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STATE NPDES PROGRAMS AND THE ESA: PROTECTING LISTED SPECIES UNDER THE CLEAN WATER ACT

BY
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I. INTRODUCTION

In enacting the Endangered Species Act of 1973 (ESA), Congress provided broad protections for our nation's federally listed, threatened and endangered species.[1] ESA section 7(a)(2) prohibits any discretionary federal action that would likely result in jeopardizing the continued existence of listed species or result in the adverse modification of designated critical habitat.[2] "This provision reflects Congress' intent that no federal activity contribute to the extinction of a species."[3]

However, ESA section 7(a)(2)'s scope is uncertain when other federal statutes require federal agencies to delegate authority to the states. For example, there is currently confusion whether section 7(a)(2) applies to the Environmental Protection Agency (EPA) when it delegates permitting authority to states under section 402 of the Clean Water Act (CWA).[4] CWA section 402, commonly known as the National Pollutant Discharge Elimination System (NPDES), regulates the discharge of pollutants into our nation's waters.[5]

In *American Forest & Paper Ass'n v. EPA* ("*AF&PA I*"), the Fifth Circuit recently held that EPA cannot consider impacts to listed species and their critical habitat when it delegates NPDES permitting authority to the states.[6] According to the Fifth Circuit, CWA section 402 requires EPA to approve state-run NPDES programs if nine enumerated conditions are met. EPA responded by developing a Draft Memorandum of Agreement (Draft MOA) with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, "Services").[7] The Draft MOA flatly declares that *AF&PA I* was wrongly decided. The Draft MOA reasserts EPA's authority to consider effects on listed species and critical habitat in its approval and oversight of state-run NPDES programs.

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[1] 16 U.S.C. §§ 1531-44 (1994).

[2] *See* 16 U.S.C. § 1536(a)(2) (1994). For a more detailed description of section 7(a)(2)'s provisions, *see infra* notes 68-81 and accompanying text.

[3] John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 245 (1994).

[4] 33 U.S.C. § 1342 (1994). The CWA is codified at 33 U.S.C. §§ 1251-1387 (1994).

[5] For a more detailed description of the NPDES program, *see infra* notes 48-61 and accompanying text.

[6] *See* CWA § 402(b), 33 U.S.C. § 1342(b) (1994); American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998) [hereinafter *AF&PA I*].

[7] *See* Draft 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, 64 Fed. Reg. 2742 (1999) [hereinafter Draft MOA].

Part II of this Article examines the history of the CWA, the CWA's dual approach of controlling water pollution through ambient water quality standards and specific effluent limitations, and the CWA's allocation of authority to EPA and the states under the NPDES permit program.[8] Part III examines the history and purpose of the ESA, explains the powers and duties the ESA confers upon federal agencies, and describes the ESA's prohibitions and penalties for "taking" listed species.[9] Part IV of this Article discusses practical concerns that arise if EPA's approval and oversight of state NPDES programs is exempt from ESA section 7's requirements, and examines historical views on the ESA's application to state NPDES programs.[10] Part V presents EPA and the Services' Draft MOA, which is designed to ensure that EPA's approval and oversight of state NPDES programs do not jeopardize listed species or adversely modify critical habitat.[11] Part VI examines whether EPA, in its Draft MOA, has overstepped its authority under the CWA or has failed to fulfill its duties under the ESA.[12]

II. THE CLEAN WATER ACT

A. A Brief History of the CWA

The 1948 Federal Water Pollution Control Act (FWPCA) was Congress' earliest attempt to address the pollution and degradation of our nation's waters.[13] The FWPCA and its pre-1972 amendments assumed that pollution was

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[8] *See infra* notes 13-61 and accompanying text.

[9] *See infra* notes 62-87 and accompanying text.

[10] *See infra* notes 88-160 and accompanying text.

[11] *See infra* notes 161-203 and accompanying text.

[12] *See infra* notes 204-21 and accompanying text.

[13] Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1367 (1994)) [hereinafter FWPCA]. Earlier federal legislation prohibited dumping into waterways which were navigable in fact. *See* Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1148 (codified as amended at 33 U.S.C. §§ 403, 407, 411 (1994)) [hereinafter RHA]. RHA section 10 prohibited any obstruction of the navigable capacity of waters of the United States, including dredging and filling, while RHA section 13 prohibited the discharge of refuse into navigable waterways. *See* Peter Goplerud III, *Water Pollution Law: Milestones from the Past and Anticipation of the Future*, NAT. RESOURCES & ENV'T, Fall 1995, at 7 (1995). In contrast to the RHA's invocation of navigation as a source of federal authority, the FWPCA marked Congress' first significant effort to use its post New Deal Commerce Clause powers to pass broad legislation aimed directly at protecting water quality. *See* U.S. CONST., art. I, § 8, cl. 3; CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY, § 1.2(H), at 31 (1993); Goplerud, *supra*, at 7.

generally acceptable until it actually harmed the nation's waters.[14] The FWPCA placed the burden of proving harm caused by pollution on the government.[15] The pre-1972 Act also required courts to consider the practicability and feasibility of abatement before enjoining polluters' activities.[16] As a result, problems associated with water pollution — including massive kills of fish and wildlife, and destruction of habitat — remained acute.[17]

Then, in 1972, Congress reversed its primary assumption about water pollution. Under the Clean Water Act Amendments of 1972 (CWA), Congress flatly outlawed the addition of any pollutant from a point source to the nation's waters without a permit.[18] Congress demonstrated its low tolerance for the con-

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[14] *See* Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863, 868 (1986). Congress amended the FWPCA five times between 1948 and 1972. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, § 4.1 at 252 (1994). With each amendment, Congress incrementally increased federal involvement in and authority over water pollution control. *See* CAMPBELL-MOHN ET AL., *supra* note 13, § 1.2(H) at 31 ("Congress used creeping federalization rather than direct regulation in the environmental area because it was unclear whether the federal government could constitutionally operate air and water pollution programs.").

[15] *See* Goplerud, *supra* note 13, at 7.

[16] *See* Pub. L. No. 80-845, § 29(d)(7), 62 Stat. 1155, *cited in* RODGERS, *supra* note 14, § 4.1 at 253.

[17] *See* RACHEL CARSON, SILENT SPRING 133-35 (1962) (describing two-week long, 200-mile fish kill on Colorado River below Austin, Texas in 1961, traced to sewer feeder line from pesticide manufacturing plant); Goplerud, *supra* note 13, at 7 (citing spectacular examples of FWPCA's failures, such as spontaneous combustion of Cuyahoga River in Cleveland, oil spill off coast of Santa Barbara, cessation of most forms of life in Lake Erie, closure of Hudson River to fishing, and temporary shutdowns of sewer systems in San Francisco and Louisville).

[18] *See* CWA § 301(a), 33 U.S.C. § 1311(a) (1994) ("Except as in compliance with [the CWA] . . . , the discharge of any pollutant by any person shall be unlawful."). The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable water from any *point source*." CWA § 502(12)(A), 33 U.S.C. § 1362(12)(A) (1994) (emphasis added). In turn, the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." CWA § 502(14), 16 U.S.C. § 1362(14) (1994).

Some commentators have broadly stated that the 1972 CWA's effluent limitation approach indicates that Congress abandoned its reliance on ambient water quality standards as a means of enforcement. *See, e.g.*, Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ENVTL. L. REP. 10,528, 10,531 (1991) (stating that Congress was "united and emphatic" in rejecting water quality standards as "a basis for upgrading the nation's waters"); Van Putten & Jackson, *supra* note 14, at 867 (stating that Congress abandoned its "underlying premise" of enforcement through ambient standards in CWA of 1972). In contrast, others insist that both effluent limitations and water quality standards remain fully enforceable under the 1972 CWA. *See* RODGERS, *supra* note 14, § 4.1 at 260 (acknowledging that effluent standards play dominant role, but that water quality standards still serve interstitial function in enforcement); *see also* EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 205 n.12 (1976) (stating that water

tinued degradation of the nation's waters by declaring a national policy prohibiting the discharge of "toxic pollutants in toxic amounts."[19] The CWA also reaffirmed the FWPCA's earlier goals of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."[20] As a result of these changes, many of the nation's lakes and streams have been restored.[21] Even so, many others fail to meet federally approved water quality standards to this day.[22]

B. Protecting the Nation's Waters: Ambient Water Quality Standards, Water Quality Criteria and Individual Pollution Discharge Permits

1. CWA Section 303: Ambient Water Quality Standards

Congress first asserted federal control over ambient water quality in the Water Quality Act of 1965 (WQA).[23] The WQA directed the states to adopt ambient water quality standards.[24] Where any state failed to establish such standards, the WQA required the Secretary of Interior to adopt standards on the state's behalf.[25]

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quality standards are retained in CWA as supplementary method of regulating pollution where individual compliance with effluent standards fails to prevent water quality from falling below accepted levels).

Regardless of this scholarly debate, the CWA still uses ambient water quality standards as a measure of compliance through its TMDL and "toxic hotspots" programs. *See* CWA §§ 303(d), 304(l), 33 U.S.C. §§ 1313(d), 1314(l) (1994). Both of these programs require adjustment to discharge permits where the receiving waters fail to meet applicable water quality standards, even though all dischargers are in compliance with their individual permits. *See id.*

[19] CWA § 101(a)(3), 33 U.S.C. § 1251(a)(3) (1994). The CWA defines "toxic pollutants" as "any pollutant or combination of pollutants . . . which . . . upon exposure . . . or assimilation into *any* organism, either directly . . . or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations . . . in such organisms or their offspring." CWA § 502(13), 33 U.S.C. § 1362(13) (1994) (emphasis added).

[20] CWA § 101(a)(2), 33 U.S.C. § 101(a)(2) (1994). *See* Goplerud, *supra* note 13, at 8 (stating that goal of CWA "was for the waters of the United States to be fishable and swimmable by 1983").

[21] *See* Goplerud, *supra* note 13, at 8.

[22] *See id.* at 8.

[23] Pub. L. No, 89-234, 79 Stat. 903.

[24] *See* RODGERS, *supra* note 14, § 4.1 at 253.

[25] *See id.*

The water quality standards approach to pollution control focuses on maintaining the overall quality of receiving waters, rather than imposing specific limitations on each point source.[26] One explicit purpose of the 1965 WQA's state water quality standards was to provide for the "propagation of fish and wildlife."[27]

a. The "Components" of State Water Quality Standards: Designated Uses, Water Quality Criteria and EPA's Antidegradation Policy

Under CWA section 303, state water quality standards consist of two primary components: "designated uses" and "water quality criteria."[28] States establish designated uses by assigning segments of water to certain use classes. For example, state water quality standards typically provide that water segments designated "Class A" must be suitable for recreation, and that "Class B" waters must be suitable for the growth and propagation of fish, and other aquatic and semi-aquatic life.[29]

Each state's water quality standards must also establish water quality criteria that meet the state's designated uses for each water segment.[30] Water quality criteria may be quantitative or descriptive. Quantitative, or "numeric," criteria state measurable amounts of pollutants in ambient water. For example, a state's numeric water quality criteria for Class B waters might state that total dissolved oxygen in the water column shall not exceed five parts per million, or that total dissolved solids shall not exceed five-hundred micrograms per liter. Descriptive, or "narrative," water quality criteria state more general characteristics for the water segment. For example, a state might establish a general requirement for Class A waters that "toxic substances shall not be present in such quantities as to cause the waters to be toxic to human, animal, plant, or aquatic life."[31]

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[26] *See* RODGERS, *supra* note 14, § 4.1 at 260 (stating that water quality standards view of water pollution "assumes a free use of water for waste disposal up to a point of 'unreasonableness,' however legally defined").

[27] Pub. L. No. 89-234, § 5(a), 79 Stat. 908, *cited in* RODGERS, *supra* note 14, § 4.1 at 253.

[28] *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1994).

[29] *See* RODGERS, *supra* note 14, § 4.1 at 344.

[30] *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

[31] RODGERS, *supra* note 14, § 4.1 at 344 (citations omitted). The Supreme Court has stated that narrative water quality criteria are enforceable without reduction to numeric form. *See* P.U.D. #1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 716 (1994) (stating that CWA allows enforcement of "broad, narrative criteria based on, for example, 'aesthetics'").

