

APPENDIX F

COORDINATION BETWEEN THE
ENVIRONMENTAL PROTECTION AGENCY,
FISH AND WILDLIFE SERVICE AND NATIONAL
MARINE FISHERIES SERVICE REGARDING
DEVELOPMENT OF WATER QUALITY CRITERIA AND
WATER QUALITY STANDARDS UNDER
THE CLEAN WATER ACT

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Signed by:

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WATER QUALITY STANDARDS HANDBOOK
SECOND EDITION

APPENDIX F

Coordination Between the Environmental Protection Agency,
the Fish and Wildlife Service and the National Marine Fisheries
Service Regarding the Development of Water Quality Criteria and
Water Quality Standards Under the Clean Water Act

PURPOSE

This memorandum sets forth the procedures to be followed by Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the Environmental Protection Agency (EPA) to insure compliance with Section 7 of the ESA in the development of water quality criteria published pursuant to Section 304(a) of the Clean Water Act (CWA) and the adoption of water quality standards under Section 303(c) of the CWA. Consultation will be conducted pursuant to 50 C.F.R. Part 402. Regional Offices of EPA and the Services may establish agreements, consistent with these procedures, specifying how they will implement this Memorandum.

I. BACKGROUND

A. Guiding Principles

The agencies recognize that EPA's water quality criteria and standards program has the express goal of ensuring the protection of the biological integrity of U.S. waterbodies and associated aquatic life. The agencies also recognize that implementation of the CWA in general, and the water quality standards program in particular, is primarily the responsibility of states. EPA's role in this program is primarily to provide scientific guidance to states to aid in their development of water quality standards and to oversee state adoption and revision of standards to insure that they meet the requirements of the CWA.

In view of the decentralized nature of EPA's water quality standards program responsibilities, and the agencies' desire to carry out their respective statutory obligations in the most efficient manner possible, the agencies believe that consultation should occur, to the maximum extent possible, at the national level. Should additional coordination be necessary on the regional level, the procedures outlined below are designed to insure that the Services are integrated early into EPA's oversight of the states' standards adoption process so that threatened and endangered species concerns can be addressed in the most efficient manner possible.

B. Legal Authorities

1. Section 7 of the ESA

Section 7 of the ESA contains several provisions which require federal agencies to take steps to conserve endangered and threatened species, and which impose the responsibility on agencies to insure, in consultation with the appropriate Service, that certain actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitat. Section 7 also requires agencies to confer with the appropriate Service regarding actions affecting species or critical habitat that have been proposed for listing or designation under section 4, but for which no final rule has been issued.

In particular, section 7(a)(1) provides that federal agencies shall "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species . . ." Section 7(a)(2) requires federal agencies to insure, in consultation with the appropriate Service, that actions which they authorize, fund or carry out are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." Section 7(a)(4) requires a conference for actions that are "likely to jeopardize the continued existence" of species proposed for listing or that are likely to "result in the destruction or adverse modification" of proposed critical habitat.

The procedures for consultation between federal agencies and the Services under section 7 of the ESA are contained in 50 C.F.R. Part 402. Section 402.14 of these regulations requires that agencies engage in formal consultation with the appropriate Service where any action of that agency may affect listed species or critical habitat. Formal consultation is not required if the action agency prepares a biological assessment or consults informally with the appropriate Service and obtains the written concurrence of the Service that the action is not likely to adversely affect listed species or critical habitat. Formal consultation culminates in the issuance of a biological opinion by the Service which concludes whether the agency action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical

habitat.¹ If the Service makes a jeopardy finding, the opinion shall include reasonable and prudent alternatives, if any, to avoid jeopardy. If the Service anticipates that an action would result in an incidental take of a listed species (defined in 50 C.F.R. 402.02), the Service shall include an incidental take statement and reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact. Such measures cannot alter the basic design, location, scope, duration or timing of the action and may involve only minor changes.

Evaluation of the potential effects of an agency action on listed species or their habitat is to be based upon the best scientific and commercial data available or which can be obtained prior to or during the consultation. 50 C.F.R. 402.14(d).

2. Water Quality Standards Development Under the CWA

Section 303 of the Clean Water Act provides for the development by states of water quality standards which are designed to protect the public health or welfare, enhance the quality of water and serve the purposes of the CWA. Such standards consist of designated uses of waterways (e.g., protection and propagation of fish, shellfish, and wildlife) and criteria which will insure the protection of designated uses.

