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Draft Improving Emerging Regulatory Experiments in Permit Process Coordination for Endangered Species and Aquatic Resources in California

by Alejandro E. Camacho,[·] Elizabeth M. Taylor,[·] Melissa L. Kelly,[·] and Stephanie L. Talavera[·]

46 ENVTL. L. REP. (forthcoming Feb. 2016).

Practitioners involved in the development of several proposed California Habitat Conservation Plans (HCPs)/Natural Community Conservation Plans (NCCPs) under the federal Endangered Species Act (ESA) and California's NCCP Act are currently undertaking a range of efforts to coordinate, to varying degrees, those endangered species permitting efforts with freshwater aquatic resource permits under the federal Clean Water Act (CWA) sections 404 and 401 and similar state laws. Many practitioners and scholars view enhanced permit coordination as beneficial due to purported efficiency gains and potentially better conservation outcomes,¹ although scholarship on interagency permit coordination is still relatively limited.² These emerging regulatory experiments in coordinating endangered species and aquatic resources permitting provide an opportunity to explore the extent of such benefits as well as some of the costs and challenges of coordinating permitting authority.

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¹ See generally Peter A. Buchsbaum, *Permit Coordination Study by the Lincoln Institute of Land Policy*, 36 URB. LAW. 191 *passim* (2004) (suggesting that permit coordination in the HCP context has promise as a way of encouraging and guiding private development while protecting environmental values).

² See *id.* at 192 (noting how little attention has been given to intergovernmental coordination of land use controls, such as permitting coordination); see also Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 150–55, 173–76 (2014) (discussing the lack of scholarship specifically focused on permit coordination and design).

Preliminary research, including interviews³ and dialogue sessions,⁴ indicates that most respondents strongly support reliance on these new approaches to coordinating planning and permitting for endangered species and aquatic resources. As these initiatives are nascent, whether the purported efficiency, effectiveness, and legitimacy benefits, explored below, will be achieved remains to be determined. An accurate, comprehensive assessment of the potential strengths and weaknesses of these permit process coordination efforts for endangered species and aquatic resources will only be possible after they are further along. However, there is solid evidence that clearer guidance from federal agency headquarters would likely provide the best opportunity to promote beneficial permit coordination while minimizing the potential challenges and drawbacks.⁵

³ The University of California, Irvine School of Law Center for Land, Environment, and Natural Resources (CLEANR) conducted interviews and preliminary research to survey the current permit coordination efforts among California HCP/NCCPs. CLEANR conducted interviews with the following: Katie Barrows, Coachella Valley Association of Governments; Jim Bartel, USFWS (retired); Michael Beck, Endangered Habitats League; Thomas Cavanaugh, USACE; Loren Clark, Placer County Planning Department; Dan Cox, USFWS; Kim Delfino, Defenders of Wildlife; Abigail Fateman, East Contra Costa County Habitat Conservancy; Lesley Hill, Orange County Transportation Authority; John Hopkins, California Habitat Conservation Planning Coalition; Paul Jones, Environmental Protection Agency; Jan Knight, USFWS; Charles Landry, Western Riverside Regional Conservation Authority; Chris Lee, Solano County Water Agency; Jennifer Norris, USFWS; Galen Schuler, Green Diamond Resource Company; Edmund Sullivan, Santa Clara Valley Habitat Agency; Eric Tattersall, USFWS; Robert D. Thornton, Nossaman LLP; Michael Wellborn, California Watershed Network; Doug Wheeler, Hogan Lovells.

⁴ On July 30, 2015, CLEANR co-convoked a roundtable on this issue of permit process coordination with the Center for Collaboration in Governance (CCG) that was hosted by the Environmental Law Institute [hereinafter ELI Roundtable]. The dialogue at the ELI roundtable built on CLEANR's research seeking to identify opportunities for coordinated permitting and the purported benefits and challenges of such coordination. Participants at the ELI Roundtable included: Alejandro Camacho, U.C. Irvine; Kathryn Campbell, ELI; Denny Grossman, Strategic Growth Council; Melissa Kelly, U.C. Irvine; Mark Kramer, The Nature Conservancy; Kate Kurgan, American Association of State Highway and Transportation Officials; Jaimee Lederman, U.C.L.A.; Lindell Marsh, CCG; Jim McElfish, ELI; Jim Murley, South Florida Regional Planning Council; Steve Quarles, Nossaman LLP; Wayne Spencer, Conservation Biology Institute; Elizabeth Taylor, U.C. Irvine; Marty Wachs, U.C.L.A.; David Zippin, ICF International. The takeaways from the discussion were shared at a second roundtable also co-convoked by CLEANR and CCG and hosted by the President's Council on Environmental Quality.

⁵ Cf. David J. Hayes, *Leaning on NEPA to Improve the Federal Permitting Process*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10018, 10018–10019 (2015) (discussing the Obama Administration's recent initiative, including the development of an interagency guidance document, to improve federal permitting for complex infrastructure projects). See also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-15-20, GUIDANCE ESTABLISHING METRICS FOR THE PERMITTING AND ENVIRONMENTAL REVIEW OF INFRASTRUCTURE PROJECTS 1 (Sept. 22, 2015) (providing guidance on interagency permit coordination), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2015/m-15-20.pdf>; STEERING COMM. ON FED. INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING

FROM REGULATORY SILOS TO MODEST COORDINATION

Historically, environmental statutes were designed to operate under separate but often overlapping regulatory schemes, each focused on managing a single (or even a fragment of an) environmental resource, such as air, water, or endangered species. When the ESA and CWA were enacted over forty years ago, their regulatory frameworks were not designed to interact in their protection of endangered species and water resources, respectively. Decades later, many of the plans adopted under the ESA's HCP program and California's state equivalent NCCP program pioneered the concept of inter-governmental, multi-species habitat conservation planning and, seeking to conserve not only listed endangered species but ecological communities. However, the local governments, working together with the state and federal wildlife agencies, still focused predominantly on species and habitat conservation. As these programs have evolved, applicants and regulators have recently begun to explore interagency permit coordination across multiple media and statutes.

