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April 15, 1999

W-98-32

ESA Comment Clerk

Water Docket (MC 4101)

U.S. Environmental Protection Agency

401 M Street, SW

Washington, DC 20460

REFERENCE: Comments on Draft Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under Clean Water Act and Endangered Species Act (FR 2742-2757)

Dear Sir/Madam:

Thank you for the opportunity to comment on the *Draft Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under Clean Water Act and Endangered Species Act* as noticed in the January 15, 1999 Federal Register. The Association of Metropolitan Sewerage Agencies (AMSA) represents the interests of 220 of the country's publicly-owned wastewater treatment agencies, which collectively serve the majority of the sewered population in the United States, and treat and reclaim more than 18 billion gallons of wastewater each day. In addition to their primary responsibility for treating the Nation's domestic and industrial wastewater, AMSA member agencies play a major part in their local communities, often leading watershed management efforts, promoting industrial/household pollution prevention and water conservation, and developing urban stormwater management programs. In implementation of these programs, AMSA agencies are involved in a number of federal and non-federal activities that are subject to the ESA.

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In general, AMSA members support the Memorandum of Agreement (MOA) goals of improved interagency cooperation and enhanced recovery of endangered species and critical habitat. While supportive of the goals, AMSA members are concerned that the MOA does not acknowledge the role of the regulated community in the process, and that resulting agreements among EPA and the Services may lead to overly protective criteria and increasing administrative burden for states and the regulated community. AMSA is concerned that permitting will become more a federal process, with little ability for meaningful input by permittees, and less of a state/local process once the MOA is implemented.

The manner in which reasonable and prudent measures are developed and applied, and the quality of data used in decision-making will be critical to the success of the MOA in providing further protection of endangered species and critical habitat under the authorities of the Clean Water Act (CWA) and Endangered Species Act (ESA).

Proposed National Level Activities Will Severely Restrict State/Local Water Quality Programs

EPA's proposal to amend the water quality standards regulation to include a blanket prohibition on mixing zones or variances that would likely cause jeopardy will severely limit opportunities for states and dischargers to develop and implement cost-effective solutions to water quality problems. The proposed blanket prohibition does not acknowledge the real compliance issues being faced by POTWs and other dischargers with increasingly stringent permit limits.

For example, many wastewater treatment agencies are concerned that compliance with very low mercury effluent limits will require the application of advanced end-of-pipe treatment, and that these kinds of costly controls may not have much impact on resolving water quality issues. EPA meanwhile, has recognized that control of these mercury sources requires a broad multimedia approach, and has indicated that *"cost effective opportunities to deal with mercury during product life-cycle, rather than just at the point of disposal need to be pursued. A balanced strategy which integrates end-of-pipe control technologies with material substitution and separation, design-for-environment, and fundamental process change approaches is needed."*¹ While EPA has indicated that costly end-of-pipe solutions are not the desired outcome of newer, more stringent effluent limits, POTWs facing these stringent permit limits are concerned that they may have limited options to do otherwise, even if they are a very minor source of mercury to the receiving water. Mercury sources that cannot be controlled through pollution prevention (e.g., residential sources, air deposition, etc.) may account for a significant portion of the POTW's mercury discharge. A prohibition on mixing zones and variances would force POTWs in these cases to install costly end-of-pipe treatment, and may result in little or no water quality improvement.

¹EPA Mercury Study Report to Congress, December 1997

National Consultation on Water Quality Criteria Inappropriate

The MOA describes EPA's commitment to perform a national consultation on EPA's published criteria for the protection of aquatic life for 45 pollutants. While this approach may be efficient for EPA and the Services, the national consultation is likely to result in overly-stringent criteria that may not be applicable in many states. Many states have devoted considerable resources into developing state-specific or site-specific standards to recognize the unique biological communities and waterbody characteristics of their regions. EPA has approved these standards as being protective. These states would now be placed in a position of defending these federally-approved, less stringent existing criteria, or be forced to promulgate new criteria based on the national consultation. To alleviate these burdens, AMSA recommends that EPA and the Services continue to perform state-by-state consultations of water quality standards, when needed. Data generated as part of previous consultations could be used as appropriate. Using this approach, States can focus its resources on those issues most relevant to protecting endangered and threatened species within their particular state (i.e., habitat, water use, water quality, etc.).