EPA's regulations additionally require the states' water quality standards to include an "antidegradation policy."[32] EPA's antidegradation policy establishes existing uses as the baseline for ambient water quality. Under EPA's antidegradation policy, state water quality standards must, with limited exceptions, maintain or improve existing water quality.[33]

The text of the CWA does not expressly authorize EPA's antidegradation policy. However, in the 1987 CWA amendments, Congress "made an indirect reference to the antidegradation policy in attempting to codify the EPA position."[34] The Supreme Court has stated that the 1987 CWA amendments "make clear" that EPA's antidegradation policy is an integral, third component of section 303's state water quality standards.[35]

b. Procedural Requirements for State Review and EPA Approval of State Water Quality Standards

The states have primary responsibility in promulgating water quality standards with EPA exercising review over the state's adopted standards.[36] Each state must review its water quality standards once every three years to ensure continued compliance with the CWA's requirements.[37] CWA section 303 subjects state water quality standards to EPA review and approval upon completion

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[32] *See* 40 C.F.R. §§ 131.6(d), 131.12 (1998).

[33] *See* 40 C.F.R. § 131.12(a)(1) (1998). EPA's antidegradation policy allow states to adopt less protective water quality standards, but only to the extent that any decrease in water quality will still fully protect existing uses, including "propagation of fish, shellfish, and wildlife." *See* 40 C.F.R. § 131.12(a)(2) (1994). The state can only adopt lower standards on a finding, after public hearing, that "lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." *Id.* In adopting such lower standards, the state must ensure that the "highest statutory and regulatory requirements" will be imposed on all existing and new point sources, and that "all cost-effective and reasonable best management practices" will be imposed on non-point sources. *Id.*

[34] THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW 1193 (David L. Shapiro et al. eds., 3d ed. 1996) (referring to Pub. L. No. 100-4, 101 Stat. 39, 68 (1987)). *See* CWA § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (1994) (stating that water quality standards may only be revised "subject to and consistent with the antidegradation policy established under this section").

[35] *See Jefferson County*, 511 U.S. at 705 (stating that "[a] 1987 amendment to the [CWA] makes clear that § 303 also contains an 'antidegradation policy'").

[36] *See* CAMPBELL-MOHN ET AL., *supra* note 13, § 2.3(A) at 61 (stating that "state governments, not the federal government, lead in setting water quality standards under the [CWA]"); RODGERS, *supra* note 14, § 4.7 at 342-43 (stating "for the most part [water quality standards] are written, enforced and construed by the state authorities"); *supra* text accompanying notes 23-42.

[37] *See* CWA § 303(c)(1), 33 U.S.C. § 1313(c)(1) (1994).

of the state's triennial review.[38] If, upon completion of the state's review, EPA determines that "any such revised or new standard is not consistent with the applicable requirements of [the CWA]," EPA must notify the state of the changes that are necessary to meet the CWA's requirements.[39]

If the state fails to change its revised or new water quality standards to meet EPA's concerns, EPA must "publish proposed regulations setting forth a revised or new water quality standard."[40] EPA may also publish proposed water quality standards "in any case where . . . a revised or new standard is necessary to meet the requirements of [the CWA]."[41] After publishing proposed water quality standards, EPA must promulgate a final rule establishing the new standards unless the state adopts standards meeting EPA's concerns.[42]

2. CWA Section 304: EPA's Water Quality Criteria Guidance

CWA section 304(a) provides that EPA shall, from time to time, publish water quality criteria guidance "reflecting the latest scientific knowledge."[43] Using its section 304 authority, EPA has established numeric guidance for forty-five different pollutants that may adversely affect aquatic species.[44] EPA's aquatic life guidance documents provide pollutant-specific, scientific information designed to facilitate protection of aquatic ecosystems.

EPA's section 304 water quality criteria guidance documents assist the states in setting water quality standards.[45] EPA's regulations allow states to adopt different water quality criteria, but only if they are "scientifically defensible."[46] In practice, the states have largely adopted EPA's section 304 water quality criteria guidance when establishing or revising state water quality standards.[47]

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[38] *See* CWA §§ 303(c)(1), (c)(2)(A), 33 U.S.C. §§ 1313(c)(1), (c)(2)(A) (1994).
[39] *See* CWA § 303(c)(3), 33 U.S.C. § 1313(c)(3) (1994).
[40] CWA §§ 303(c)(3), (c)(4)(A), 33 U.S.C. §§ 1313(c)(3), (c)(4)(A) (1994).
[41] CWA § 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B) (1994).
[42] *See* CWA § 303(c)(4), 33 U.S.C. § 1313(c)(4) (1994).
[43] 33 U.S.C. § 1314(a)(1) (1994).
[44] *See* Draft MOA, *supra* note 7, at 2751, § VI.C.1.
[45] *See* SCHOENBAUM & ROSENBERG, *supra* note 34, at 1181.
[46] 40 C.F.R. § 131.11(b)(iii) (1998).
[47] *See* SCHOENBAUM & ROSENBERG, *supra* note 34, at 1182.

3. CWA Section 402: The National Pollutant Discharge Elimination System

CWA section 301 requires point-source polluters to obtain a NPDES permit before discharging pollutants into the nation's waters.[48] Section 402(a) of the CWA authorizes EPA to issue federal NPDES permits.[49] EPA may issue a federal NPDES permit as long as the individual discharge complies with various CWA effluent, technology and reporting standards.[50]

CWA section 402(b) allows states to assume NPDES permitting authority by submitting a proposed program for EPA review and approval.[51] Section 402(b) enumerates nine specific conditions of state NPDES program approval.[52] Sec-

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[48] *See* CWA § 301(a), 33 U.S.C. § 1311(a) (1994).

[49] *See* CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994).

[50] *See id.* The final decision to issue a federal NPDES permit is entirely within EPA's discretion:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311 [effluent limitations established for individual pollutants], 1312 [ambient water quality standards], 1316 [technology standards], 1317 [toxic effluent limitations], 1318 [reporting requirements], and 1343 [ocean discharging guidelines] of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Id.

[51] *See* CWA § 402(b), 33 U.S.C. § 1342(b) (1994).

[52] *See* CWA § 402(b)(1)-(9), 33 U.S.C. § 402(b)(1)-(9) (1994). Section 402(b)'s nine conditions are stated as follows:

> The Administrator shall approve each such submitted program unless [s]he determines that adequate authority does not exist:
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> (1) To issue permits which — (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title; (B) are for fixed terms not exceeding five years; and (C) can be terminated or modified for cause including, but not limited to, the following: (i) violation of any condition of the permit; (ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; (D) control the disposal of pollutants into wells;
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> (2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or (B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;
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> (3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;
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> (4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;
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> (5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the

tion 402(b)'s nine conditions ensure that the states' NPDES programs will comply with various substantive and procedural requirements of the CWA. Section 402(b) states that EPA "shall approve" the state's proposed program if the state's program meets each of section 402(b)'s conditions. EPA must suspend issuance of federal NPDES permits after the state submits its proposed program unless EPA determines that the state's proposed program does not satisfy section 402(b)'s requirements or EPA's regulations under CWA section 304(i)(2).[53] CWA section 304(i)(2) requires EPA to establish regulations governing "procedural and other requirements" of approving state-run NPDES programs.[54]

EPA retains administrative oversight of state-run NPDES programs and reviews proposed state NPDES permits. If EPA determines that a state is not administering its NPDES program in compliance with section 402's requirements, EPA must withdraw approval of the state's program.[55] The state must

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Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Id.

[53] *See* CWA § 402(c)(1), 33 U.S.C. § 1342(c)(1) (1994).

[54] CWA § 304(i)(2), 33 U.S.C. § 1314(i)(2) (1994).

[55] *See* CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) (1994) ("Whenever the Administrator determines . . . that a state is not administering a program approved under this section in accordance with the requirements of this section . . . the Administrator shall withdraw approval of such program.").

provide EPA and the Services with notice of every proposed state NPDES permit.[56] EPA's regulations require the state's notice to include a copy of the permit application and a draft copy of the proposed permit.[57]

If EPA finds that approval of a proposed state NPDES permit would be "outside the guidelines and requirements" of the CWA, EPA may object to the permit's issuance.[58] States may not issue a NPDES permit over EPA's objection.[59] EPA must provide the state with a statement of reasons for the objection, and describe the limitations and conditions that must be added to comply with the CWA.[60] If the state does not submit a revised permit that satisfies EPA's concerns, CWA section 402(d)(4) grants EPA plenary powers to assume authority over the proposed permit, to revise the permit as necessary, and to issue the proposed permit as a federal NPDES permit under CWA section 402(a).[61]

III. THE ENDANGERED SPECIES ACT

A. ESA Section 2: The Purpose and Policy of the ESA

The ESA of 1973 is, by far, the most comprehensive species protection statute ever enacted by Congress.[62] In enacting the ESA, Congress explicitly recognized that economic growth and untempered development have extirpated various species of fish, wildlife and plants.[63] Congress also recognized that the continued existence and recovery of listed species is of great value to the na-

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[56] *See* CWA § 402(d)(1), 33 U.S.C. § 1342(d)(1) (1994); 40 C.F.R. §§ 124.10(c)(ii)-(iv) (1998) (requiring states to send notice of every proposed NPDES permit to EPA, federal agencies "with jurisdiction over fish, shellfish and wildlife resources," Army Corps of Engineers, USFWS and NMFS).

[57] *See* 40 C.F.R. § 124.10(e) (1998).

[58] CWA § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B) (1994); *see* 40 C.F.R. §§ 123.44(a)(1), (b)(1), (c)(7) (1998).

[59] *See* CWA § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B).

[60] *See id.*; 40 C.F.R. § 123.44(b)(2) (1998).

[61] *See* CWA § 402(d)(4), 33 U.S.C. § 1342(d)(4) (1994); 40 C.F.R. § 123.44(h) (1998); *supra* notes 49-50 and accompanying text.

[62] *See* CAMPBELL-MOHN ET AL., *supra* note 13, § 6.1(B)(3) at 218 (1993). Although Congress has enacted other laws which protect wildlife, the ESA is "the flagship enactment on wildlife protection." RODGERS, *supra* note 14, § 4.1 at 996 (1994).

[63] *See* ESA § 2(a)(1), 16 U.S.C. § 1531(a)(1) (1994).

tion.[64] Congress' plain intent in enacting the ESA of 1973 "was to halt and reverse the trend toward species extinction, whatever the cost."[65]

To address these concerns, ESA section 2 declares Congress' intent that all federal departments and agencies utilize their authorities to recover listed species.[66] With regard to water resource issues, section 2 declares that federal agencies shall cooperate with state and local agencies to recover listed species.[67]

B. ESA Section 7: Guiding Federal Actions That May Affect Listed Species

Although Congress had enacted endangered species protection in 1966 and 1969, the ESA of 1973 marked a substantial change from these prior Acts.[68] Of central importance to this discussion, section 7 of the 1973 Act imposes substantive duties on federal agencies to protect and recover listed species.[69]

ESA section 7(a)(1) requires federal agencies to "utilize their authorities" to carry out programs for the recovery of listed species.[70] ESA section 7(a)(2) requires federal agencies to ensure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of listed species or to result in the destruction or adverse modification of critical habitat.[71] The Services' regulations define agency "action" broadly to include "all activities or programs of any kind authorized, funded or carried out, in whole or in part by Federal agencies."[72] However, the Services' regulations limit section 7(a)(2)'s

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[64] *See* ESA § 2(a)(3), 16 U.S.C. § 1531(a)(3) (1994) (recognizing that threatened and endangered species are of esthetic, ecological, educational, historical, recreational and scientific value).

[65] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1973). In enacting the ESA of 1973, "Congress was concerned about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." *Id.* at 178-79.

[66] *See* ESA §§ 2(c)(1), 3(3), 16 U.S.C. §§ 1531(c)(1), 1532(3) (1994).

[67] *See* ESA § 2(c)(2), 16 U.S.C. § 1531(c)(2) (1994).

[68] *See* Pub. L. No. 89-669, 80 Stat. 926 (1966); Pub L. No 91-135, 83 Stat. 275 (1969). For an overview of the 1966 and 1969 Acts, *see* Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 295-97 (1991).

[69] 16 U.S.C. § 1536 (1994). For a discussion of the ESA's listing procedures, *see* TARA L. MUELLER, GUIDE TO THE FEDERAL AND CALIFORNIA ENDANGERED SPECIES LAWS 8-28 (1994); RODGERS, *supra* note 14, § 9.9 at 1003-10; DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS & IMPLEMENTATION 25-28 (1989).

[70] *See* 16 U.S.C. § 1536(a)(1) (1994).

[71] 16 U.S.C. § 1536(a)(2) (1994). An exception to section 7(a)(2)'s "no jeopardy" requirement may be granted by the Endangered Species Committee (euphemistically known as the "God Squad"). *See* ESA § 7(h), 16 U.S.C. § 1536(h) (1994); MUELLER, *supra* note 69, at 45, 61.