California's wetlands, particularly vernal pool areas, provide habitat for many endangered species. This interconnected relationship between wetlands and endangered species has spurred efforts to coordinate the respective permitting processes with the prospect that it might improve the effectiveness of conservation measures and/or enhance permit process efficiency for agencies and applicants.⁶ Some plan applicants reported experiencing redundancies, inefficiencies, and a lack of certainty in their attempts to comply with both the CWA and HCP/NCCP requirements due to a lack of coordination among the regulatory agencies and the tendency to operate within defined silos.

In 2003, staff from four counties working on regional conservation planning efforts in northern California approached the U.S. Army Corps of Engineers (USACE) and the U.S. Fish and Wildlife Service (USFWS) to request consultation on coordinating wetlands and endangered species permitting.⁷ Ultimately, the four northern California counties, USACE, USFWS, the U.S. Environmental Protection Agency (EPA), the California Department of Fish and Wildlife (CDFW), and the Institute for Ecological Health formed the Northern California Wetlands and Endangered Species Permits Working Group with the

INFRASTRUCTURE PERMITTING 1 (May, 2014) (documenting and planning the interagency coordination efforts) *available at* <http://www.permits.performance.gov/sites/permits.performance.gov/files/docs/pm-implementation-plan-2014.pdf>.

⁶ Telephone Interview with John Hopkins, Dir., Cal. Habitat Conservation Planning Coal. (June 25, 2015).

⁷ The four counties were Contra Costa, Placer, South Sacramento, and Solano.

goal of determining whether it would be possible to coordinate regional permit processes for wetlands and endangered species.⁸ This working group met several times over the course of six months and helped elucidate the opportunities and challenges of coordinating regional permitting for endangered species and aquatic resources.⁹

As a result of this process, a number of proposed or planned HCPs began to pursue or accelerated their work toward permit coordination. However, these efforts are not part of an overarching programmatic approach to permit coordination. Rather, they are decentralized efforts,¹⁰ with each HCP/NCCP negotiating its own approach to harmonizing conventionally separate permit processes.

Though these efforts at permit coordination are pioneering, it is important to note that they nonetheless are fairly modest efforts to reconcile fragmented regulatory processes. Currently, some plans, such as the proposed Placer County Conservation Plan (PCCP) HCP/NCCP, Solano Multi-Species HCP, South Sacramento HCP, and Orange County Transportation Authority (OCTA) HCP/NCCP, are pursuing permit process coordination simultaneously with the planning of the HCP/NCCP. Other plans, such as the Santa Clara Valley (SCV) HCP/NCCP and Coachella Valley Multiple Species HCP/NCCP, already have their HCP/NCCP approved and are now attempting to make their CWA permits consistent with the already-issued HCP/NCCP permits. To date, only the East Contra Costa County (ECCC) HCP/NCCP has an approved HCP/NCCP with a coordinated CWA section 404 permit.¹¹

Accordingly, though some applicants are seeking to streamline successive project-specific permits after program-wide permit approval, none of these efforts are immediately seeking to establish a “one-stop shop” that fully consolidates the

⁸ N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., OPPORTUNITIES FOR COORDINATING PERMITTING UNDER SECTION 404 OF THE CLEAN WATER ACT WITH REGIONAL HABITAT CONSERVATION PLANNING 1 (2004), *available at* http://www.conservationplanning.info/pdfs/404-ESA_white_paper_11-16-04.pdf.

⁹ *Id.*

¹⁰ However, there is an informal dialogue occurring between some HCP/NCCP program managers to share experiences and confirm consistency in agency communications and actions on applications. This is particularly true for Placer and South Sacramento counties. E-mail from Loren Clark, Assistant Planning Dir., Placer Cnty. Planning Dep’t, to author (Sep. 25, 2015, 04:42 PM PST).

¹¹ U.S. ARMY CORPS OF ENG’RS, SAC. DIST., ACTION ID SPK-2001-00147, REGIONAL GENERAL PERMIT 1 (May 4, 2012), *available at* <http://www.spk.usace.army.mil/Portals/12/documents/regulatory/gp/GP-01-w-encls.pdf> [hereinafter ECCC REGIONAL GENERAL PERMIT].

initial plan approval process, under which a single, integrated application results in all permits being issued simultaneously. Rather, these permit process coordination efforts are more modestly aiming to harmonize separate permitting processes that nonetheless are all congruent in their treatment of key resources conserved under the HCP/NCCP document. For example, successful coordination is expected to ensure that conservation or mitigation measures in the HCP/NCCP document will serve as the basis for a regional wetlands compliance process. As such, the challenges further explained below in even these modest attempts at coordination truly illustrate the real difficulties of harmonizing regulatory processes.

ALTERNATIVE TOOLS FOR ESA/AQUATIC PERMIT PROCESS COORDINATION

Programmatic General Permits under the Clean Water Act

The tool being pursued by HCP applicants and permittees in California that most closely coordinates permitting over water and wildlife resources is the programmatic general permit (PGP). Issued by USACE, a PGP delegates wetlands permitting authority to a local agency that submits a program for local regulation of wetlands impacts that provides the same or a higher level of environmental protection as the existing USACE regulations.¹² If the program is approved, the local agency adopts an ordinance and detailed procedures to implement the locally-led regulatory process.

The proposed PCCP HCP/NCCP and the proposed South Sacramento HCP are currently developing programs that seek to combine permitting processes for waters of the United States under CWA sections 404 and 401, waters of the state under the Porter-Cologne Water Quality Control Act, and streams, rivers, lakes, and ponds under the California Fish and Game Code section 1602.¹³ These proposed programs are seeking to provide a process through which the

¹² It should be noted that PGPs are limited to authorizing activities regulated under section 404 that have no more than minimal individual and cumulative adverse environmental effects. 33 U.S.C. § 1344(e)(1) (1982). Accordingly, this limits the types of activities expected to occur in an HCP/NCCP that can be covered by a PGP. E-mail from David Olson, Chief, Regulatory Div., USACE, to author (Sept. 22, 2015 04:07 PM PST).

¹³ PLACER CNTY. AQUATIC RES. PROGRAM (CARP), DRAFT PLACER COUNTY CARP STRATEGY 1-1, 1-1, 1-2 tbl. 1 (Jan. 28, 2011), available at <http://www.placer.ca.gov/~media/cdr/Planning/PCCP/PolicyDoc2011/Appendix%20M.pdf>; DEP'T OF CMTY. DEV., PLANNING AND ENVTL. REVIEW DIV., CONTROL NO. 2003-PL-0637, NOTICE OF PREPARATION NOP-2, NOP-2, NOP-4 (Oct. 28, 2013), available at <http://www.per.saccounty.net/PlansandProjectsIn-Progress/Documents/SSCHP/EIR%20Materials%202013-2014/SSHCP%20NOP%2010-28-13.pdf>.