Under the CWA, the development of water quality standards is primarily the responsibility of States. However, pursuant to section 304(a) of the CWA, EPA from time to time publishes water quality criteria which serve as scientific guidance to be used by states in establishing and revising water quality standards. These EPA criteria are not enforceable requirements, but are recommended criteria levels which states may adopt as part of their legally enforceable water quality standards; states may adopt other scientifically defensible criteria in lieu of EPA's recommended criteria. See 40 C.F.R. 131.11(b).

Standards adopted by states constitute enforceable requirements with which permits issued by States or EPA under section 402 of the Clean Water Act must assure compliance. CWA section 301(b)(1)(C). Under section 303(c) of the CWA, EPA must review water quality standards adopted by states and either approve them if the standards meet the requirements of the CWA or disapprove them if the standards fail to do so. However, EPA's disapproval of state water quality standards does not alter the enforceable requirements with which CWA section 402 permits must comply, because the state standards remain in full force and

¹ Any reference in this document to "jeopardy" for purposes of section 7 of the ESA is intended also to include the concept of destruction or adverse modification of critical habitat.

effect under state law. The state-adopted standards remain effective for all purposes of the CWA until they are revised by the state or EPA promulgates federal water quality standards applicable to the state.

II. PROCEDURES

A. Development of Water Quality Criteria Guidance Under Section 304(a) of the CWA

EPA will integrate the Services into its criteria development process by consulting with the Services regarding the effect EPA's existing aquatic life criteria (and any new or revised criteria) may have on listed endangered or threatened species. References below to endangered or threatened species include species proposed to be listed by the Services. In addition, EPA will include the Service(s) on the aquatic life criteria guidelines revision committee which is currently revising the methodological guidelines that will form the technical basis for future criteria adopted by EPA.

1. Consultation on Existing Criteria

EPA has developed and published aquatic life criteria documents explaining the scientific basis for aquatic life criteria that EPA has published. EPA will consult with the appropriate Service regarding the aquatic life criteria as described below.

Step 1: Services' Identification of Species that May Be Affected By Water Quality Degradation

The Services and EPA will request their regional offices to identify the endangered and threatened species within their jurisdictions that may be affected by degraded water quality. Each Service will provide EPA with a consolidated list of these species. To facilitate this process, the initial species list will include information identifying the areas where such species are located, a description of the pollutants causing the water quality problems affecting the species (if known) and any other relevant information provided by the Services' regional offices. In future consultations, the Services will provide a species list, as required in 50 C.F.R. Part 402, and access to any relevant data concerning identified species.

Step 2: EPA Initiation of Informal Consultation and Performance of Biological Assessment

Based upon a review of information provided by the Services under Step 1, above, and any other information available to EPA (as described by 50 C.F.R. 402.12(f)(1)-(5)), EPA will determine what species may be affected by the aquatic life criteria and will request informal consultation with the appropriate Service regarding such species. EPA will submit to the appropriate Service a biological assessment that evaluates the potential effects of the criteria levels on those species. The biological assessment will be developed in an iterative process between EPA and the Service (initially involving submission of a "pilot" assessment addressing 2 or 3 chemicals), and is expected to contain the information listed in the Appendix of this Memorandum.

Step 3: Further steps Based on Results of Biological Assessment

Based upon the findings made by EPA in the Biological Assessment, the consultation will proceed as follows (see 50 C.F.R. 402.12(k)):

- For those criteria/species where EPA determines that there is no effect, EPA will not initiate formal consultation.
- For those criteria/species where there is a "may affect" situation, and EPA determines that the species is not likely to be adversely affected, the appropriate Service will either concur or nonconcur with this finding under Step 4, below.
- Where EPA finds that a species is likely to be adversely affected, formal consultation will occur between the agencies under Step 5, below.

Step 4: Service Reviews Biological Assessment and Responds to EPA

Within 30 days after EPA submits a complete biological assessment to the Service, the Service will provide EPA with a written response that concurs or does not concur with any findings by EPA that species are not likely to be adversely affected by EPA's criteria. For those species/criteria where the Service concurs in EPA's finding, consultation is concluded and no formal consultation will be necessary. For any species/criteria where the Service does not concur in EPA's finding, formal consultation on the criteria/species will occur under step 5, below (see 50 C.F.R. 402.14).