[72] 50 C.F.R. § 402.02 (1998). According to the Services' regulations, agency "action" explicitly includes the granting of federal permits. *See id.*

scope to "actions in which there is discretionary Federal involvement or control."[73]

ESA section 7 establishes a three-step consultation process for determining whether agency action is likely to jeopardize listed species.[74] First, any federal agency proposing an action must inquire of the Services whether listed species may be in the area.[75] If so, the action agency must prepare a "biological assessment" to determine whether the species are likely to be affected by the action.[76] If the biological assessment reveals that listed species are likely to be affected, the action agency must enter formal consultation with USFWS or NMFS.[77]

Formal consultation with the Services results in a "biological opinion" detailing how the action will affect listed species and their critical habitat.[78] If the direct or indirect effects of the action are likely to result in jeopardy or adverse habitat modification, the biological opinion recommends "reasonable and pru-

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[73] 50 C.F.R. § 402.03 (1998). Some specific examples where the courts have found the existence of discretionary agency action include leasing of land by the Department of Navy to local farmers, *see* Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990); construction of a timber road and timber sales to private parties in the National Forests, *see* Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); issuance of selection criteria for timber harvest plans, *see* Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992); and issuance of federal funds by the Department of Transportation to state highway construction agencies, *see* National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976).

[74] *See Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1010.

[75] *See* ESA §§ 7(a)(3), (c)(1), 16 U.S.C. §§ 1536(a)(3), (c)(1) (1994); *Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1010.

[76] *See* ESA § 7(c)(1), 16 U.S.C. § 1536(c)(1); *Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1010-11. The term "biological assessment" refers to "the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat." 50 C.F.R. § 402.02 (1998).

[77] *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); *Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1011. "Formal consultation" is "a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act." 40 C.F.R. § 402.02 (1998).

[78] *See* ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); *Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1011. A "biological opinion" is "the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02 (1998).

dent alternatives."[79] The Services' biological opinions are only advisory.[80] However, agencies run substantial risks of project interruption if they proceed contrary to the Services' recommendations.[81]

C. ESA Section 9: Prohibiting Actions That "Take" Listed Species

ESA section 9 and the Services' regulations broadly prohibit any act that will result in the "take" of listed species with certain, limited exceptions.[82] Section 9's take prohibition is self-limited to species which are listed as "endangered." However, ESA section 4(d) explicitly allows the Secretaries of Interior and Commerce to extend section 9's take prohibitions to "threatened" species.[83]

Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" any listed species or to attempt any such activity.[84]

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[79] *See* ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A); *Thomas v. Peterson*, 753 F.2d at 763; RODGERS, *supra* note 14, § 9.9 at 1011. "Reasonable and prudent alternatives" are "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is [sic] economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." *Id.*

[80] *See* RODGERS, *supra* note 14, § 9.9 at 1013.

[81] *See id.* at 1012.

[82] *See* 16 U.S.C. § 1538 (1994). Section 9 expressly allows take of endangered species as provided by a cooperative agreement between the Services and a state, *see* ESA § 6(g)(2), 16 U.S.C. § 1535(g)(2) (1994), or in compliance with an enumerated list of exceptions authorized under ESA section 10, 16 U.S.C. § 1539 (1994) (including scientific take permits, incidental take permits issued in conjunction with an authorized habitat conservation plan, economic hardship permits, Alaskan native take for subsistence purposes, and special take provisions for the release of experimental populations of "endangered" species). Other enumerated exceptions to Section 9's take prohibition include incidental take statements issued to federal agencies pursuant to ESA section 7(b)(4), 16 U.S.C. § 1536(b)(4) (1994), *see* ESA § 7(o)(2), 16 U.S.C. § 1536(o)(2) (1994); "God Squad" exemptions under ESA section 7(h), 16 U.S.C. § 1536(h) (1994), *see* ESA § 7(o)(1), 16 U.S.C. § 1536(o)(1) (1994); and regulated takings of threatened species as authorized under ESA section 4(d), 16 U.S.C. § 1533(d) (1994).

[83] *See* 16 U.S.C. § 1533(d) (1994). *See generally*, MUELLER, *supra* note 69, at 47-64 (comprehensively describing mechanics of ESA's take prohibitions and exceptions, and Services' regulations interpreting, implementing and augmenting ESA's provisions). USFWS has promulgated regulations extending section 9's take prohibition to all threatened fish, wildlife and plant species under its jurisdiction. *See* 50 C.F.R. §§ 17.31(a), 17.71(a) (1998). NMFS has taken a more cautious approach, and extends section 9's take prohibitions to threatened marine species on a case-by-case basis. *See, e.g.*, 50 C.F.R. §§ 227.11 (Guadalupe fur seal), 227.12 (Stellar sea lion), 227.21 (Sacramento River winter-run chinook salmon), 227.71(b) (several species of sea turtles) (1998).

[84] ESA § 3(19), 16 U.S.C. § 1532(19) (1994).

USFWS's regulations go even further to declare that "harm" under the ESA's definition of "take" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[85] Under this expansive definition, any action that modifies existing habitat — not just formally designated critical habitat — and results in actual death of or injury to listed species violates section 9.

The Secretaries of Interior and Commerce may assess a civil penalty of up to $25,000 for any knowing violation of the ESA or the Services' regulations implementing ESA section 9.[86] The Secretaries may also seek criminal penalties of up to $50,000 and one year imprisonment for such violations.[87] Lesser criminal and civil penalties may be assessed for knowing violations of the Services' other ESA regulations.

IV. The Intersection Between the ESA and the CWA: The Special Challenges of Protecting Listed Species Under the Clean Water Act

Given the above descriptions of the CWA and ESA, there is no question that EPA must adhere to ESA section 7(a)(2)'s mandate to avoid jeopardizing listed species when issuing federal NPDES permits. EPA's discretionary decision to issue a federal NPDES permit is clearly agency "action" within the meaning of the ESA and the Services' regulations.[88] As such, EPA must consult with the Services if it finds that issuance of any federal NPDES permit is likely to affect listed species.[89]

What remains unclear is whether — and how — ESA section 7 applies to EPA's approval and oversight of state NPDES programs. But, before examining this issue, a fundamental question must first be addressed: why does it matter?

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[85] 50 C.F.R. § 17.3 (1998). The Supreme Court has determined that USFWS's inclusion of habitat modification in its regulatory definition of "harm" does not exceed the Service's authority under the ESA. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697-703 (1995).

[86] *See* ESA § 11(a)(1), 16 U.S.C. § 1540(a)(1) (1994).

[87] *See* ESA § 11(b)(1), 16 U.S.C. § 1540(b)(1) (1994).

[88] *See supra* notes 50, 72-73 and accompanying text (explaining that EPA's decision to issue federal NPDES permit is discretionary, and that discretionary federal agency action triggers section 7(a)(2)'s requirements).

[89] *See supra* note 77 and accompanying text (explaining that federal agencies must engage in formal consultation under ESA section 7 if their discretionary actions are likely to affect listed species).

For example, according to Gary Aydell, Water Pollution Control Division Administrator for the Louisiana Department of Environmental Quality ("LDEQ"), EPA did not cite any evidence of past ESA violations or present threats to listed species when it approved Louisiana's proposed NPDES program.[90] Nevertheless, EPA specifically conditioned its approval of Louisiana's program on LDEQ's agreement to consult with the Services on individual, state-issued NPDES permits.[91] If EPA has little or no evidence of past injury to listed species or their critical habitat, what substantive value does ESA section 7 consultation add to EPA's approval and oversight of state-run NPDES programs?

A. The Value of Requiring Consideration for Listed Species and Critical Habitat in EPA's Approval and Oversight of State-Run NPDES Programs

1. National Implications of Delegating NPDES Permitting Authority to the States

Regardless of EPA's lack of explanation for requiring section 7 consultation in approving state NPDES programs, it is clear that the Services believe that state-issued NPDES permits may have deleterious site- and discharge-specific impacts on listed species. For example, in September of 1998, USFWS wrote a letter to LDEQ identifying thirty-nine "sensitive" water segments in Louisiana where state-issued NPDES permits may adversely affect federally listed species — including the inflated heelsplitter, Louisiana pearlshell, ringed sawback turtle and Gulf sturgeon.[92]

USFWS's letter requests that LDEQ provide information to the Services, and coordinate permit issuance with the Services and EPA, for any proposed permit that would authorize the release of certain toxic chemicals into Louisiana's

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[90] Telephone interview with Gary Aydell, Division Administrator, Water Pollution Control Division, Louisiana Department of Environmental Quality (Aug. 2, 1999) (notes on file with author). LDEQ's Water Pollution Control Division administers Louisiana's EPA-approved NPDES program. *Id.*

[91] *See AF&PA I*, 137 F.3d at 293-94; e-mail from Dale Givens, Secretary, Louisiana Department of Environmental Quality, to Keith G. Wagner (July 26, 1999) (on file with author).

[92] *See* 1997-98 Implementation Strategy for Louisiana Department of Environmental quality and the United States Fish & Wildlife Service Memorandum of Understanding [hereinafter LDEQ MOU 1997-98 Implementation Strategy], at § II.2., *mailed as attachment to* Letter from David W. Frugé, Field Supervisor, USFWS, to Gary Aydell, Administration, Water Pollution Control Division, LDEQ (Sept, 28, 1998) (on file with author) (extending terms of LDEQ MOU 1997-98 Implementation Strategy to cover LDEQ's NPDES permitting activities through 1999).

sensitive waters.[93] USFWS's letter also requests coordination with the Services and EPA on state-issued permits authorizing sanitary sewage treatment, landfill activities, or sand and gravel operations upstream from these sensitive waters.

The import of USFWS's concerns is magnified when considered at the national level. Currently, forty-four states and territories issue NPDES permits under EPA-approved, state-run NPDES programs.[94] Over 200,000 point-sources are regulated by NPDES permits nationwide.[95] These numbers suggest that approximately 170,000 NPDES permits exist by virtue of state, rather than federal, authority.[96]

The federal government currently recognizes 1174 "endangered" and "threatened" plant and animal species within the United States.[97] Of the nation's 477 federally listed endangered animal species, 216 are clearly water dependent: 110 fish, 69 clams, 20 crustaceans and 17 amphibians.[98] Most animal species in the remaining categories — mammals, birds, reptiles, snails, insects and arachnids — also depend on adequate ambient water quality.

Recent scientific studies show that habitat loss due to non-point source pollution is the single greatest threat to aquatic biodiversity in the United States.[99] Agriculture, livestock grazing, mining, logging, infrastructure development, road construction, military activities, outdoor recreation, off-road vehicle use, water diversions and land conversion are all activities which have destroyed or degraded the aquatic habitat of threatened and endangered species.[100] As demon-

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[93] *See id.* The LDEQ MOU 1997-98 Implementation Strategy lists fourteen specific chemicals that require notification to the Services for sensitive waters including endosulfan, hexachlorobenzene, dioxins, arsenic, lead, mercury, cyanide and pentachlorophenol. *See id.*

[94] *See* EPA, *State NPDES Program Status* (last modified Sept. 9, 1998) <http://www.epa.gov/owm/stat.pdf> (on file with author).

[95] *See* EPA, *Office of Wastewater Management – NPDES Permit Programs* (last modified Oct. 27, 1997) <http://www.epa.gov/owm/gen2.htm> (on file with author).

[96] 44 state NPDES programs divided by 52 states and territories means that 85% of existing NPDES permits have been issued under state authority. 85% of the existing 200,000 NPDES permits translates into 170,000 state-issued permits.

[97] *See* 50 C.F.R. §§ 17.11-.12 (1998); USFWS, *Box Score, Endangered Species; U.S. Fish & Wildlife Service* (last modified Apr. 30, 1999) <http://www.fws.gov/r9end.spp/boxscore.html> [hereinafter *Box Score*] (on file with author).

[98] *See* 50 C.F.R. §§ 17.11-.12; *Box Score*, *supra* note 97.

[99] *See* David S. Wilcove, et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 609, 611-12 (1998). "A nonpoint source . . . should be understood as any source of water pollution or pollutants not associated with a discrete conveyance." RODGERS, *supra* note 14, § 4.1 at 303.

[100] *See* Wilcove, *supra* note 99, at 611 (box titled *The major categories of habitat destruction used in this analysis*); *id.* at 612, Table 4.

strated by the Services' concerns in Louisiana, injury to listed species and damage to their habitat caused by non-point source pollution will only be exacerbated if states refuse to work with EPA and the Services to ensure that state-permitted, point source discharges will not further jeopardize listed species or adversely modify critical habitat.