HCP/NCCPs' conservation strategies for aquatic resources are implemented.¹⁴ For example, PCCP HCP/NCCP's proposed program will establish a reserve system that will support the mitigation and conservation requirements of both the proposed program and the HCP/NCCP.¹⁵ PGPs expire after five years and must be renewed.

If adopted, these burgeoning initiatives would be the most coordinated water/species permitting processes being considered at this time. Though the processes for obtaining the initial permits under each statute remain fairly independent, if adopted the plan will combine the USACE, USFWS, the Regional Water Quality Control Boards (RWQCBs), and the California Department of Fish and Wildlife (CDFW) processes for regulating impacts to aquatic resources and endangered species into a single implementation program. However, for that same reason, some consider PGPs to be too great of an undertaking and instead are pursuing permit coordination between endangered species and specific aquatic resources separately, as discussed below.

Regional General Permits under Clean Water Act Section 404

A regional general permit (RGP) is another tool available for coordinating implementation of endangered species permitting with permitting for waters of the United States under CWA section 404. Similar to a PGP, an RGP authorizes activities in waters of the United States within the HCP/NCCP plan area "that are substantially similar in nature and cause only minimal individual and cumulative impacts."¹⁶ However, unlike a PGP, the local agency is not the applicant for an RGP. For an RGP, subsequent project proponents still must individually apply for authorization from USACE, but the permit conditions and mitigation requirements are expected to match those under the adopted HCP/NCCP. Like PGPs, RGPs expire after five years and must be renewed.

The first RGP was issued in May 2012 for activities within the ECCC HCP/NCCP,¹⁷ which was approved in 2007.¹⁸ Similar to the ECCC HCP/NCCP,

¹⁴ The PCCP and SSHCP are also each pursuing creation of an in-lieu fee program, an important component of these efforts because it involves coordinated monitoring and funding to offset wetland impacts. E-mail from Loren Clark, *supra* note 10.

¹⁵ See PLACER CNTY. AQUATIC RES. PROGRAM (CARP), *supra* note 13, at 1-1.

¹⁶ ECCC REGIONAL GENERAL PERMIT, *supra* note 11, at 1.

¹⁷ *Id.*

¹⁸ U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES ACT SECTION 10(A)(1)(B) INCIDENTAL TAKE PERMIT (July 25, 2007), available at http://www.co.contra-costa.ca.us/depart/cd/water/HCP/documents/USFWS_ESA_Permit_10a1b_Signed.pdf; CAL. DEP'T OF FISH & WILDLIFE, FINDINGS OF FACT AND NATURAL COMMUNITY CONSERVATION PLAN (NCCP) PERMIT 2835-2007-001-03 FOR THE EAST CONTRA COSTA COUNTY NCCP 1 (Aug., 2007),

the SCV HCP/NCCP was approved in 2013 before CWA permitting had occurred,¹⁹ and applicants are subsequently pursuing permit coordination through an RGP.²⁰ The Solano Multi-Species HCP is also in the process of obtaining an RGP; however, it is doing so while still in the HCP planning phase.

Letters of Permission under Clean Water Act Section 404

Another tool available for coordinating CWA section 404 permitting with species permitting is the Letters of Permission (LOP) procedure. LOP procedures can be used for projects with small section 404 impacts, and according to practitioners are not useful for HCP/NCCPs with extensive impacts to aquatic resources.²¹ Like RGPs, project proponents individually apply for wetlands authorization from USACE, but the process is streamlined because the permit conditions and mitigation requirements match those under the HCP/NCCP.²² While LOPs have expiration dates, some have suggested that LOPs are easier to renew than RGPs.²³ The OCTA HCP/NCCP, which is in the HCP/NCCP planning stage, considers LOP procedures and the renewal process to be the most appropriate tool for its permit coordination efforts because it has a defined set of projects (and their impacts) planned out over the next thirty years.²⁴

Programmatic Certification under Clean Water Act Section 401 and the Porter-Cologne Water Quality Control Act

To coordinate species permitting with permitting for impacts to “waters of the United States” under CWA section 401 and “waters of the state” under the Porter-

available at http://www.co.contra-costa.ca.us/depart/cd/water/HCP/documents/CDFG_NCCP_Permit_and_Findings_Signed.pdf.

¹⁹ U.S. FISH & WILDLIFE SERV., FEDERAL FISH AND WILDLIFE PERMIT (July 30, 2013), available at <http://scv-habitatagency.org/DocumentCenter/Home/View/182>; CAL. DEP'T OF FISH & WILDLIFE, NATURAL COMMUNITY CONSERVATION PLAN PERMIT FOR THE SANTA CLARA VALLEY HABITAT PLAN (July 31, 2013), available at <http://scv-habitatagency.org/DocumentCenter/Home/View/181>.

²⁰ U.S. ARMY CORPS OF ENG'RS, S.F. DIST., PUBLIC NOTICE, PROJECT: SANTA CLARA VALLEY HABITAT CONSERVATION PLAN, REGIONAL GENERAL PERMIT 1 (May 5, 2014), available at http://www.sccgov.org/sites/dpd/DocsForms/Documents/SCVHP_RGP_2012-00302S_PublicNotice.pdf.

²¹ However, some program managers are pursuing or investigating using LOPs in addition to PGPs. E-mail from Loren Clark, *supra* note 10.

²² U.S. ARMY CORPS OF ENG'RS, PERMITTING PROCESS INFORMATION, available at <http://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf>.

²³ Telephone Interview with Lesley Hill, Project Manager, Orange Cnty. Transp. Auth. (July 1, 2015).