Permitting Program Activities Must Provide Opportunity for Involvement of Affected Entities

The January 15 Federal Register notice discusses certain issues that have repeatedly arisen in recent ESA consultations, including "the appropriate scope of reasonable and prudent measures" (page 2742). For state-issued permits, the draft MOA indicates that EPA, the Services, and the state "will discuss appropriate measures protective of Federally-listed species and critical habitat" (page 2755). For EPA-issued permits, the draft MOA indicates that the Services will specify and describe the reasonable and prudent "measures necessary or appropriate to minimize takings," and that EPA may delegate the terms and conditions of the incidental take statement to permittees.

While the draft MOA describes interagency roles and coordination in developing and applying these reasonable and prudent measures, there is no discussion concerning the actual role of the regulated community in this process. Given the potential resulting burdens that may be placed on the regulated community, AMSA believes that it is appropriate for the MOA to acknowledge the role of permittees in developing actions and activities designed to minimize take.

As an example, one AMSA agency has recently played a significant role in discussions between EPA and the the National Marine Fisheries Service (NMFS), regarding the impact of moving its discharge outfall. After NMFS issued a "no jeopardy finding" in its Biological Opinion, and recommended a number of additional studies and actions in its Conservation Recommendations (many of which EPA and the publicly-owned treatment works (POTW) considered inappropriate), NMFS, EPA and the POTW eventually negotiated a 3-way inter-agency agreement on what actions and activities could be performed to minimize take. One task agreed to was to develop a "Contingency Plan," which would lay out how the POTW would respond if plant data indicated operational problems or results of its already established Outfall Monitoring Program indicated evidence of unexpected problems in the receiving water that might

threaten endangered species.

Additionally, based on the draft permit, the POTW will be required to implement (among many other conditions): 1) the Outfall Monitoring Plan (developed under the guidance of an independent scientific task force and costing \$2.5 to \$3 million annually to implement); 2) additional monitoring requirements rejected by the task force, but supported by the local concerned communities and by NMFS; 3) the Contingency Plan, developed by the POTW in the meantime with considerable public input, with a number of trigger points based on permit compliance and monitoring plan data, which, if crossed, will result in further studies and actions; and, 4) an aggressive Pollution Prevention Plan focused on discharges to the POTW's system.

As illustrated by this example, dischargers have a unique stake in the process of addressing issues related to endangered and threatened species. The MOA clearly lacks a description of these roles and opportunities for public participation, especially for impacted dischargers. AMSA recommends that the MOA be revised to define the opportunities for public review of all documents related to ESA consultation, and biological opinions.

Decisions Must Be Made Using Quality Assured, Peer-Reviewed Data

AMSA is also concerned about the quality of data used to determine jeopardy. In our July 28, 1998 comments on the U.S. Fish and Wildlife Service and National Marine Fisheries Service Draft Biological Opinion for the Proposed California Toxics Rule, AMSA expressed concern with the citation of non-peer reviewed, non-published literature to support their determination of jeopardy. Due to the implications of the determination, AMSA urged EPA to insist that the Services use data and methodologies which have undergone rigorous scientific peer-review and reflect state-of-the-art knowledge. AMSA recommends that a degree of scientific rigor be defined to ensure that decisions are based on accurate and defensible data.

Thank you for the opportunity to comment. If you have any questions, please feel free to call me at 757/460-4243 or Mark Hoeke, AMSA at 202/833-9106.

Sincerely,



Norman E. LeBlanc
Chair, AMSA Water Quality Committee