2. ESA Section 7 Consultation as a Superior Alternative to ESA Section 9's Prohibition of "Take"

Accepting the fact that state NPDES permitting activity has real potential to injure listed species and damage critical habitat, the next logical question is whether ESA section 7 consultation serves any useful purpose in light of the ESA's severe sanctions for killing or injuring listed species.[101] ESA section 9's prohibition on the "take" of listed species, coupled with the ESA's civil and criminal sanctions, seem to provide strong, across-the-board incentives — both to states agencies and to individual permittees — to avoid actions that may harm listed species or their actual habitat. Nevertheless, several factors suggest that section 7's proactive consultation requirements confer added value that transcends section 9's after-the-fact penalties.

Section 7's consultation process separates biological decisionmaking from policy decisionmaking.[102] In the context of state-run NPDES programs, requiring section 7 consultation places questions of biological significance with the Services and leaves the policy decisions of whether to delegate NPDES authority and whether to object to specific state-issued permits with EPA. This "separation of function" has two benefits. First, the Services — as the agencies entrusted with listing, protecting and recovering imperiled species — will almost certainly have greater expertise in determining whether a state's proposed NPDES program or permit will likely jeopardize listed species or adversely modify critical habitat.[103] In contrast, isolated decisionmaking by EPA would rest on little, if any, reliable biological information. Second, separating biological decisionmaking from policy decisionmaking helps insulate against problems of agency capture

[101] *See supra* notes 86-87 and accompanying text (describing penalties for criminal and civil violations of ESA's take prohibition).

[102] *See* Steiger, *supra* note 3, at 256-57.

[103] *See id.*

by separating evaluations of impacts to listed species from the NPDES program's federal-state and permitter-permittee relationships.[104]

Identification and preservation of mitigation and recovery options is another benefit of early consultation.[105] Requiring advance consideration for listed species may result in adjustments which allow a proposed permit to be issued, while preserving the greatest range of acceptable opportunities for species survival and recovery. As explained above, even if the Services find that a proposed permit is likely to jeopardize the existence of listed species or adversely modify critical habitat, the most the Services can do is recommend "reasonable and prudent alternatives," unless jeopardy simply cannot be avoided.[106] As an empirical fact, the number of project stoppages resulting from the Services' jeopardy opinions is "vanishingly thin."[107] Several commentators attribute the Services consistent ability to provide "reasonable and prudent alternatives" to political rather than scientific underpinnings.[108] Nevertheless, the fact remains that more alternatives for species preservation are available earlier in the decisionmaking process with section 7 consultation than without.

Enforcement problems provide a third reason for preferring consultation over sanctions. Although section 9's threat of fines and penalties appears to be a strong disincentive, actual enforcement of the ESA's "take" prohibition with regard to water pollution may prove to be exceptionally difficult, if not impossible. Enforcement difficulties arise on three levels. First — as a practical matter — detection of violations is problematic. USFWS and NMFS simply do not have the personnel to continuously monitor 170,000 point-sources of discharge for signs of take.[109] Second, even if the Services do detect or are made aware of take,

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[104] *See id.* at 257.

[105] *See id.*

[106] *See supra* note 79 and accompanying text.

[107] RODGERS, *supra* note 14, § 9.9 at 1011. According to Professor Rodgers, one study of the five year period from 1987 to 1982 found that USFWS engaged in 71,560 informal consultations and 2000 formal consultation which ultimately resulted in the termination of only 18 proposed projects (less than .02% of all consultations). *See* Oliver Houck, *The Endangered Species Act & Its Implementation by the U.S. Departments of Interior & Commerce*, 64 COLO. L. REV. 277, 317-320 (1993), *cited in* RODGERS, *supra* note 14, § 9.9 at 1011.

[108] *See, e.g.*, RODGERS, *supra* note 14, § 9.9 at 1011 (stating that USFWS's reasonable and prudent alternatives often contain "charitable assumptions about the behavior and consequences that would allow the project to co-exist with the species"); Houck, *supra* note 107, at 320 (stating that USFWS often rules out more protective measures for listed species in favor of alternatives that are "within the economic means, authority, and ability of the applicant"); Steiger, *supra* note 3, at 257, n.75 (stating that political pressures caused USFWS's objectivity to "lapse on occasion, if not regularly, during the Reagan-Bush era").

[109] *See supra* note 96.

proving that a particular pollutant was the actual cause of habitat modification, injury or death may be difficult, costly and time consuming. Finally, after the actual cause of injury has been determined with some degree of certainty, establishing individual guilt or liability may still be a practical impossibility.[110] In the abstract, section 9 appears to be an "equalizing force" that could moot application of section 7. In practice, section 9 is likely to have the effect of a ferocious guard dog on a two-inch leash.[111]

Finally, section 7's prophylactic role must not be underestimated. Section 9 applies only *after* listed species have been injured or their habitat destroyed. Section 9 may be effective, under limited circumstances, for exacting retribution against persons who knowingly take listed species.[112] However, the ESA's maximum penalties of $50,000 and one year of imprisonment hardly compensate future generations for permanent, irreversible losses of biodiversity. Regardless of its imperfections, section 7 consultation has prevented or ameliorated the most severe aspects of many proposed projects.[113] When properly implemented, section 7 provides proactive safeguards against the most egregious of federal actions, and prevents individuals — who may not have the intestinal fortitude to avoid political pressure and financial incentives — from covertly gambling with our nation's collective esthetic, ecological, educational, historical, recreational and scientific capital.[114]

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[110] For example, suppose there are three factories on a "sensitive" river segment. Each factory discharges arsenic into the river in amounts authorized by their EPA-approved, state-issued NPDES permit. Scientific measurements upstream of all three factories show that the river contains naturally occurring amounts of arsenic. A federally listed gulf sturgeon is found dead downstream of the three factories. Biologists conclusively determine that arsenic was the cause of death. The biologists determine that the total arsenic load downstream of the factories exceeds the threshold of toxicity for gulf sturgeon. However, the amount of arsenic required to kill a gulf sturgeon substantially exceeds the authorized amount of arsenic emitted by any single polluter. In such situations, the likelihood of criminal prosecution is zero. And, even under a civil complaint, who should be named as defendants? Who should be held liable? The state (which relied on EPA's review in issuing the permit)? The factories (which each fully complied with their NPDES permits)? EPA (which only engages in *inaction* by not objecting to state permits)? And in what proportions?

[111] As noted by Professor Rodgers, "The legal designer that can make compliance [with ESA section 9] the norm . . . will deserve the first Nobel prize in law." RODGERS, *supra* note 14, § 9.9 at 1018.

[112] A long history of court decisions imposing only token fines and probation for serious violations further erodes section 9's effectiveness. "[T]he conspicuous markers in this legal world are paltry penalties that are unlikely to deter future offenders." *Id.* at 1017-18 (citations omitted).

[113] *See, e.g.*, Houck, *supra* note 107, at 319 (noting that section 7 consultation, although most often providing politically easy alternatives, has prevented "the most jeopardizing actions").

[114] *See* ESA § 2(a)(3), 16 U.S.C. § 1531(a)(3) (1994) (recognizing that threatened and endangered species are of esthetic, ecological, educational, historical, recreational and scientific value).

B. Views on the Application of ESA Section 7 to State-Run NPDES Programs

As explained above, section 7 consultation serves a valuable function in EPA's approval and oversight of state NPDES programs. However, there is ongoing disagreement whether CWA section 402(b) allows EPA to mandate consultation procedures when delegating NPDES permitting authority to the states. EPA recently insisted that its delegation to the state must be accompanied by consultation provisions to meet ESA section 7(a)(2)'s requirements.[115] In response, the Fifth Circuit ruled that EPA must approve state-run NPDES programs that meet CWA section 402(b)'s nine enumerated requirements, regardless of the impacts to listed species or critical habitat.[116]

In 1994, John Steiger explained the confusion surrounding section 7(a)(2)'s application to state NPDES programs. According to Steiger, the issue is whether EPA exercises sufficient discretion to trigger section 7(a)(2)'s requirements when it approves states' proposed NPDES programs and when it reviews individual state-issued permits.[117] Steiger opined that agency "discretion" exists on a continuum ranging from statutes flatly requiring agency action to those allowing agencies broad latitude in deciding whether or how to effect the statute's intent.[118] Steiger argued that ESA section 7(a)(2) applies wherever agency action contains an element of discretion, no matter how limited. Steiger concluded that EPA's discretion in deciding whether CWA section 402(b)'s nine conditions have been met, and whether to veto proposed state permits, triggers ESA section 7(a)(2)'s requirements.[119]

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[115] *See infra* notes 120-42 and accompanying text.

[116] *See infra* notes 145-60 and accompanying text.

[117] *See* Steiger, *supra* note 3, at 264.

[118] *See id.* at 264-65.

[119] *See id.* at 327. Steiger states:

> If section 7(a)(2) applies so long as the action agency has any discretion to prevent the action . . . it makes no difference that the CWA and its regulations do not provide EPA with authority to refuse to delegate a NPDES program or veto a proposed permit to prevent harm to fish and wildlife. Because both the delegation and the exercise of review and veto authority fall within section 7(a)(2)'s definition of "any action" that is "authorized, funded or carried out," section 7(a)(2) is triggered.

Id. at 265-66 (citations omitted).

1. EPA's Past Views on Section 7's Scope as Applied to State-Run NPDES Programs

Prior to 1994, EPA insisted that it did not have authority under CWA section 402 to require ESA section 7(a)(2) consultation in its approval and oversight of state-run NPDES programs. For example, in a 1991 case filed in the Northern District for Alabama, *Mudd v. Reilly*, USFWS had requested EPA to engage in section 7 consultation regarding various EPA actions in relation to Alabama's NPDES program.[120] EPA refused USFWS's request as being beyond EPA's CWA section 402(b) authority. EPA's reply brief in *Mudd v. Reilly* asserted that EPA's approval of state NPDES programs is "mandatory" as long as CWA section 402(b)'s nine conditions are met, and that section 7(a)(2) only applies to "discretionary" agency action.[121] *Mudd v. Reilly* was settled out of court when EPA agreed to reopen and enter formal consultation on its 1991 approval of Alabama's state water quality standards.[122] As a result, the district court never addressed the key question of whether EPA's approval and oversight of state NPDES programs requires section 7 consultation.

However, by 1996 — most likely as a result of its experience in *Mudd v. Reilly* — EPA had reversed its position.[123] For example, in 1996, EPA required LDEQ to consult with the Services on proposed state NPDES permits that might affect Louisiana's listed species and their critical habitat as a condition of approving Louisiana's proposed NPDES program.[124] EPA required identical provisions in approving Oklahoma's NPDES program later that same year.[125]

Before approving Louisiana's proposed NPDES program, EPA required LDEQ to sign a Memorandum of Agreement ("LDEQ MOA") delineating EPA

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[120] *See Mudd v. Reilly*, No. CV-91-P-1392-S (N.D. Ala. filed June 19, 1991), *cited in* Steiger, *supra* note 3, at 250-51.

[121] *See* Steiger, *supra* note 3, at 266 n.118.

[122] *See id.* at 250-51.

[123] Telephone interview with Gary Aydell, Division Administrator, Water Pollution Control Division, Louisiana Department of Environmental Quality (Aug. 2, 1999). In response to the question "Why do you think EPA required LDEQ to agree to consult with the Services?" Mr. Aydell expressed his belief that "some problems in Alabama" were the likely cause of EPA's decision to formally require consultation on individual permits as a condition of approving Louisiana's NPDES program.

[124] *See* State Program Requirements; Approval of Application by Louisiana to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Louisiana, 61 Fed. Reg. 47,923 (1996) [hereinafter LPDES Final Rule].

[125] *See* State Program Requirements; Approval of Application by Oklahoma to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 61 Fed. Reg. 65,047 (1996).

and LDEQ's respective responsibilities.[126] The LDEQ MOA requires LDEQ and the Services to develop separate Memoranda of Understanding (MOUs) outlining specific ESA consultation procedures between LDEQ and each Service.[127] The LDEQ MOA also provides that LDEQ will generally consult with the Services on issues relating to the protection of fish, shellfish, wildlife and listed species when issuing state NPDES permits.[128]

LDEQ's MOUs with the Services require consultation processes that essentially mirror federal agency responsibilities under ESA section 7(a)(2).[129] Under the MOUs, each Service annually provides LDEQ with a list of Louisiana's water segments — termed "sensitive waters" — containing listed or proposed species and their critical habitat.[130] The Services' lists delineate specific species of concern and describe specific types of discharges for each sensitive water segment.[131] If a permit application involves a listed type of discharge into sensitive waters, LDEQ must provide the appropriate Service with information about the application and its determination whether the proposed permit "is not likely to adversely affect" or "may affect" listed species.[132] The MOUs provide that if either LDEQ or the Services determine that a draft permit is "likely to affect a listed species, a designated critical habitat, jeopardize a proposed species, or adversely

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[126] *See Memorandum of Agreement Between the Louisiana Department of Environmental Quality and the United States Environmental Protection Agency* (visited Aug. 2, 1999) <http://ftp.deq.state.la.us/owr/npdes/moa.htm#A18> [hereinafter LDEQ MOA] (on file with author). EPA's regulations require all states to sign a Memorandum of Agreement with EPA before EPA will approve the state's NPDES program. *See* 40 C.F.R. § 123.24 (1998).