²⁴ *Id.*

Cologne Water Quality Control Act, HCP/NCCPs are pursuing a programmatic water quality certification from either the State Water Resources Control Board or the Regional Water Quality Control Board that has jurisdiction in the plan area. Once adopted, programmatic water quality certification authorizes the local agency to issue subsequent permits for certain projects in the plan area through a streamlined agency approval process. Both the proposed PCCP HCP/NCCP and proposed South Sacramento HCP are incorporating this permit coordination into their aquatic resources programs.²⁵ With its RGP approved, the adopted ECCC HCP/NCCP is now pursuing a programmatic water quality certification, and the proposed Solano Multi-Species HCP is also in the early stages of pursuing a programmatic water quality certification.²⁶

Streambed Alteration Agreements under California Fish and Game Code Section 1602

Under California law, Streambed Alteration Agreements (SAAs) are required whenever a public agency or private party diverts or obstructs the natural flow of the bed, bank, or channel of any CDFW designated rivers, streams, or lakes.²⁷ The SAA is not a permit, but an agreement resulting from negotiations between the proponent and CDFW.²⁸ CDFW can enter into an SAA that covers routine operation and maintenance, often referred to as a “programmatic” SAA,²⁹ and/or long-term agreements covering development activities, known as a Master SAA.³⁰ The proposed PCCP HCP/NCCP³¹ and proposed South Sacramento HCP³² are

²⁵ Telephone Interview with John Hopkins, *supra* note 6; Telephone Interview with Loren Clark, Assistant Planning Dir., Placer Cnty. Planning Dep’t (June 2, 2015).

²⁶ Telephone Interview with Abigail Fateman, E. Contra Costa Cnty. Habitat Conservancy (July 2, 2015); Telephone Interview with John Hopkins, *supra* note 6.

²⁷ CAL. FISH & GAME CODE §§ 1600–1616.

²⁸ R.J. Comer, *Navigating the Negotiation of Streambed Alteration Agreements*, 24 L.A. LAW. 13 (Jan., 2002).

²⁹ See N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 4 (referring to the SAA as “programmatic”).

³⁰ CAL. CODE REGS. tit. 14, § 699.5.

³¹ PLACER CNTY. AQUATIC RES. PROGRAM (CARP), *supra* note 13, at 1-2.

³² CNTY. OF SACRAMENTO ET AL., WORKING DRAFT SOUTH SACRAMENTO HABITAT CONSERVATION PLAN i, 1-1 (July, 2010) (referring to the SAA as “programmatic”), *available at* http://www.per.saccounty.net/PlansandProjectsInProgress/Documents/SSHCP/SSHCP_Working%20Draft_Vol%201_CH1-2.pdf; DEP’T OF CMTY. DEV., PLANNING AND ENVTL. REVIEW DIV., CONTROL NO. 2002-PL-0637, NOTICE OF PREPARATION NOP-2, NOP-2, NOP-3 (Oct. 28, 2013) (referring to SAA as a Master SAA), *available at* <http://www.per.saccounty.net/PlansandProjectsInProgress/Documents/SSCHP/EIR%20Materials%202013-2014/SSHCP%20NOP%2010-28-13.pdf>.

incorporating this agreement into their aquatic resources programs.³³ The adopted ECCC HCP/NCCP intends to pursue this after it obtains a programmatic water quality certification.³⁴ The proposed OCTA HCP/NCCP,³⁵ adopted Coachella Valley Multiple Species HCP/NCCP, and proposed Solano Multi-Species HCP³⁶ are in the early stages of pursuing programmatic streambed alteration agreements.³⁷

Special Area Management Plans

Lastly, Special Area Management Plans (SAMPs) are an alternative tool for permit process coordination.³⁸ SAMPs are similar to HCP/NCCPs in that they are a plan document intended to analyze individual and cumulative impacts in the context of broad ecosystem needs.³⁹ However, SAMPs focus on aquatic resources and are prepared by USACE, in cooperation with local land use authorities. They serve as a basis for USACE's authorization of permits, such as an RGP or LOP procedures, and the identification of areas that warrant protection through use as

³³ However, Master SAAs neither give the local land use agency the ability to authorize projects nor contain any regulatory assurances. Placer County still hopes to receive streamlining benefits through a Master SAA because CDFW is expected to issue agreements based on Placer County's conservation strategy, *supra* note 13, which CDFW approved. E-mail from Loren Clark, Assistant Planning Dir., Placer Cnty., to author (Sept. 29, 2015, 04:45 PM PST).

³⁴ E. CONTRA COSTA CNTY. HABITAT CONSERVATION PLAN ASS'N, EAST CONTRA COSTA COUNTY HCP/NCCP, CHAPTER 1, INTRODUCTION 1-1, 1-5, 1-8, 1-17-18 (Oct., 2007), *available at* <http://www.co.contra-costa.ca.us/depart/cd/water/HCP/archive/final-hcp-rev/pdfs/ch01intro.pdf>.

³⁵ ICF INT'L, ORANGE CNTY. TRANSP. AUTH., PUBLIC DRAFT OCTA M2 NATURAL COMMUNITY CONSERVATION PLAN/HABITAT CONSERVATION PLAN i, ES-5, 1-21-22, 5-2, 5-47 (Sept., 2014), *available at* http://www.octa.net/pdf/OCTA_NCCP_HCP_Plan.pdf.

³⁶ SOLANO CNTY. WATER AGENCY, PUBLIC DRAFT, SOLANO HABITAT CONSERVATION PLAN, VOLUME 1, SECTION 1, INTRODUCTION, 1-i, 1-15, 1-19, 1-20 (Oct., 2012), *available at* <http://www.scwa2.com/home/showdocument?id=398>.

³⁷ Telephone Interview with Lesley Hill, *supra* note 23; Telephone Interview with Loren Clark, *supra* note 25; Telephone Interview with Abigail Fateman, *supra* note 26; Telephone Interview with John Hopkins, *supra* note 6.

³⁸ Although SAMPs originated with the Coastal Zone Management Act, 16 U.S.C.A. § 1453 (17) (West 2009), the concept of a SAMP applies equally to non-coastal, geographically sensitive areas such as wetlands. U.S. ARMY CORPS OF ENG'RS, SPECIAL AREA MANAGEMENT PLANS, REGULATORY GUIDANCE LETTER NO. 05-09 § 2(a) (Dec. 7, 2005), *available at* <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-09.pdf> [hereinafter REGULATORY GUIDANCE LETTER NO. 05-09] (replacing U.S. ARMY CORPS OF ENG'RS, SPECIAL AREA MANAGEMENT PLANS, REGULATORY GUIDANCE LETTER NO. 86-10 (Oct. 2, 1986), *available at* <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl86-10.pdf> [hereinafter REGULATORY GUIDANCE LETTER NO. 86-10]).