Step 5: Formal Consultation

Formal consultation will occur between the agencies (coordinated by the agencies' headquarters' offices) beginning on the date the Service receives a written consultation request from EPA regarding those species where EPA or the Service believe there is likely to be an adverse affect, as determined under steps 3 and 4, above. The consultation will be based on the information supplied by EPA in the biological assessment and other relevant information that is available or which can feasibly be collected during the consultation period (see 50 C.F.R 402.14(d)). The Service will issue a biological opinion regarding whether any of the species are likely to be jeopardized by the pollutant concentrations contained in EPA's criteria. Any jeopardy conclusion will specify the specific pollutant(s), specie(s) and geographic area(s) which the Service believes is covered by such conclusion. If the Service makes a jeopardy finding, it will identify any available reasonable and prudent alternatives, which may include, but are not limited to, those specified below. EPA will notify the Service of its action regarding acceptance and implementation of all reasonable and prudent alternatives.

1. EPA works with the relevant State during its pending triennial review period to insure adoption (or revision) of water quality standards for the specific pollutants and water bodies that will avoid jeopardy. Such adoption or revision may include adoption of site-specific criteria in accordance with EPA's site-specific criteria guidance, or other basis for establishing more stringent criteria.

2. EPA disapproves relevant portions of state water quality standards (see 40 C.F.R. 131.21) and initiates promulgation of federal standards for the relevant water body (see 40 C.F.R. 131.22) that will avoid jeopardy. Where appropriate, EPA will promulgate such standards on an expedited basis.

2. Service Participation in Committee Revising Criteria's Methodological Guidelines

An EPA committee is currently charged with revising and updating the methodological guidelines which will in the future be followed by EPA when it issues new 304(a) water quality criteria. The Service(s) will become a member of the workgroup as an observer/advisor to insure that the methodological guidelines take into account the need to protect endangered and threatened species. The guidelines will be subject to peer review and public notice and comment prior to being finalized. During the public comment period, the Services will provide the agencies' official position on the guidelines.

3. Consultation with the Services on New or Revised Aquatic Life Criteria and New Wildlife and Sediment Criteria

When EPA develops and publishes new or revised aquatic life criteria and new wildlife and sediment criteria under section 304(a), EPA will request consultation with the Services on such criteria, which will proceed in accordance with the procedures outlined in section II.A.1 of this Memorandum.

B. EPA Review of State Water Quality Standards Under Section 303 of the CWA

In order to insure timely resolution of issues related to protection of endangered or threatened species, EPA and the Services will coordinate in the following manner with regard to state water quality standards that are subject to EPA review and approval under section 303(c) of the CWA.

1. Participation of the Services in EPA/State Planning Meetings

Unless other procedures ensuring adequate coordination are agreed to by the regional offices of EPA and the Service(s), EPA regional offices will request in writing that the Services attend EPA/state meetings where the state's plan for reviewing and possibly revising water quality standards is discussed. The invitation will include any preliminary plans submitted by the state and any suggestions offered by EPA to the state that will be discussed at the planning meeting, as well as a request for the Services to suggest any additional topics of concern to them.

Service staff will attend the planning session and be prepared to identify areas where threatened and endangered species that may be affected by the proposed action may be present in the state and to provide access to any data available to the Services in the event additional discussions will need to occur. If the Service does not intend to attend the planning meeting, it will notify the EPA regional office in writing. If threatened and endangered species may be present in the waters subject to the standards, such notice will include a species list.

2. Consultation on EPA Review of State Water Quality Standards Where Federally Listed Species Are Present

Except in those cases where the Service's Director, at the Washington Office level, requests consultation, EPA may complete its review and approval of state water quality standards without requesting consultation where (1) the state's criteria are as stringent as EPA's section 304(a) aquatic life criteria and consultation between EPA and the appropriate Service on EPA's

criteria has resulted in a Service concurrence with an EPA finding of "not likely to adversely affect," a "no jeopardy" biological opinion (or EPA's implementation of a reasonable and prudent alternative contained in the Service's "jeopardy" biological opinion), and EPA's adherence to the terms and conditions of any incidental take statement and (2) the state has designated use classifications for the protection and propagation of fish and shellfish.

However, if a State adopts water quality standards consistent with the provisions of the preceding paragraph, but the Service believes that consultation may be necessary in either of the circumstances described below, only the Service's Director, at the Washington Office level, may request consultation with EPA. Such consultation may be necessary (1) where review of a state water quality standard identifies factors not considered during the relevant water quality criterion review under this Memorandum which indicate that the standard may affect an endangered or threatened species, or (2) where new scientific information not available during the earlier consultation indicates that the criterion, as implemented through the state water quality standard, may affect endangered or threatened species in a manner or to an extent not considered in the earlier consultation.