[127] *See* LDEQ MOA, *supra* note 126, at § III.E.1.d.

[128] *See id.* at § III.E.1.b.

[129] *See* Agreement No. 1448-0004-96-907, Louisiana Department of Environmental Quality & United States Fish & Wildlife Service, Memorandum of Understanding (Mar. 22, 1997) [hereinafter USFWS MOU] (on file with author); Louisiana Department of Environmental Quality & National Marine Fisheries Service, Cooperative Endangered Species Procedures for the Louisiana Pollutant Discharge Elimination System (LPDES) Program (Aug. 21, 1996) [hereinafter NMFS MOU] (on file with author); *supra* notes 74-81 and accompanying text (describing ESA section 7's three-step consultation process).

[130] USFWS MOU, *supra* note 129, at 1, § II.1.; NMFS MOU, *supra* note 129 at 1, § II.1.

[131] Telephone interview with Gary Aydell, Division Administrator, Water Pollution Control Division, Louisiana Department of Environmental Quality (Aug. 2, 1999). *See supra* notes 92-93 and accompanying text (describing letter from USFWS to LDEQ requesting LDEQ to coordinate with Services on proposed state NPDES permits involving "sensitive waters" of Louisiana).

[132] Telephone interview with Gary Aydell, Division Administrator, Water Pollution Control Division, Louisiana Department of Environmental Quality (Aug. 2, 1999); *see* USFWS MOU, *supra* note 129, at 1-2, § II.2.; NMFS MOU, *supra* note 129 at 1-2, § II.2.

modify or destroy a proposed critical habitat," LDEQ and the Services will work together to modify the permit to avoid the adverse effect.[133]

The MOUs and the LDEQ MOA require LDEQ to notify EPA if LDEQ and the Services do not reach agreement on permit modifications.[134] Upon such notification, EPA may object to the permit and, if necessary, exercise its authority under CWA section 402(d)(4) to assume federal authority over issuing the permit.[135] EPA will engage in formal section 7 consultation with the Services before issuing the federalized permit under CWA section 402(a).[136]

EPA rested its authority to require state ESA "consultation" before approving state NPDES programs on three bases. First, EPA cited CWA section 304(i), which allows EPA to promulgate guidelines establishing "procedural and other elements" of state NPDES programs.[137] Second, EPA relied on a 1997 D.C. Circuit decision, *American Iron & Steel Institute v. EPA* ("*AISI*").[138] In *AISI*, the D.C. Circuit held that EPA could require states to engage in ESA consultation in con-

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[133] USFWS MOU, *supra* note 129, at 2, § II.2.; NMFS MOU, *supra* note 129 at 2, § II.2.; *See* LDEQ MOA, *supra* note 126, at § III.E.1.d. ("LDEQ will address and attempt to resolve any issues raised by [the Services].").

[134] *See* USFWS MOU, *supra* note 129, at 2, § II.2.; NMFS MOU, *supra* note 129 at 2, § II.2.; LDEQ MOA, *supra* note 126, at § III.E.1.d. ("In the event that agreement is not reached on any issue raised by these agencies, LDEQ shall notify EPA in writing prior to permit issuance.").

[135] *See supra* text accompanying notes 58-61. "EPA will formally object to the issuance of the draft permit if [the Services] determine[] that the action is likely to jeopardize the continued existence of a listed or proposed species or destroy designated critical habitat." LPDES Final Rule, *supra* note 124, at 47,934. "If EPA's concerns are not satisfied . . . , LDEQ may not issue the permit and exclusive authority to issue the permit vests in EPA." LDEQ MOA, *supra* note 126, at § III.E.1.d.

[136] *See* LPDES Final Rule, *supra* note 124, at 47,934; *supra* notes 49-50 and accompanying text (explaining that EPA's decision to issue federal NPDES permit is discretionary federal action).

[137] *See AF&PA I*, 137 F.3d at 297. CWA section 304(i)(2) provides that:

> The administrator shall . . . promulgate guidelines establishing the minimum procedural and other elements of any State [NPDES] program . . . which shall include: . . . monitoring requirements; . . . reporting requirements . . . ; enforcement provisions; . . . and funding, personnel qualifications and manpower requirements . . . .

33 U.S.C. § 1314(i)(2) (1994). The legislative history of the CWA indicates that section 304(i) was primarily intended to establish uniform national procedures for state program approvals. *See* S. Rep. No. 92-414, at 54 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3720. The Senate Report states that:

> [S]ection [304(i)] requires the Administrator to promulgate guidelines establishing the minimum requirements for the acquisition of information from owners and operators of point sources applying for permits under section 402. It is intended that the program under section 402 will . . . be uniform in as many procedural requirements as possible.

Id.

[138] 115 F.3d 979 (D.C. Cir. 1997).

nection with certain state-run CWA programs in the Great Lakes Basin.[139] Finally, EPA asserted that the Supreme Court's statements in *Tennessee Valley Authority v. Hill* (*TVA v. Hill*) compel EPA to include ESA consultation as a condition of approving state-run programs.[140] In *TVA v. Hill*, the Supreme Court expansively stated that ESA section 7(a)(2)'s mandate to avoid agency action that will likely jeopardize listed species or result in adverse habitat modification "admits of no exception."[141] The Supreme Court also stated that the ESA's mandate is to be given priority over federal agencies' "primary missions."[142]

2. Judicial Reaction to EPA's Views on Section 7's Scope as Applied to State-Run NPDES Programs

Following EPA's conditional approval of Louisiana and Oklahoma's NPDES programs, the American Forest & Paper Association (AF&PA) filed suit in the Fifth and Tenth Circuits.[143] In both cases, AF&PA challenged EPA's authority to require ESA consultation as a condition of approving state-run NPDES programs. The Tenth Circuit dismissed AF&PA's challenge to Oklahoma's NPDES program on procedural grounds.[144] However, in *AF&PA I*, the Fifth Circuit rejected EPA's procedural defenses, and reached the merits of AF&PA's claim.

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[139] *See id.* at 1002-03. CWA section 118(c)(2)(A) directs EPA to promulgate "numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife." 33 U.S.C. § 1268(c)(2)(A) (1994). EPA used this authority to promulgate a regulation requiring that state-issued permits in the Great Lakes Basin include provisions to avoid jeopardy of listed species and adverse critical habitat modification. *See* 40 C.F.R. § 132.5(h) (1998). In *AISI*, the D.C. Circuit rejected the American Iron & Steel Institute's claim that EPA lacked authority to promulgate this regulation. *See AISI*, 115 F.3d at 1003. Instead, the D.C. Circuit found that CWA section 118(c)(2)(A) provides ample authority for EPA's regulation: "Obviously, if impaired water quality will likely cause the extinction of species, such water quality would not meet [CWA section 118(c)(2)(A)'s] requirements." *Id.* The D.C. Circuit never reached the question of whether ESA section 7(a)(2) also required consultation.

[140] *See AF&PA I*, 137 F.3d at 298.

[141] *See TVA v. Hill*, 437 U.S. at 173. In *TVA v. Hill*, the Supreme Court held that Congress' continued approval of appropriations to complete the Tellico Dam did not constitute an implied waiver of ESA section 7(a)(2)'s affirmative mandate that actions authorized, funded or carried out by federal agencies not threaten the extinction of a listed species — in this case a 3" fish, commonly known as the snail darter — or the adverse modification of designated critical habitat.

[142] *See id.* at 185.

[143] *See AF&PA I*, 137 F.3d 291; American Forest & Paper Ass'n v. EPA, 154 F.3d 1155 (10th Cir. 1998) [hereinafter *AF&PA II*].

[144] *See AF&PA II*, 154 F.3d at 1159 (holding that AF&PA lacked standing because AF&PA had not identified any members who would suffer imminent injury as result of EPA's actions).

In *AF&PA I*, the Fifth Circuit reviewed EPA's interpretation of the CWA under the two-prong *Chevron* test.[145] Under the first prong of the *Chevron* test, a reviewing court examines whether Congress' intent is clear in enacting a statute.[146] If so, the court will uphold the agency's construction only if it complies with Congress' intent.[147] If Congress' intent is not clear, the court moves to the second prong of the *Chevron* test and examines whether the agency's interpretation is a permissible construction of the statute.[148] Under *Chevron*'s second prong, a reviewing court should grant deference to an agency's reasonable interpretation of a statute that it administers.[149] Thus, the Fifth Circuit indicated it would defer to EPA's reasonable interpretation of ambiguous language in the CWA.[150]

Looking first to the CWA's statutory language, the Fifth Circuit declared that CWA section 304(i) only grants EPA limited authority to promulgate procedural regulations governing the approval of state-run NPDES programs.[151] The Fifth Circuit then invoked the maxim of *expressio unius est exclusio alterius* by pointing to CWA section 402(b)(6).[152] Section 402(b)(6) provides that state NPDES programs must have provisions allowing the Secretary of Army to object to permits which will impair anchorage or navigation.[153] According to the Fifth Circuit, "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species."[154] Based on its analysis of sections 304(i) and 402(b)(6), the Fifth Circuit concluded under *Chevron*'s first prong that Congress

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[145] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

[146] *See id.* at 842.

[147] *See id.* at 842-43.

[148] *See id.* at 843.

[149] *See id.* at 843 n.11.

[150] *See* CWA § 101(d), 33 U.S.C. § 1251(d) (1994) (delegating administration of CWA to EPA Administrator); *AF&PA I*, 137 F.3d at 297.

[151] *See AF&PA I*, 137 F.3d at 298. It appears from the CWA's legislative history that section 304(i) was only intended to establish procedural regulations for approving state NPDES programs. *See* S. Rep. No. 92-414, at 54 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3720; *supra* note 137. However, section 304(i) also contains ambiguous language regarding EPA's ability to generate "other elements" of state programs. *See* CWA § 304(i)(2), 33 U.S.C. § 1314(i)(2) (1994). By limiting section 304(i) to only cover procedural regulations, the Fifth Circuit arguably ignored the existence of ambiguous language (i.e., "other elements"), and, under the second prong of the *Chevron* test, improperly rejected EPA's reasonable interpretation of the CWA.

[152] 33 U.S.C. § 1342(b)(6) (1994). *See AF&PA I*, 137 F.3d at 297-98. The Latin phrase *expressio unius est exclusio alterius* means, "[t]he expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 1635 (7th ed. 1999).

[153] *See* 33 U.S.C. § 1342(b)(6) (1994); *supra* note 52.

[154] *AF&PA I*, 137 F.3d at 298.

intended to strictly limit EPA's review of proposed state NPDES programs to section 402(b)'s nine enumerated criteria.[155]

The Fifth Circuit next distinguished *AISI*. First, the Fifth Circuit noted that *AISI* involved CWA section 118(c), not section 402(b).[156] CWA section 118(c) grants EPA authority to specify pollution limits and to develop "guidance" for state programs in the Great Lakes Basin.[157] The Fifth Circuit found it highly significant that section 118(c) specifically mentions the protection of aquatic life and wildlife, while section 402(b) does not. The Fifth Circuit concluded, "*AISI*'s reasoning, insofar as it concerns a section of the CWA that materially differs in language and purpose, is inapplicable here."[158]

Finally, the Fifth Circuit summarily rejected EPA's reliance on *TVA v. Hill*. The Fifth Circuit opined that *TVA v. Hill* was inapplicable because EPA's "agency action" in approving proposed state NPDES programs lacks sufficient discretion to trigger ESA section 7(a)(2)'s requirements.[159] "Even if EPA were required [by

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[155] *See id.* The Fifth Circuit's conclusion that the existence of section 402(b)(6) precludes EPA from requiring state ESA consultation on select permits is non sequitur. At the most, the Fifth Circuit's *expresio unius* rationale supports the conclusion that EPA cannot require states programs to grant veto authority to departments other than the Army. LDEQ's MOA and MOUs never stated or implied that the Services could unilaterally veto state permits. These documents only exercised EPA's *express* authority under CWA section 402(d)(2)(B), 33 U.S.C. § 1342(d)(2) (1994), to object to permits "outside the guidelines and requirements" of the CWA — which includes Congress' goal of achieving, wherever attainable, "water quality which provides for the protection . . . of fish, shellfish, and wildlife." CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2) (1994). *See supra* text accompanying notes 20, 27, 58-61 (explaining CWA's goal of protecting fish, shellfish and wildlife, and describing EPA's authority to object to proposed state NPDES permits).