³⁹ REGULATORY GUIDANCE LETTER NO. 05-09, *supra* note 38, at § 3(a); N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 7-8.

mitigation areas or where more stringent permit reviews (i.e., standard individual permits) are conducted.

SAMPs are typically time consuming and labor intensive to develop.⁴⁰ As compared to species permitting on a landscape level, SAMPs are more dependent on detailed ecological information and analysis,⁴¹ including advanced identification of resources that should be given higher levels of protection from development activities.⁴² SAMPs require the complete delineation upfront of wetlands to be impacted by the proposal.⁴³ Delineating the boundaries of numerous wetlands to be impacted requires survey of the area for wetland indicators; on privately owned land, these surveys require the landowner's permission. Further, prioritizing wetlands, itself, is a difficult process and contestable.⁴⁴ Ecological populations are the easiest values to estimate and agree upon,⁴⁵ but on the ecosystem scale, wetlands provide numerous benefits with real value that are harder to quantify without detailed ecological information.⁴⁶ For these reasons, SAMPs can be particularly difficult to develop because resources within a SAMP or HCP/NCCP are often on privately owned land and impacts are delineated generally, by urban growth boundary for example, which makes it extremely difficult to prohibit impacts from development.⁴⁷

⁴⁰ Because SAMPs are labor intensive, USACE requires that four factors be present before approval: (1) the area is environmentally sensitive and under strong developmental pressure; (2) there is a supporting local agency; (3) public involvement throughout the process; and, (4) that all parties involved understand the end result of a SAMP will be a definitive regulatory product. REGULATORY GUIDANCE LETTER NO. 05-09, *supra* note 38, at § 3(b), (c).

⁴¹ N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 7.

⁴² E-mail from David Olson, Chief, Regulatory Div., USACE, to author (Sept. 23, 2015 08:05 AM PST).

⁴³ N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, 7–8.

⁴⁴ Daryn McBeth, *Article: Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201, 207–208 (1997); William J. Mitsch & James G. Gosselink, *The Value of Wetlands: Importance of Scale and Landscape Setting*, 35 ECOLOGICAL ECONOMICS 25, 25–26 (2000) (discussing general principles when attempting to value wetlands).

⁴⁵ Mitsch & Gosselink, *supra* note 44, at 27.

⁴⁶ See Mitsch & Gosselink, *supra* note 44, at 28 (“At the ecosystem scale, wetlands provide flood control, drought prevention, and water quality protection. These ecosystem values are real, but their quantification is difficult and the benefits are generally regional and less specific to individual land owner.”).

⁴⁷ E-mail from David Olson, *supra* note 42.

SAMPs are also prepared by USACE, with varying levels of participation by local and state land use agencies.⁴⁸ While many potential applicants want to coordinate planning efforts with USACE, many have rejected relying on SAMPs because they are reluctant to hand primary control of the planning process over to USACE.⁴⁹

ANTICIPATED BENEFITS

The future success of these various emerging efforts depends on how one defines the goals of permit coordination. If the goal is improved conservation, for example, the benefits and challenges of coordination may be assessed differently than if the goal is simply to issue permits more quickly.⁵⁰ Numerous proponents of species/water permit coordination efforts assert that permit process coordination will promote program effectiveness, efficiency, and legitimacy. The various claimed benefits and challenges are explored below.

Proponents maintain that an HCP/NCCP that takes a regional approach to conservation, in coordination with other agencies, is likely to be more effective at achieving the goals of the various statutes at issue, including promoting long-term water quality and ecosystem or landscape-level conservation.⁵¹ Numerous participants and scholars claim that addressing resources concurrently on a regional scale that can take ecosystem and watershed functions into account is more likely to lead to better conservation results, including integrated compliance monitoring and adaptive management.⁵² Certain local environmental

⁴⁸ E-mail from David Olson, *supra* note 12 (asserting that the participation of local or state land use authorities and long-term commitment to implement the SAMP as intended are critical to its success).

⁴⁹ E-mail from John Hopkins, Dir., Cal. Habitat Conservation Planning Coal., to author (Oct. 5, 2015 03:20 PM PST).

⁵⁰ See Amy Wilson Morris & Jessica Owley, *Mitigating the Impacts of the Renewable Energy Gold Rush*, 15 MINN. J.L. SCI. & TECH. 293, 312–14 (2014) (discussing the benefits, relatively quick processing times and consolidation of permits, in similar efforts to streamline permitting for large-scale solar projects in California). However, the authors also note that many environmental groups have been critical of these fast-tracking or streamlining initiatives as lacking adequate review, *id.* at 337.

⁵¹ Telephone Interview with Doug Wheeler, Partner, Hogan Lovells (July 2, 2015); ELI Roundtable, *supra* note 4.

⁵² Telephone Interview with Galen Schuler, Green Diamond Resource Co. (June 4, 2015); Telephone Interview with Kim Delfino, Defenders of Wildlife (May 22, 2015); E-mail from Loren Clark, *supra* note 10; ELI Roundtable, *supra* note 4. See also Paul Jones, *Toward an Adaptive-Monitoring Paradigm: Addressing Information Needs Over the Next 50 Years*, 35 NAT'L WETLANDS NEWSL. 26, 26–27 (May–June, 2013) [hereinafter Jones, *Toward an Adaptive-Monitoring Paradigm*] (outlining a framework for a comprehensive program that integrates federal and state resource permitting, HCPs, and NCCPs).

organizations, for example, support this coordinated permitting approach because landscape-scale conservation, with its protection of large areas of high-quality wetlands, provides for better long-term conservation outcomes than project-by-project aquatic resource permitting.⁵³ Coordinating permit processes brings multiple agencies together and facilitates a discussion among experts that some scholars contend can lead to the development of more effective and innovative conservation measures and methods for permitting.⁵⁴

For some HCP/NCCPs, the local development community has vigorously pursued the development of programmatic section 404 permitting in coordination with the conservation plans at least in part because of the purported effectiveness benefits.⁵⁵ Proponents assert that coordinated permitting can help assure regulatory mandates are implemented in a compatible fashion if both wetlands and endangered species regulations are addressed in a concurrent, coordinated planning process.⁵⁶ In addition, having a single entity responsible for an integrated monitoring program (and the possibility of multiple HCP/NCCPs using comparable monitoring methods) could greatly improve understanding of not just the extent and distribution of the resources, but their individual and collective condition.⁵⁷

Proponents anticipate that coordinating permit processes will result in efficiency benefits, such as improved regulatory certainty, cost savings, and time savings, as compared to a project-by-project approach.⁵⁸ Proponents assert that streamlined planning and permitting will minimize duplication of effort by regulatory authorities and thus reduce the costs to the public of permit processing.⁵⁹ Under the current system of multiple overlapping permits, regulators are often required to produce the same or similar document twice, such as a duplicate set of findings and biological opinions.⁶⁰ A consolidation of the review process could lead to

⁵³ Telephone Interview with Michael Wellborn, Cal. Watershed Network (May 28, 2015); ELI Roundtable, *supra* note 4.

