

Important Provisions of the Action for Purposes of ESA Consultation: The Services regard the following as significant provisions of the pending final regulation with regard to potential effects to Federally-listed threatened and endangered species and designated critical habitat and request confirmation from EPA that we are understanding and interpreting these provisions appropriately.

Impingement, Entrainment, and Entrapment

The regulation requires that the location, design, construction, and capacity of CWIS reflect the best technology available for minimizing adverse environmental impacts, primarily by reducing the amount of fish and shellfish that are impinged (including entrapped) or entrained at a CWIS. The regulation also provides that the Director may establish in the permit additional control measures, monitoring requirements and reporting requirements that are designed to minimize incidental take, reduce or remove more than minor detrimental effects to Federally-listed species and designated critical habitat, or avoid jeopardizing federally-listed species or destroying or modifying designated critical habitat. For purposes of this consultation, the Service is interpreting the regulation's application to "fish and shellfish" and the Director's authority to establish additional measures to protect listed species and habitat as broadly encompassing all taxa of listed species, including their critical habitat. The Services also interpret the rule requirements – impingement (including entrapment) and entrainment reduction actions (e.g., BTA standards), including additional measures established by the Director to protect listed species and habitat – as applying to all taxa of listed species, including their designated critical habitats.

The Services interpret the BTA standards, including additional measures established by the Director to protect listed species and habitat, as applying to, and protecting the aquatic environment from, the direct and indirect effects of a CWIS, including effects to a listed species' prey base.

As part of the definition of "modified traveling screen" at §125.92, the regulations state that the Director may approve of fish being returned to water sources other than the original source water, taking into account any recommendations from the Services with respect to endangered or threatened species. The Services interpret this limitation to mean that when making permitting decisions concerning the return of impinged aquatic species to waters other than the source water, the Director will address any concerns from the Services. If the Services' concerns are not addressed and the permit would cause more than minor detrimental effects, the permit will be subject to the EPA oversight provisions of section IX.A of the 2001 MOA.

Action Area

Within the preamble and section 125.95(f), EPA uses the term "action area" to indicate the extent of potential effects to listed species and designated critical habitat. For the purposes of this consultation, the Services interpret the term "action area" whenever it is used in the preamble and rule in a manner consistent with the definition of this term in the Services' regulations implementing ESA Section 7 at 50 CFR 402.02.

Notification

Section 125.98(h) requires the Director to transmit all permit applications received from existing facilities to the appropriate Field Office of the U.S. Fish and Wildlife Service and/or Regional Office of the National Marine Fisheries Service upon receipt for a 60 day review prior to public notice of the draft or proposed permit. Directors may not propose/publish the draft permit until the 60 day review period has ended. Directors are also required to provide public notice and a public comment period (40 CFR 124.10) and to submit a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any), and the draft permit (if any) to the Service. This includes notice of specific CWIS requirements and notice of the draft permit. When the Director submits this information to the Service, the Director should include any specific information the Director has about ESA-listed species and designated critical habitat that are or may be present in the action area, including any proposed control measures and monitoring and reporting requirements for such species and habitat.

Section 125.95(f) requires owners/operators to identify all endangered/threatened species and designated critical habitat in the action area.

Information

Section 125.95(f) requires that the owner or operator of an existing facility or new unit at an existing facility must, based on readily available information at the time of the permit application instead of the information required at 122.2(r)(4)(vi), identify all Federally-listed threatened and endangered species and/or designated critical habitat that are or may be present in the action area. The Services interpret “readily available information” to mean information that is publicly available information. “Readily available information” includes information obtained from the Services. “Readily available information” is not limited to information that is in the facility’s possession; however, facilities are not required to create new information (e.g. new studies or surveys) in order to identify Federally-listed threatened and endangered species and/or designated critical habitat.

Take

Section 125.98(b)(1) specifies that the Director must include the following language as a permit condition “Nothing in this permit authorizes take for the purposes of a facility’s compliance with the Endangered Species Act.”

MOA

The Services interpret the statements in the preamble to mean that, consistent with subsection IX.A of the 2001 MOA, in situations where the Services contact EPA with concerns that a State or Tribal permit will have more than minor detrimental effect on Federally-listed species or critical habitat that cannot be resolved with the State or Tribal permitting authority:

i) EPA will coordinate with the State or Tribe to ensure that the permit will comply with all applicable CWA requirements and will discuss appropriate measures protective of Federally-listed species and critical habitat; and

ii) EPA will work with the State or Tribe to reduce or remove the detrimental impacts of the permit, including, in appropriate circumstances, by objecting to and Federalizing the permit where consistent with EPA's CWA authority.

The Services also interpret the preamble, consistent with subsection IX.A of the 2001 MOA, to mean that if EPA determines (after taking into account all available information, including any analysis conducted by the Services) that a State or Tribal permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat, EPA will use the full extent of its CWA authority to object to the permit, including Federalizing the permit where consistent with EPA's CWA authority.

The Services interpret "giving, as appropriate, substantial weight to the views of the Services" and "taking into account . . . any analysis conducted by the Services" to include giving deference to the views of the Services with regard to effects on Federally-listed fish and wildlife resources.

In those situations where a Director determines, pursuant to §125.94(c)(11), that a facility's rate of impingement is so exceptionally low as to not warrant additional impingement controls, the Services may still consider the detrimental effects of the facility operation to be more than minor if Federally-listed threatened or endangered species are subject to impingement.

Discretionary Actions

Section 125.94(g) provides that State Directors may include as conditions of a CWIS permit control measures to avoid or minimize adverse effects to listed species or designated critical habitat, including such measures that are recommended by the Services.

Monitoring and Reporting

Section 125.94(g) provides that the Director may establish in the permit additional control measures, monitoring requirements, and reporting requirements that are designed to minimize incidental take, reduce or remove more than minor detrimental effects to Federally-listed species and designated critical habitat, or avoid jeopardizing Federally-listed species or destroying or adversely modifying designated critical habitat. We interpret this to mean that State or Tribal permitting authorities will include any monitoring and reporting recommendations provided by the Services. Failure to include these recommendations will subject the permit to the EPA oversight provisions of section IX.A of the 2001 MOA in circumstances where the Services are concerned about more than minor detrimental effects. This includes, but is not limited to, monitoring and reporting requirements related to impingement (including entrapment), entrainment, flow alteration, and indirect effects (e.g., effects to prey base).