[156] *See AF&PA I*, 137 F.3d at 298; *supra* note 139.

[157] *See* 33 U.S.C. § 1268(c) (1994); *supra* note 139.

[158] *AF&PA I*, 137 F.3d at 298. The Fifth Circuit's comparison of CWA section 402(b) and section 118(c) is unduly rigid and formalistic. It also imposes impossible and undesirable requirements on Congress to ensure that EPA achieves the CWA's goals. It is certainly true that section 402(b) itself never specifically mentions the protection of "aquatic life and wildlife" when approving proposed state NPDES programs. However, CWA section 402(d) allows EPA to object to the issuance of, and federalize if necessary, any permit which falls outside of the "guidelines and requirements" of the CWA. *See* CWA § 402(d)(2)(B), 33 U.S.C. § 1342(d)(2)(B) (1994); *supra* text accompanying notes 58-61. CWA section 101(a)(2) states the CWA's long-standing goal of protecting fish, shellfish, and wildlife. *See* 33 U.S.C. § 1251(a)(2) (1994); *supra* text accompanying notes 20, 27. And, CWA section 101(a)(3) prohibits the discharge of toxic pollutants in toxic amounts. *See* 33 U.S.C. § 1251(a)(3); *supra* note 19 and accompanying text. Through its myopic dissection and isolation of section 402(b), the Fifth Circuit would apparently write the CWA's purpose out of existence in every subsection where Congress forgets to repeat its overarching intent to protect *all* fish, shellfish, and wildlife — including those on the brink of extinction.

[159] *See AF&PA I*, 137 F.3d at 298, n.6. To bolster its holding, the Fifth Circuit relied on a poorly reasoned 1992 D.C. Circuit opinion, *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) [hereinafter *Platte River II*]. In *Platte River II*, an environ-

TVA v. Hill] to consult with [USFWS and NMFS] before approving Louisiana's program, EPA lacks the authority to modify the plain language of the CWA by adding to [section 402(b)'s] list of enumerated requirements."[160]

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mental group challenged the Federal Energy Regulatory Commission's ("FERC") failure to include protective conditions for designated whooping crane critical habitat in relicensing a hydroelectric plant. *See Platte River II*, 962 F.2d at 30. Under the Federal Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended in scattered sections starting at 16 U.S.C. § 791a (1994)) [hereinafter FPA], FERC may only impose new conditions "under the terms and conditions of the existing license," and even then only upon "mutual agreement between the licensee and [FERC]." FPA §§ 6, 15(a)(1), 16 U.S.C. §§ 799, 808(a)(1) (1994). In *Platte River II*, the environmental group claimed that ESA section 7(a)(2) supersedes the limits of FERC's authority under the FPA, and requires FERC to do "whatever it takes" to protect endangered species. *See Platte River II*, 962 F.2d at 34. The *Platte River II* court declined to follow this interpretation of ESA section 7(a)(2), stating, "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives," and that *TVA v. Hill*, "which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purpose of the ESA, is hardly authority to the contrary." *Id.*

As John Steiger points out, the analysis in *Platte River II* is flawed. *See* Steiger, *supra* note 3, at 277-78. *Platte River II* improperly grafted section 7(a)(1)'s requirement — that agencies "utilize their authorities" to carry out programs for the conservation of listed species — onto section 7(a)(2)'s unqualified mandate that *any* action "authorized, funded or carried out" by an agency not jeopardize listed species or adversely modify critical habitat. *See id.*

> [T]he implication in *Platte River II* that section 7(a)(2) does not allow the agency to decline actions for reasons not otherwise authorized by its programmatic statute is contradicted by *TVA*, subsequent legislative history, and other case law. . . . Although the Tennessee Valley Authority did not point to an inconsistent programmatic statute, it did rely on continued appropriations and fairly clear legislative history to argue that Congress intended for [the Authority] to complete [Tellico Dam] notwithstanding section 7. The Supreme Court's firm rejection of this argument at least should call into doubt *Platte River II*'s snide dismissal of [*TVA v. Hill*] as "hardly authority to the contrary."

Steiger, *supra* note 3, at 278 (citations omitted).

[160] *AF&PA I*, 137 F.3d at 298 n.6. The Fifth Circuit's analysis on this point is plainly erroneous. Determining whether section 7(a)(2) applies to EPA's approval of state-run NPDES programs does not hinge on EPA's ability to "add to section 402(b)'s list of enumerated requirements." The Fifth Circuit may have been correct if it had stated that ESA section 7(a)(1) does not allow EPA to go beyond its authorities in adding to CWA section 402(b)'s requirements. *See* 16 U.S.C. § 1536(a)(1) (1994); *supra* text accompanying note 70. However, under a proper section 7(a)(2) analysis, what the Fifth Circuit should have examined is whether CWA section 402(b) grants EPA sufficient *discretion* in approving the state's proposed NPDES program to trigger section 7(a)(2)'s requirements. *See supra* notes 71-73, 117-19 and accompanying text (explaining ESA section 7's requirement that federal agencies consult if discretionary action is likely to affect listed species, and Steiger's argument that any agency discretion is enough to trigger section 7's requirements). If EPA exercises discretion when approving the states' NPDES programs, section 7(a)(2) requires EPA to decline approval if it will likely jeopardize listed species or adversely modify critical habitat. *See* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1994); *TVA v. Hill*, 437 U.S. at 173; *supra* notes 71-73, 117-19, 141-42 and accompanying text (explaining ESA's section 7's requirement of consultation for discretionary federal actions, Steigers arguments that any discretionary action is enough to trigger section 7's requirements, and *TVA v. Hill*'s holding that there is no exception to section 7(a)(2)'s requirements).

V. EPA AND THE SERVICES' JOINT MEMORANDUM OF AGREEMENT ON ENHANCED COORDINATION UNDER THE CWA AND THE ESA

In February of 1999, EPA and the Services published a Draft MOA outlining a nationwide plan for incorporating endangered species protection into EPA's approval and oversight of state-run NPDES programs. The Draft MOA establishes a uniform, national procedural framework that "ensures a consistent, appropriate level of protection for listed species, and avoids the need to continue developing procedures on a case-by-case basis."[161]

The Draft MOA dismisses *AF&PA I* as "wrongly decided."[162] Nevertheless, the Draft MOA carefully works within the limits of the Fifth Circuit's decision. Instead of requiring state consultation on certain state NPDES permits, the Draft MOA sets forth a plan to promulgate new national regulations and only *requires* ESA section 7(a)(2) consultation between EPA and the Services.[163]

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[161] Draft MOA, *supra* note 7, at 2745.

[162] "While EPA believes that [*AF&PA I*] was wrongly decided, the procedures in the draft MOA are within EPA's authorities under the [Fifth Circuit's] reading of the CWA." *Id.* EPA and the Services distinguish the Draft MOA's process by pointing out that the Draft MOA is only between federal agencies, and imposes no new obligations or commitments on any state in administering its own NPDES program. *See id.* at 2746. The Draft MOA explicitly states that EPA will not impose conditions beyond CWA section 402's nine enumerated requirements when approving proposed state NPDES programs. *See id.*

[163] The Draft MOA also establishes 1) procedures to facilitate interagency cooperation, including mechanisms for information sharing and resolving disagreements that arise between EPA and the Services, *see id.* at 2747-50, § V.; 2) an interagency, interdisciplinary research committee that will make recommendations to EPA and the Services regarding water quality standards and criteria, *see id.* at 2752, § VII.; and, 3) specific section 7 consultation procedures for EPA's issuance of federal NPDES permits, *see id.* at 2756, § IX.C. These sections of the Draft MOA are not examined in this Article because they do not directly affect the relationships between states and federal agencies in the approval and oversight of state-run NPDES programs. With regard to the last point (federal section 7 consultation), even the Fifth Circuit appears to agree that EPA has the power — if not the duty — to consult with the Services before issuing federal NPDES permits. *See AF&PA I*, 137 F.3d at 294 (acknowledging without criticism EPA's "choice" to consult with Services before issuing federal NPDES permits in Louisiana prior to approval of Louisiana's NPDES program); *supra* notes 50, 71-73, 88-89 and accompanying text (explaining that EPA's issuance of federal NPDES programs is a discretionary action, that ESA section 7(a)(2) is triggered by discretionary federal agency action, and that EPA must, therefore, comply with ESA section 7 when issuing federal NPDES permits).

A. Promulgation of National Regulations to Protect Listed Species Under the CWA

The Draft MOA calls for EPA to propose amendments to its "national water quality standards regulations."[164] Within twenty-four months of adopting the Draft MOA, EPA will formally propose a narrative, national water quality standard requiring "that water quality not likely jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat."[165] The Draft MOA additionally states that EPA's new regulation will require states to "adopt site-specific water quality criteria . . . where determined to be necessary to avoid a likelihood of jeopardy."[166]

B. Interagency Consultation Procedures Designed to Protect Listed Species and Critical Habitat

In addition to promulgating narrative standards and a regulation requiring site-specific, numeric criteria, the Draft MOA calls for four different levels of consultation. First, EPA and the Service will consult under section 7 to ensure that EPA's existing numeric water quality criteria guidance is sufficient to protect listed species. Second, the Draft MOA establishes consultation procedures between EPA and the Service designed to ensure that EPA's approval of state water quality standards will not jeopardize listed species or result in adverse critical habitat modification. Third, the Draft MOA establishes consultation procedures

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[164] Draft MOA, *supra* note 7, at 2750, § VI.A. The Draft MOA cites 40 C.F.R., Part 131 as the location of its "national water quality standards regulations." The closest reference to "national water quality standards" in Part 131 is EPA's "Federally Promulgated Water Quality Standards." *See* 40 C.F.R. Part 131, subpart D (1998). EPA's current federally promulgated standards are state-specific. The single exception is a regulation establishing numeric limitations for certain toxic pollutants. *See* 40 C.F.R. § 131.36 (1998). EPA's federal toxic limitations only apply to states that have failed to adopt their own toxic effluent standards as required by CWA section 302(c)(2)(B), 33 U.S.C. § 1312(c)(2)(B) (1994). Thus, EPA's one regulation that applies to multiple states is triggered only by a failure to comply with the CWA itself. EPA's authority to promulgate a "national water quality standard" based on the ESA, rather than the CWA, is uncertain at best. *See infra* notes 204-08 and accompanying text.

[165] Draft MOA, *supra* note 7, at 2750, § VI.A.; telephone interview with Barbara McLeod, Special Assistant to the Deputy Assistant Administrator, Office of Water, EPA (Aug. 20, 1999) (stating that EPA's new water quality standard under Draft MOA will not contain numeric, water-body specific limitations, but rather will be in simple narrative form). Ms. McLeod is EPA's primary contact regarding the Draft MOA. *See* Draft MOA, *supra* note 7, at 2742.

[166] *See id.* at 2750, § VI.A.

between EPA and the Services for EPA's review of proposed permits under state-run NPDES programs. Finally, the Draft MOA states that EPA and the Services will consult on whether implementing all of the above procedures will generally ensure that EPA's approval of proposed state NPDES programs will avoid jeopardizing listed species or adverse modification of critical habitat.

1. Programmatic Consultation on EPA's CWA Section 304(a) Numeric Aquatic-Life Water Quality Criteria Guidance

EPA and the Services will conduct a national consultation to assess the effect of EPA's current section 304(a) water quality criteria guidance on listed species and designated critical habitat.[167] Under this national consultation, EPA will make "effects determinations" on the direct and indirect effects of EPA's existing, numeric, aquatic-life water quality criteria guidance on listed species and their habitat.[168] The Services will then develop a biological opinion describing reasonable and prudent alternatives to EPA's existing guidance. If the Services' alternatives call for changes or additions, EPA will revise or promulgate new numeric guidelines to meet the Services' concerns.[169]

Many states expressly support national level consultation on EPA's water quality criteria guidance.[170] The States, EPA and the Services agree that "it would be more efficient for [EPA and the Services] to consult once nationally . . . rather than repeat the process on a case-by-case basis."[171] National level consultation will provide greater certainty as to what numeric criteria the states must adopt in their triennial review for EPA approval of their water quality standards. "The national consultation will provide section 7 coverage for any new water quality criteria included in State . . . water quality standards . . . that are identical to or more stringent than [EPA's] recommended section 304(a) criteria."[172]

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[167] *See id.* at 2751, § VI.C.1.

[168] *See id.* at 2751, § VI.C.2.

[169] *See id.*; *supra* text accompanying note 43 (explaining that CWA requires EPA's water quality criteria guidance to reflect latest scientific knowledge).