⁵⁴ Roger Fleming, *Does the Clean Water Act Protect Endangered Species? The Case of Maine's Wild Atlantic Salmon*, 7 OCEAN & COASTAL L.J. 259, 262–263 (2002) (discussing efforts by the EPA and the Services to better integrate their respective CWA and ESA programs).

⁵⁵ Telephone Interview with John Hopkins, *supra* note 6.

⁵⁶ Telephone Interview with Robert D. Thornton, Partner, Nossaman LLP (June 1, 2015); N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 5.

⁵⁷ See Jones, *Toward an Adaptive-Monitoring Paradigm*, *supra* note 52.

⁵⁸ Buchsbaum, *supra* note 1, at 197. See also Hayes, *supra* note 5, at 10018–10019 (discussing efficiency benefits of improved permit coordination).

⁵⁹ Telephone Interview with Jim Bartel, Field Supervisor, Carlsbad, U.S. Fish & Wildlife Serv. (retired) (June 2, 2015); ELI Roundtable, *supra* note 4.

⁶⁰ ELI Roundtable, *supra* note 4.

potential time and cost savings for financially constrained agencies as well as plan applicants, many of whom claim that the current permitting system is expensive, lengthy, and often results in ineffective mitigation.⁶¹ Applicants also appreciate the enhanced regulatory certainty and lower risk of litigation that results from coordinated rather than individual permitting.⁶² The efficiency benefits are likely to be most present for those alternatives such as PGPs that seek to streamline and even consolidate subsequent permit processing.

Finally, for at least some of the various tools available for permit process coordination, there also may be legitimacy benefits that come with transferring control over permitting from single-purpose federal agencies to more local authorities with generalized jurisdiction. Buttressed by the principles of subsidiarity and federalism,⁶³ some claim local agencies are better suited to address on-the-ground issues and that having federal agencies delegate permitting authority to local agencies promotes accountability. Furthermore, by enhancing citizen participation and promoting public acceptance of the regulatory process, some maintain that more localized decision making might lead to better outcomes and thus ultimately a more effective regulatory program.

OBSERVED CHALLENGES

Permit coordination, as evidenced to date by these burgeoning efforts, is not without its challenges. Integrating aquatic resource planning with endangered species planning inevitably adds complexity to the permitting process.⁶⁴ This is potentially compounded by the fact that, unlike the ESA, the CWA does not have a tool for issuing permits across a broad planning area over a time horizon longer than five years.⁶⁵ Because these attempts at coordinating complicated but fragmented regulatory processes are unprecedented and occurring on an ad hoc

⁶¹ Telephone Interview with Robert D. Thornton, *supra* note 56. See also E-mail from Abigail Fateman, E. Contra Costa Cnty. Habitat Conservancy, to author (October 5, 2015 04:44 PM PST).

⁶² ELI Roundtable, *supra* note 4.

⁶³ See Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D*, 51 HARV. J. ON LEGIS. 19, 39–40 (2014).

⁶⁴ See Dave Owen, *Mapping, Modeling, and the Fragmentation of Environmental Law*, 2013 UTAH L. REV. 219, 230–231 (2013) (discussing the challenges and rarity of multimedia permitting integration).

⁶⁵ While LOP procedures can be in place longer, both PGPs and RGP expire after five years and must be renewed. Some see this five-year limit as an opportunity because it requires a reexamination of the PGP or RGP during the re-issuance process, and lessons learned during the initial cycle can be used to improve the reissued PGP or RGP. E-mail from David Olson, *supra* note 12.

basis, it is not surprising that they are encountering hurdles that delay the realization of the potential benefits.⁶⁶

Limited resources in terms of funding and staff have presented chronic difficulties.⁶⁷ Permit process coordination efforts are less common outside of California, in part because of the limited overlap in other states of aquatic resources and listed species.⁶⁸ Accordingly, some have reported that it is often more challenging to garner national political and financial support for these efforts.⁶⁹

There is also the challenge of convincing some agency officials and stakeholders to take a long-term view in order to understand the benefits of permit coordination. Despite the potential streamlining benefits through permit coordination, some doubt that the time and financial costs of achieving permit process coordination are outweighed by the efficiency benefits, particularly as such advantages may not be realized for many years down the line. As a result, it can be difficult to get all of the relevant players to the table initially.⁷⁰ In some cases, applicants and local authorities are skeptical that permit coordination allows them to better meet their goals because they remain focused on the current projects, rather than the subsequent projects that will enjoy the effectiveness and efficiency benefits of permit process coordination.⁷¹ Similarly, some report that the state and federal wildlife agencies have been more focused on the overall HCP/NCCP and not necessarily convinced that considering other aquatic resources, beyond ESA issues, allows them to better meet their habitat conservation and species recovery goals.⁷²

Likewise, despite the considerable effort by some to promote permit coordination, there is significant variation between offices within the same agency regarding the

⁶⁶ *But see* Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 217 (2002) (discussing the practical difficulties in interagency cooperation but rejecting the piecemeal approach, noting that, “in each case, lacking any pre-existing regional coordinating mechanism, it became necessary to invent one; and invented they were, on ad hoc, case-by-case bases, as local exigencies demanded.”).

⁶⁷ *See* N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 5.

⁶⁸ *See* Jones, *Toward an Adaptive-Monitoring Paradigm*, *supra* note 52 (describing the opportunities for collaboration and integrated monitoring programs in California’s wetlands).

⁶⁹ Telephone Interview with John Hopkins, *supra* note 6.

⁷⁰ Telephone Interview with Charles Landry, W. Riverside Reg’l Conservation Auth. (May 20, 2015).

⁷¹ ELI Roundtable, *supra* note 4.

