Where EPA intends to request formal consultation, EPA will attempt to do so at least 45 days prior to the State's or Tribe's expected submission of water quality standards to EPA. 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)). 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.

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 Services.

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 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 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 Services, 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 reasonable and prudent measure in an incidental take statement.

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 Services of its final decision on the action.

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

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 Services 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 part 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 review of permits issued by States or Tribes with approved permitting programs, and (2) EPA issuance of permits under section 402 of the CWA.

*A. 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 among other things, 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 regulations 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 Services or EPA are concerned that an NPDES permit is likely to have a more than minor detrimental effect 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 Services 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 Services 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 more than minor detrimental effect on Federally-listed species or critical habitat.

For those NPDES permits with detrimental 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 detrimental effects stemming from the permit. For those NPDES permits that have detrimental 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 detrimental 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 detrimental 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 a more than minor detrimental 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 have more than minor detrimental effects Federally-listed species or critical habitat.

9. EPA will encourage the State or Tribe to facilitate the involvement of permittees or permit applicants in this process.

*B. 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) and 50 CFR part 402 on the issuance of individual and general NPDES permits. 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. 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 or is likely to jeopardize the continued existence of a species proposed for listing or result in the destruction or adverse modification of proposed designated critical habitat.

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.

5. EPA will facilitate the involvement of permittees or permit applicants in this process.

*C. 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. Signatures

Dated: January 10, 2001.
J. Charles Fox,
*Assistant Administrator for Water, U.S. Environmental Protection Agency.*
Dated: January 17, 2001.
Jamie Rappaport Clark,
*Director, U.S. Fish and Wildlife Service.*
Dated: January 18, 2001.
Penelope D. Dalton,
*Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.*

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