[170] Telephone interview with Barbara McLeod, Special Assistant to the Deputy Assistant Administrator, Office of Water, EPA (Aug. 20, 1999). *See* Draft MOA, *supra* note 7, at 2745.

[171] Draft MOA, *supra* note 7, at 2745.

[172] *Id.* at 2752, § VI.C.2; *see supra* text accompanying note 46 (noting that states can adopt water quality criteria different than EPA's guidance, but only if states' alternative criteria are scientifically defensible).

2. Consultation Procedures for EPA's Triennial Review of State Water Quality Standards

The Draft MOA also establishes detailed federal consultation procedures to ensure that the states' water quality standards will avoid jeopardy to listed species and adverse modification of critical habitat. The Draft MOA calls for the Services to provide the states and EPA with "information on Federally-listed species, proposed species and proposed critical habitat, and designated critical habitat" that are found within the state.[173] This information is offered to assist the state in preparing for its triennial review of state water quality standards. The Services will "work cooperatively with the States . . . to identify any concerns the Services may have [regarding the state's existing water quality standards] and how to address those concerns."[174]

If a state's pre-existing water quality standards fail to meet the Service's concerns, the Draft MOA provides that "EPA will work with the State . . . in the context of its triennial review to obtain revisions in the State . . . standards."[175] Under CWA section 303, the states have authority to adopt whatever water quality standards they wish on completion of the state's triennial review.[176] However, the Draft MOA flatly states, "Section 7 consultation [between EPA and the Services] is required if EPA determines that its approval of any of the [state's adopted] standards may affect listed species or designated critical habitat."[177]

In reviewing a state's adopted water quality standards, EPA will make a determination of "No Effect" or "May Affect" regarding listed species and their critical habitat.[178] EPA will transmit any "No Effect" determination, along with relevant information, to the Services on request.[179] If EPA determines that the state's water quality standards "May Affect" listed species or critical habitat, EPA will then determine whether the standards are likely to jeopardize listed species

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[173] Draft MOA, *supra* note 7, at 2753, § VIII.A.2.

[174] *Id.*

[175] *Id.* at 2754, § VIII.B.

[176] *See supra* text accompanying note 36-38 (explaining states' initial authority to propose and adopt water quality standards).

[177] Draft MOA, *supra* note 7, at 2753, § VIII.A.3.

[178] *See id.* at 2753, § VIII.A.5.

[179] *See id.* If the Services dispute EPA's "No Effect" determination, section V.2. of the Draft MOA provides a series of detailed interagency elevation and review procedures to resolve the conflict. *See id.* at 2747-50, § V.

or adversely modify critical habitat. If EPA finds jeopardy or adverse modification are likely, EPA will enter formal consultation with the Services.[180]

Following formal consultation, the Services shall issue a biological opinion outlining reasonable and prudent alternatives to EPA's approval of the state's water quality standards.[181] The Services' alternatives may suggest that EPA work with the state to adopt or revise standards that will avoid the jeopardy determination, or may even go so far as to recommend that EPA unilaterally disapprove relevant portions the state's standards and exercise its authority under CWA section 303(c)(4)(B) to promulgate federal water quality standards for the state.[182] EPA will consult with the Services before revising state water quality standards or promulgating federal water quality standards for the state.[183]

The Draft MOA explicitly declines to force any part of these consultation duties directly upon the states.[184] However, the Draft MOA does not categorically prohibit state involvement. If a state wants to participate in the federal consultation processes, the state can voluntarily request designation as EPA's "non-Federal representative" to conduct consultation with the Services.[185]

3. Consultation Procedures for Individual State-Issued NPDES Permits

The Draft MOA also establishes federal consultation procedures to ensure that EPA's review of individual, proposed state NPDES permits will not result in jeopardy or adverse habitat modification. The Draft MOA provides that EPA will ensure, "in accordance with existing CWA requirements," that the states submit

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[180] *See* Draft MOA, *supra* note 7, at 2753, § VIII.A.5. If EPA determines that jeopardy is not likely after making a "May Affect" finding, the Draft MOA allows the Services thirty days to respond in writing whether they concur with EPA's findings. *See id.* at § VIII.A.6. The Services response may take one of three forms: 1) concurrence with EPA's determination; 2) non-concurrence with either a) specific actions which will avoid adverse effects, or b) a request for formal consultation; or, 3) a request for further information. *See id.* If EPA has no further information to share, the Services will either concur, or not concur, based on the best available scientific and commercial information. *See id.*

[181] *See id.* at 2754, § VIII.A.7.

[182] *See id.*; *supra* text accompanying notes 40-42 (describing extent of EPA's authority to revise and promulgate water quality standards).

[183] *See* Draft MOA, *supra* note 7, at 2754-55, § VIII.C.

[184] *See id.* at 2746.

[185] *See id.* at 2752, § VIII.A.

copies of proposed permits for the Services' review.[186] EPA and the Services will then "work with States . . . to share information on permits" that might impact listed species or their designated critical habitat.[187] The Services or EPA will contact one another and the state if they are concerned the proposed permit is "likely to have an adverse impact on a Federally listed species or critical habitat."[188] If the state fails to make adequate revisions, the Services will contact EPA.[189] EPA will then work with the Services and the state to ensure that the permit will comply with all CWA requirements, "including . . . narrative criteria prohibiting toxic discharges."[190]

If the state refuses to modify a proposed permit, EPA will use its CWA authorities to object to the permit as being "outside [of] the guidelines and requirements" of the CWA.[191] If the permit's adverse effects are minor, the Services will work with the state to reduce the permit's impacts.[192] However, if the permit will result in more-than-minor discharges that "fail[] to ensure the protection and propagation of fish, shellfish and wildlife," EPA will intervene, and "object[] to and Federaliz[e] the permit where consistent with the CWA's authority."[193] EPA will formally consult under section 7 with the Services before issuing a "federalized" NPDES permit.[194]

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[186] *Id.* at 2745. *See id.* at 2755, § IX.B.2. (stating that 40 C.F.R. sections 124.10(c)(1)(iv), and (e), require states to provide notice and copies of draft NPDES permits to USFWS and NMFS); *supra* notes 56-57 and accompanying text (explaining that states must provide EPA and Services with notice and copies of proposed state NPDES permits).

[187] Draft MOA, *supra* note 7, at 2755, § IX.B.2.

[188] *Id.* at 2755, § IX.B.3.

[189] *See id.* at 2755, § IX.B.4.

[190] *Id.* at 2755, § IX.B.5; *see* CWA § 101(a)(3), 33 U.S.C. § 1251(a)(3) (1994) (prohibiting discharge of toxic pollutants in toxic amounts); *supra* note 19 and accompanying text.

[191] *See* Draft MOA, *supra* note 7, at 2755, § IX.B.6.; CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2)(B) (1994); *supra* note 58 and accompanying text (explaining EPA's authority to object to proposed state NPDES permits).

[192] *See* Draft MOA, *supra* note 7, at 2755, § IX.B.6.

[193] *Id.* The Draft MOA states that:

> EPA will use the full extent of its CWA authority to object to a State . . . permit where EPA finds . . . that [the] permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

Id. See supra text accompanying notes 58-61 (describing EPA's authority to object to, and federalize, proposed state NPDES permits).

[194] *See* Draft MOA, *supra* note 7, at 2756, § IX.B.7; *supra* notes 50, 61, 71-73, and accompanying text (explaining that EPA's issuance of federal NPDES permit is a discretionary action, that EPA has power to federalize proposed state NPDES permits under certain circumstances, and that discretionary federal action triggers ESA section 7(a)(2)'s requirements).

The Draft MOA candidly acknowledges that EPA and the Services have no authority to require changes to existing permits.[195] Even so, if the Services identify a permit that is likely to jeopardize listed species or adversely modify critical habitat, the Services will contact the state.[196] "EPA or the Services could request that the State . . . reopen an issued permit [that] is likely to adversely affect Federally listed species or critical habitat."[197]

4. Programmatic Consultation on EPA's Approval of State NPDES Programs

Finally, the Draft MOA proposes to eliminate ESA section 7(a)(2) consultation when EPA approves state NPDES programs. More specifically, the Draft MOA provides that EPA and the Services will engage in a national-level section 7 consultation on EPA's future approvals of proposed state NPDES programs.[198] EPA and the Services will determine whether the Draft MOA's other provisions — including revisions to EPA's national water quality standards,[199] numeric aquatic-life water quality criteria guidance,[200] triennial review of water quality standards,[201] and state-permit review processes[202] — are sufficient to ensure that approval of state NPDES programs exclusively under section 402(b)'s nine enumerated conditions is not likely to jeopardize listed species or adversely modify critical habitat.[203]

VI. Finding Independent Authority in the CWA to Protect Listed Species Under State-Run NPDES Permit Programs

EPA and the Services' Draft MOA calls for a complex series of interlocking federal regulations and consultations designed to prevent state actions that may

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[195] *See* Draft MOA, *supra* note 7, at 2756, § IX.B.8.
[196] *See id.*
[197] *Id.*
[198] *See id.* at 2746.
[199] *See supra* notes 164-66 and accompanying text (describing EPA's plan to promulgate national water quality standards).
[200] *See supra* notes 167-72 and accompanying text (describing EPA's plan to promulgate new water quality criteria guidance in consultation with Services).
[201] *See supra* notes 173-83 and accompanying text (describing EPA's new procedures for triennial review of state water quality standards).
[202] *See supra* notes 186-97 and accompanying text (describing EPA and Services' new procedures for reviewing proposed state NPDES permits).
[203] *See* Draft MOA, *supra* note 7, at 2755, § IX.A.

jeopardize listed species or adversely modify critical habitat. In some cases, it is unclear whether EPA, in its Draft MOA, overstepped its authority under the CWA or failed to fulfill its duties under the ESA.

A. Can EPA Promulgate National Water Quality Standards and Criteria to Protect Endangered Species?

First, is unclear whether the CWA authorizes EPA to promulgate and enforce national water quality standards and numeric aquatic-life criteria that specifically target listed species and their critical habitat for protection. In *AF&PA I*, the Fifth Circuit nullified the LDEQ MOA's provisions requiring state consultation because EPA lacked authority under CWA section 402 to require consideration for listed species in approving state NPDES programs. Permit applicants might challenge EPA's proposed national water quality standards and aquatic-life criteria on similar grounds.

1. Section 303(c)'s Procedural Limits on EPA's Authority to Promulgate Federal Water Quality Standards

As an initial matter, permit applicants may generally question whether the CWA authorizes EPA to independently promulgate "national water quality standards." The Draft MOA states that EPA will promulgate a narrative, national water quality standard protecting listed species and critical habitat.[204] However, the Draft MOA fails to explain the source of EPA's supposed authority to independently promulgate across-the-board, national standards.

From a plain reading of the CWA, it appears that EPA's authority to revise or replace the states' existing water quality standards is limited to the context of the state's triennial review.[205] Under CWA section 303, EPA can only revise state water quality standards after the state — on its triennial review — has failed to adopt standards which meet the CWA's requirements. Even the Draft MOA im-

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[204] *See* Draft MOA, *supra* note 7, at 2750, § VI.A. (explaining EPA's plan to promulgate narrative national water quality standard protecting listed species and critical habitat); *supra* note 165 and accompanying text.

[205] *See supra* notes 36-42 and accompanying text (describing EPA's role in promulgation and revision of state water quality standards).

plicitly concedes that the states' triennial review is the only point at which EPA can *require* changes to state water quality standards.[206]

Considering the limited timing of EPA's authority to unilaterally alter water quality standards, EPA should amend the Draft MOA to state that it intends to codify national *policy* rather than "national water quality standards." If EPA promulgates a narrative "national water quality standard" outside of section 303's procedural framework, the courts may invalidate EPA's action as an improper intrusion on the states' primary authority to initially propose and develop their own water quality standards. To avoid this result, EPA could simply amend its antidegradation policy to state that water quality standards must protect all existing uses by listed and protected species.[207] This modification to the Draft MOA would make clear EPA's intent to leave CWA section 303's procedural requirements intact while providing comparable protection to listed species and their critical habitat.[208]

2. Substantive Limits on EPA's Authority to Promulgate Federal Water Quality Standards and Water Quality Criteria Guidance

The above recommendation hinges on the assumption that CWA section 303 authorizes EPA to incorporate concern for listed species and their habitat when promulgating antidegradation regulations. EPA's plan to revise its CWA section 304 numeric, aquatic-life water quality criteria guidance to protect listed species and critical habitat also hinges on finding adequate statutory authority. In *AF&PA I*, the Fifth Circuit reasoned that EPA lacks authority to import ESA concerns when approving state NPDES programs because CWA section 402(b)'s nine conditions of state NPDES program approval do not include concern for

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[206] *See* Draft MOA, *supra* note 7, at 2753, § VIII.A.5. (stating that EPA will work in context of states' triennial reviews to ensure that state water quality standards will not jeopardize listed species or adversely modify critical habitat); *supra* text accompanying note 175.