⁷² *Id.*

willingness to facilitate permit coordination efforts.⁷³ For example, the Western Riverside Multi-Species HCP attempted to integrate its plan with CWA permitting in the early 2000s, but the efforts were not successful due in part to USACE funding challenges as well as the involvement of a regional water quality control board that had a skeptical view of the advantages of landscape-level over project-by-project permitting.⁷⁴ This indifference or even aversion to larger-scale planning has hampered interagency coordination efforts and led to significant time delays or even road blocks for other plans.⁷⁵ Some applicants actually reported in some cases an inability for different offices within an agency to work together, which has led to duplication of effort and increased processing time and costs.⁷⁶

Perhaps most importantly, various participants reported a lack of retention of institutional knowledge within regulatory agencies due to turnover of personnel and the absence of an infrastructure for collection of such information.⁷⁷ Without any mechanism for information-sharing and assessment of the successes and limitations of these regulatory experiments, these pioneering plans have not been able to reap the full extent of potential efficiency benefits that could come with enhanced coordination. Such difficulties are compounded by the lack of guidance from higher-level agency policymakers on how to approach permit process coordination. These features have prevented subsequent plans from learning from one another and have led to later applicants and regulators reinventing the wheel.⁷⁸

CONCLUSIONS

Permit process coordination efforts for aquatic resources among California HCP/NCCPs are still a relatively new undertaking,⁷⁹ and as a result it is not clear whether such efforts will prove successful. Though some point to the potential for more efficient, legitimate, and effective permitting and resource conservation, others have raised concerns about the significant up-front costs; a limited infrastructure for inter-plan learning; and a lack of high-level guidance and support and thus inconsistency between these pilot efforts.

⁷³ *Id.*

⁷⁴ Telephone Interview with Charles Landry, *supra* note 70.

⁷⁵ ELI Roundtable, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ Telephone Interview with Robert D. Thornton, *supra* note 56; ELI Roundtable, *supra* note 4.

⁷⁸ ELI Roundtable, *supra* note 4.

⁷⁹ See N. CAL. WETLANDS & ENDANGERED SPECIES PERMITS WORKING GRP., *supra* note 8, at 1–2.

The experience of California HCP/NCCPs and the tools tested in pursuing permit coordination are already providing valuable lessons for both current and future applicants, and they almost certainly will continue to do so as they progress. These decentralized, lengthy regulatory experiments have the potential for helping future plan preparation and implementation efforts. However, if agencies want to truly explore the potential value of permitting process coordination, higher-level support and leadership from federal and state regulators is needed to allow agency staff and applicants the necessary license and support to pursue permit process coordination efforts. The issuance of a policy directive by the USFWS, working with the relevant federal and state water authorities, could not only provide this needed foundation, but could also provide guidance on permit process coordination and consistency by establishing standard practices.

Such guidance could provide a template for USACE, USFWS, EPA, CDFW, and local officials to improve their synchronization of permit reviews, develop common and transparent permit review schedules, and promote training and awareness among agencies to reduce duplication of effort. It should draw on existing and parallel efforts at permit coordination, such as the President's Executive Order No. 13604,⁸⁰ which was adopted after the Administration identified lack of coordination among multiple agencies as a root cause of infrastructure permitting problems, such as delays and escalated costs.⁸¹ To execute federal permitting and review processes with maximum efficiency and effectiveness, the Order directs agencies to provide a transparent, consistent, and predictable path for both project sponsors and affected communities.⁸²

In 2014, an interagency Steering Committee released an implementation plan outlining major strategies, reforms, and milestones for modernizing permit processes, including institutionalizing interagency coordination and

⁸⁰ Improving Performance of Federal Permitting and Review of Infrastructure Projects, Exec. Order No. 13604, 77 Fed. Reg. 18,887, 18,887 (Mar. 22, 2012). The order expands on and advances the Administration's prior efforts, *id.* at 18,888; Interagency Working Group on coordination of Domestic Energy Development and Permitting in Alaska, Exec. Order No. 13580, 76 Fed. Reg. 41,989, 41,989 (July 12, 2011); Improving Regulation and Regulatory Review, Exec. Order No. 13563, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011); Presidential Memorandum--Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review (Aug. 31, 2011), *available at* <https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more>.

⁸¹ Hayes, *supra* note 5, at 10019.

⁸² Exec. Order No. 13604, *supra* note 80, at 18,888–90 (directing agencies to set and adhere to timelines and schedules for completion of reviews, set clear permitting performance goals, and track progress against those goals).

transparency.⁸³ Actions identified in the plan to promote coordination include: (1) developing a mechanism for elevating and resolving interagency issues and disputes; (2) expanding the use of programmatic approaches for routine activities and those with minimal impacts; and (3) establishing a dedicated team, staffed by dedicated subject matter experts and supported by rotating “detailees” from participating agencies, to support the ongoing improvement of permitting and review responsibilities.⁸⁴ The implementation plan also established a clearinghouse to share best practices across agencies and lessons learned from an initial set of projects.⁸⁵ As part of the President’s FY 2015 budget, the plan proposed legislative changes and targeted increases in agency funding that enhance agency capacity to implement these suggested reforms.⁸⁶ If enacted, such legislative proposals would allow agencies more flexibility in using federal funds for improving permitting and review.⁸⁷

A key component of the plan was the further development and deployment of an online permitting “dashboard” to facilitate early collaboration, reduce time associated with permitting, and increase accountability by making more project information available to the public.⁸⁸ The dashboard has been expanded to include an internal IT platform that allows agency members to develop collaborative schedules, share project documents, and quickly communicate with each other.⁸⁹ Recent guidance from the Office of Management and Budget and the Council on Environmental Quality calls on agencies to begin using this dashboard to establish metrics for permitting and environmental review of complex infrastructure projects.⁹⁰

Though focused on infrastructure permitting coordination and not specific to activities affecting endangered species and water resources, this effort

⁸³ See STEERING COMM. ON FED. INFRASTRUCTURE PERMITTING & REVIEW PROCESS IMPROVEMENT, *supra* note 5, at 5 (identifying four strategies, fifteen goals, and ninety-six near and long-term milestones to further institutionalize best practices and lessons learned).

⁸⁴ *See id.* at 7–8.

⁸⁵ *See id.* at 51–52.

⁸⁶ *Id.* at 44–45.