If a state submits water quality standards containing aquatic life criteria that are less stringent than EPA's section 304(a) aquatic life criteria, or use designations that do not provide for the protection and propagation of fish and shellfish, EPA will consult with the appropriate Service regarding the state's standards. EPA's request for formal or informal consultation (as appropriate) shall be made as early as possible in the standards development process (e.g., when standards regulation are under development by the state). The EPA region should not wait until standards are formally submitted by the state to request such consultation.

If a state water quality standard under review by EPA relates to specie(s), pollutant(s) and geographic area(s) that were the subject of a jeopardy opinion issued by the Service under section II.A. of this Memorandum, EPA will consider the opinion (and any reasonable and prudent alternatives specified by the Service) and take action that, in EPA's judgment, will insure that water quality standards applicable to the state are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of species' critical habitat. EPA will notify the Service that issued the biological opinion of its action, in accordance with 50 C.F.R. 402.15.

Except in those cases where the Service's Director, at the Washington Office level, requests consultation, EPA may take

action pursuant to CWA section 303(c)(4) to promulgate federal standards applicable to a water of the state without requesting consultation where (1) the aquatic life criteria promulgated by EPA are no less stringent than EPA's section 304(a) criteria guidance and consultation between EPA and the Service on EPA's criteria has resulted in a Service concurrence with an EPA finding of "not likely to adversely affect," a "no jeopardy" biological opinion (or EPA's implementation of a reasonable and prudent alternative contained in the Service's "jeopardy" biological opinion), and EPA's adherence to the terms and conditions of any incidental take statement and (2) the applicable use classifications provide for the protection and propagation of fish and shellfish.

However, if EPA promulgates water quality standards consistent with the provisions of the previous paragraph, but the Service believes that consultation may be necessary in either of the circumstances described below, only the Service's Director, at the Washington Office level, may request consultation with EPA. Such consultation may be necessary (1) where review of the water quality standard identifies factors not considered during the relevant water quality criterion review under this Memorandum which indicate that the standard may affect an endangered or threatened species, or (2) where new scientific information not available during the earlier consultation indicates that the criterion, as implemented through the water quality standard, may affect endangered or threatened species in a manner or to an extent not considered in the earlier consultation.

III. Revisions to Agreement

EPA and the Services may jointly revise the procedures agreed to in this document based upon the experience gained in the pilot consultation on EPA's aquatic life criteria or other experience in the implementation of the above procedures.

IV. Third Party Enforcement

The terms of this Memorandum are not intended to be enforceable by any party other than the signatories hereto.

V. Reservation of Agency Positions

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

VI. Effective Date; Termination

This Memorandum will become effective upon signature by each of the parties hereto. Any of the parties may withdraw from this Memorandum upon 60 days' written notice to the other parties;

provided that any Section 7 consultation covered by the terms of this Memorandum that is pending at the time notice of withdrawal is received by the parties, and those activities covered by this Memorandum that begin the consultation process with the 60-day notice period, will continue to be governed by the procedures in this Memorandum.

Ralph Morgenweck, Assistant Director
Fish and Wildlife Enhancement
U.S. Fish and Wildlife Service

Date

Dr. Tudor T. Davies, Director
Office of Science and Technology
U.S. Environmental Protection Agency

Date

Dr. Nancy Foster, Director
Office of Protected Resources
National Marine Fisheries Service

Date

APPENDIX
Expected Contents of EPA's Biological Assessment

I. Introduction/Overview

A. Benefits of pollution reduction relative to endangered and threatened species/description of the ESA

B. Role of Water Quality Standards under the CWA

C. Overview of water quality criteria (philosophy, objectives, methodology)

D. Discussion of comparative sensitivity of listed species (and surrogates) with criteria database

E. Description of Fact Sheet contents

- data included
- description of how specific criteria derived
- description of logic/thought processes supporting findings of effect on listed species

II. Fact Sheets

Pollutant-specific fact sheets will be compiled which evaluate the available data and reach conclusions regarding the findings of effect of the criteria on endangered and threatened species. The fact sheets will be presented largely in tabular, graph form.

A. Summary of toxicological relationships (from water quality criteria documents)

1. acute (acute lethality)
2. chronic (life processes at risk)
3. plants
4. residues
5. other key data
6. updated information through review of ACQUIRE database and other key data

B. Taxa at risk vis-a-vis listed species (through use of surrogates, where appropriate)

C. Impact of other water quality factors -- describe effects such as environmental variability, ph, hardness, temperature, etc.

D. Assessment of impact on listed species

Findings to be made regarding whether each criteria (1) "may affect" and/or (2) is likely to adversely affect, listed species.