[207] In fact, such requirements arguably already exist under 40 C.F.R. § 131.12(a)(1)-(2) (1998), which, when read together, currently require that state water quality standards protect existing uses by all fish, shellfish and wildlife, regardless of their ESA status. *See supra* note 33 and accompanying text.

[208] EPA agrees that it never intended to formally promulgate a "national" water quality standard that supersedes all existing state water quality standards. Telephone interview with Barbara McLeod, Special Assistant to the Deputy Assistant Administrator, Office of Water, EPA (Aug. 20, 1999). According to Ms. McLeod, EPA intends to "phase in" its new "water quality standard" in conjunction with the states' triennial reviews. *Id.*

endangered species.[209] Permit applicants may point out that, like section 402, neither section 303 nor 304 makes specific mention of promulgating water quality standards or guidance for purposes of protecting listed species or their habitat.

However, even applying the Fifth Circuit's crabbed reasoning in *AF&PA I*, CWA sections 303 and 304 allow EPA to incorporate ESA concerns into its approval of state water quality standards and its water quality criteria guidance. CWA section 303(c)(2) states that water quality standards "shall be established taking into consideration their use and value for . . . propagation of fish and wildlife."[210] And, CWA section 304(a)(1) states that EPA shall develop and publish water quality criteria guidance reflecting "the latest scientific knowledge . . . on the kinds and extent of all identifiable effects on . . . fish, shellfish, [and] wildlife."[211] Applying the Fifth Circuit's analysis of *AISI* in *AF&PA I*, sections 303(c) and 304(a) each allow importation of ESA concerns because each subsection contains language requiring the protection of fish and wildlife — including those on the brink of extinction.

B. Does the CWA Allow EPA to Object to State-Issued Permits Based on Concerns for Listed Species and Critical Habitat?

Another potential sticking point for the Draft MOA is whether EPA exceeds its CWA authority by objecting to proposed state-issued permits based on concerns for listed species and their critical habitat. Permit applicants, relying on *AF&PA I*'s off-hand dismissal of *TVA v. Hill*, may argue that CWA section 402(d) only allows EPA to object to proposed state permits that are "outside the guidelines and requirements" of the CWA.[212] Permit applicants could argue that CWA section 402(d), like section 402(b), contains no explicit provision allowing the Services to "veto" proposed permits on ESA grounds. Permit applicants could thus charge that the Fifth Circuit's reading of *TVA v. Hill* in *AF&PA I* also prevents EPA from objecting to proposed permits on ESA grounds because such action exceeds EPA's section 402(d) authority.

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[209] *See supra* notes 156-58 and accompanying text (explaining Fifth Circuit's poorly reasoned determination that CWA section 402(b) supersedes ESA section 7(a)(2)'s requirements).

[210] *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1994).

[211] *See* CWA § 304(a)(1)(A), 33 U.S.C. § 1314(a)(1)(A) (1994).

[212] *See supra* notes 58, 159-60 and accompanying text (describing EPA's authority under CWA to object to proposed state NPDES permits, and Fifth Circuit's erroneous conclusion that ESA section 7(a)(2)'s application to other statutes is limited to situations where other statute specifically requires protection of wildlife).

Under the Draft MOA, these claims are likely to fail — but not because of the ESA, *TVA v. Hill* or *AF&PA I*. CWA section 402(b) explicitly requires that state NPDES programs must contain sufficient authority to insure compliance with the requirements of CWA section 301.[213] In turn, CWA section 301(b) requires states to establish point source effluent limitations that will meet "any applicable water quality standard established pursuant to [the CWA]."[214] Thus, under these two provisions, a state must 1) generally establish effluent limitations which will meet the state's existing water quality standards and criteria, and 2) have sufficient authority to insure that state-issued NPDES permit will comply with such limitations.

The Draft MOA's proposed water quality standard and revised aquatic-life water quality criteria guidance will directly integrate protection of listed species into section 301(b)'s effluent limitation requirements. Once EPA promulgates its narrative water quality standard and its numeric water quality criteria guidance protecting listed species — and imposes them through the state's triennial review process — these standards and criteria will necessarily form the underlying basis for each state's section 301 effluent limitations. In turn, these new effluent limitations will be incorporated into individual NPDES permits.

If EPA then finds that a state has failed to incorporate *its own* species-protective limitations into a proposed permit, EPA must notify the state that it has failed to administer its NPDES program in accordance with the requirements of section 402.[215] EPA may then directly invoke its section 402(d) authority to object to and, if necessary, assume authority over the state-issued permit as being "outside the guidelines and requirements" of the CWA.[216] In fact, if the state refuses to modify the permit, EPA could even go so far as to revoke the state's entire NPDES program.[217]

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[213] 33 U.S.C. §§ 1311 (1994). *See* CWA § 402(b)(1)(A), 33 U.S.C. § 1342(b)(1)(A); *supra* note 52.

[214] CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994).

[215] *See* CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) (1994).

[216] *See supra* notes 58-61 and accompanying text (describing EPA's authority to object to proposed state NPDES permits).

[217] *See* CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) (1994); *supra* text accompanying note 55.

C. Can EPA Avoid Section 7 Consultation When Delegating NPDES Permitting Authority to States?

Another potential shortcoming is the Draft MOA's apparent retreat from EPA's recent insistence that delegation of NPDES permitting authority to states under CWA section 402(b) requires ESA section 7 consultation.[218] Despite its criticism of *AF&PA I*, the Draft MOA explicitly avoids requiring section 7 consultation when EPA reviews proposed state NPDES programs for compliance with CWA section 402(b)'s nine requirements.[219] Environmental groups — pointing up the inconsistencies in *AF&PA I*'s section 7(a)(2) analysis, and instead relying on *TVA v. Hill* and John Steiger's arguments — may object to EPA's concession as inconsistent with section 7(a)(2)'s mandate that agencies ensure that their discretionary actions are not likely to jeopardize listed species.[220]

However, EPA can reasonably justify its decision to abandon section 7(a)(2) consultation in connection with approving state NPDES programs, provided that EPA: 1) promulgates a narrative, national water quality standard mandating that states avoid water quality which will likely jeopardize listed species or adversely modify critical habitat; 2) revises its numeric, aquatic-life criteria guidance to prevent jeopardy and adverse habitat modification; 3) requires these standards and criteria to be adopted by the states on their triennial review; 4) consults with the Services on individual state-issued permits of concern; and 5) consults on the collective effectiveness of all of these new regulations and procedures to prevent jeopardy in approving the states' NPDES programs.[221] Assuming that EPA's approval of a state's NPDES program is a discretionary federal action, EPA's approval will not require section 7(a)(2) consultation because the state's existing effluent limitations and water quality standards — which must

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[218] *See* Draft MOA, *supra* note 7, at 2746 (stating that future EPA approval of state NPDES programs will be based exclusively on CWA section 402(b)'s nine requirements); *supra* notes 123-42 and accompanying text (describing EPA's insistence, before *AF&PA I*, that delegation of NPDES permitting authority to states must be conditioned on state's agreement to consult with Services when issuing certain NPDES permits).

[219] *See supra* notes 162-63, 198-203 and accompanying text (describing EPA and the Service's agreement under Draft MOA to avoid ESA section 7 consultation when approving state-run NPDES programs).

[220] *See supra* notes 71-73, 117-19, 141-42, 160 and accompanying text (explaining that discretionary federal action triggers ESA section 7(a)(2)'s requirements, and describing case law and scholarly commentary indicating that EPA's delegation of NPDES permitting authority to states is a discretionary federal action within meaning of ESA).

[221] *See supra* notes 164-203 and accompanying text (describing various regulations and procedures that EPA and Services intend to implement under Draft MOA).

be met in issuing individual permits — will automatically reflect the level of protection which the Services find necessary to avoid jeopardy or adverse habitat modification. Moreover, under the Draft MOA, EPA and the Services will continue to consult on, and federalize if necessary, any remaining state-issued permits which raise endangered species concerns. Because the Draft MOA's regulations and procedures ensure that no individual state-issued permit can threaten jeopardy or adverse modification, EPA's antecedent approval of the state's NPDES program cannot, of itself, jeopardize listed species or adversely modify critical habitat.

VII. Conclusion

There is currently confusion over whether, and to what extent, EPA may require states to incorporate concern for listed species and critical habitat when administering state-run NPDES programs. The Fifth Circuit, in *AF&PA I*, rejected incorporation of such concerns as wholly beyond EPA's authority. EPA and the Services' have issued a Draft MOA acknowledging the Fifth Circuit's ruling, but dismissing it as "wrongly decided." Still, the Draft MOA is careful to avoid the processes and statutory authorities explicitly rejected in *AF&PA I*.

The Draft MOA stands on stronger legal ground than EPA's prior strategy of requiring state consultation with the Services as a condition of approving state-run NPDES programs. Rather than relying on ambiguous statutes and arguably distinguishable case law, the Draft MOA goes to two of EPA's core CWA functions: reviewing and revising state water quality standards, and publishing water quality criteria guidance. The Draft MOA also stands on stronger legal ground because it only requires section 7 consultation between federal agencies. The Draft MOA wisely avoids conscripting states as "federal actors" for purposes of consultation.

The Draft MOA may even have beneficial economic effects. Once EPA and the Services complete their section 7 review of EPA's new national water quality standard and water quality criteria guidance, any new requirements will be directly incorporated into each state's triennial review process. Within a few years, the levels of water quality necessary to protect listed species will be an integral part of every state's water quality standards and criteria. In turn, the states will use these new standards and criteria to establish generic effluent limitations that will be required in each proposed NPDES permit. Adequate protection for listed species will become a seamless part of the state's existing standards and permit-

ting programs. As a result, federal review of state-issued NPDES permits for ESA compliance should be reduced to a cursory examination to ensure that the state has followed its own policies and procedures in drafting the permit. Over time, incorporation of ESA concerns into state water quality standards and criteria will translate into faster permit approvals and greater certainty for all parties as to what specific effluent limitations will be required to obtain state-issued NPDES permits.

Even with these benefits, the Draft MOA is certain to raise concerns from both sides of the "environment versus economics" debate. Industry groups, such as the AF&PA, will certainly view the Draft MOA as a less-than-covert effort by EPA and the Services to violate the spirit, if not the letter, of the Fifth Circuit's ruling in *AF&PA I*. On the other side, environmental interests may express dissatisfaction with EPA's about-face — for the third time in five years — on whether approval of state-run NPDES programs requires ESA section 7 consultation.

Notwithstanding these objections, it appears that the Draft MOA successfully walks the fine line between EPA's CWA authorities and its ESA duties. The Draft MOA works within the CWA's existing statutory framework. The Draft MOA crafts a set of policies, regulations and procedures that should ensure EPA's future approval of state-run NPDES programs and individual state-issued permits will not likely jeopardize the continued existence of listed species or adversely modify their critical habitat.

In 1965, Congress mandated that the nation's water quality should protect fish, shellfish and wildlife.[222] In 1972, Congress prohibited the discharge of toxic pollutants which would disrupt the biological function of "any organism."[223] In 1973, Congress stated that federal agencies are to work cooperatively with the states on water resource issues in order to recover listed species.[224] In 1973, Congress also directed federal agencies to utilize their authorities to protect listed species and to ensure that their actions avoid jeopardizing listed species or adversely modifying critical habitat.[225] Viewed from this distance, requiring federal concern for endangered species when states decide how much and what

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[222] *See supra* notes 27 and accompanying text (describing Congress' goal in enacting WQA of 1965).

[223] *See supra* note 19 and accompanying text (describing CWA's prohibition on discharge of toxic pollutants in toxic amounts).

[224] *See supra* note 67 and accompanying text (describing Congress' policy in enacting ESA of 1973).

[225] *See supra* notes 70-71 and accompanying text (describing ESA section 7's affirmative mandates to federal agencies).

kinds of pollution can be dumped from point sources into our nation's rivers and streams is consistent with the spirit and the letter of the Clean Water Act and the Endangered Species Act.[226]

[226] EPA and the Services are currently reviewing numerous comments on their Draft MOA, and intend to publish their final agreement sometime in 2000. Telephone interview with Barbara McLeod, Special Assistant to the Deputy Assistant Administrator, Office of Water, EPA (Aug. 20, 1999). EPA has not yet completed drafting its proposed "national water quality standards" protecting listed species and critical habitat. *Id.*