⁸⁷ *Id.* at 45.

⁸⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 5, at 1–2.

⁸⁹ *Report to the President, Rebuilding America’s Infrastructure: Cutting Timelines and Improving Outcomes for Federal Permitting and Review of Infrastructure Projects* i, 3 (May, 2013), <https://www.whitehouse.gov/sites/default/files/omb/reports/report-to-the-president-rebuilding-americas-infrastructure.pdf>.

⁹⁰ *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 5, at 7–8 (defining complex projects that must be posted on the dashboard, starting October, 2015).

demonstrates the federal government's broader interest in permit coordination. Moreover, it provides useful suggestions that should inform efforts in the endangered species and water resources context. Similar policy guidance from USFWS could delineate the tools available for endangered species and aquatic resources permitting coordination, as well as what has worked and not worked previously.

Notably, the recent Executive initiatives to promote infrastructure permit coordination have focused primarily on procedural mechanisms. Likewise, most of the lessons offered by respondents on species and water resource conservation permit coordination have centered on procedures that may help promote more effective communication or harmonization among authorities and/or parties. For example, respondents have suggested that a clear delineation up front of the relationship among and responsibilities of the various jurisdictional authorities, including the USFWS, CDFW, USACE, the State Water Quality Control Board, Regional Boards, and/or the EPA, is more likely to promote more efficient and effective coordination.⁹¹ Further, some participants assert that the integrated document would benefit from offering a wide variety of stakeholders from the environmental, academic, agricultural and development communities a more active role in shaping the details of the initial plan, rather than making them as mere passive consultants.⁹² In addition, any issues related to developing a coordinated, integrated monitoring program that serves ESA and CWA purposes could be addressed from the outset of the process instead of trying to shoehorn the CWA monitoring into the ESA monitoring at the end of the HCP process.⁹³ One respondent suggested a Memorandum of Agreement (MOA) between an HCP applicant, the Services, and the CWA agencies.⁹⁴ The MOA would establish the goal of HCP/NCCP integration and include operational terms and conditions for the sections 404/401 permitting framework.⁹⁵

⁹¹ Telephone Interview with Loren Clark, Assistant Planning Dir., Placer Cnty. Planning Dep't (Nov. 2, 2015); E-mail from Chris Lee, Solano Cnty. Water Agency, Dir. of Env. Compliance, Permitting, and Habitat Conservation, Principal Water Resource Specialist, to author (Oct. 26, 2015, 01:45 PM PST); E-mail from Paul Jones, U.S. Env't'l Protection Agency, Wetlands Div., to author (Oct. 26, 2015, 09:26 AM PST).

⁹² E-mail from Paul Jones, *supra* note 91.

⁹³ *Id.* Early planning could identify common management questions from which the integrated monitoring objectives could be developed, which would then drive the methods to obtain the data and the information necessary to inform adaptive management. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* For example, if the management requirements for CWA mitigation were to include an in-lieu fee program, the program's "compensation planning framework" should evolve in lock-step with the HCP/NCCP conservation strategy. *Id.*

Beyond lessons about effective streamlining of process, USFWS guidance could also extend to provide information on substantive issues of agreement or conflict at the intersection of endangered species conservation and aquatic resource protection. For example, respondents have indicated that early planning documents should unambiguously connect the two permit processes by clearly identifying that species conservation permits will seek to advance water resource conservation objectives, and that water resource permits will seek to promote species conservation goals.⁹⁶ This would include an acknowledgement from the outset of the various goals and objectives of the habitat conservation and the wetland, stream, and water quality protection issues. Including both procedural and substantive guidance such as these could be used not only to promote more efficient permit processing but also to facilitate more effective resource conservation.

USFWS might consider incorporating such guidance, or at least an acknowledgement of the opportunities for and challenges of permit coordination, in the revisions to the HCP Handbook that are currently underway. A relevant example is the recent update to the Red Book, a federal interagency guidance document between USACE, USFWS, EPA, the Coast Guard, Department of Transportation, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, and National Oceanic and Atmospheric Administration on permit review coordination that incorporated case studies and best practices designed to enhance synchronization and integration.⁹⁷ The Red Book captures lessons learned from previous review synchronization efforts, and breaks down the concurrent review procedure into easy to understand components, affording agencies the opportunity to replicate the procedure or portions of the procedure more widely and without having to execute a formal agreement.⁹⁸ A chapter in the new HCP Handbook addressing permit coordination could similarly incorporate case studies and best practices to facilitate more widespread adoption of these efforts to integrate planning and permitting for endangered species and aquatic resources. USFWS might also consider

⁹⁶ Telephone Interview with Loren Clark, *supra* note 91; E-mail from Chris Lee, *supra* note 91; E-mail from Paul Jones, *supra* note 91.

⁹⁷ U.S. ARMY CORPS OF ENG'RS ET AL., FHWA-HEP-15-047, SYNCHRONIZING ENVIRONMENTAL REVIEWS FOR TRANSPORTATION AND OTHER INFRASTRUCTURE PROJECTS: 2015 RED BOOK 1 (Sept., 2015), *available at* https://www.environment.fhwa.dot.gov/strmlng/Redbook_2015.pdf [hereinafter 2015 RED BOOK]. The 2015 Red Book acknowledges the efforts of the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement, *see generally* STEERING COMM. ON FED. INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, *supra* note 5. Agencies are strongly encouraged to use the principles, processes, tools, approaches, and dispute resolution procedures identified in the handbook. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 5, at 9–10.

⁹⁸ 2015 RED BOOK, *supra* note 97, at 1–5.

establishing a dedicated team of ESA and CWA subject matter experts, supported by rotating detailees from USFWS, EPA and USACE, to support the ongoing improvement of permitting coordination efforts. In addition, the development of an online permitting dashboard to report project schedules and progress could promote transparency and encourage early coordination.

Development of a learning infrastructure that promotes self-reflection and the sharing of lessons learned would also be helpful.⁹⁹ As these permit coordination initiatives remain nascent, initial guidance necessarily will have to rely on preliminary evidence about what synergies are emerging from using concurrent or consecutive processes for species and water conservation planning. As pilots evolve and new permit coordination efforts are initiated, the various authorities have an opportunity to better develop reliable conclusions and harness these lessons going forward. This could be achieved through the methodical assessment of new pilot coordination efforts. If there are not sufficient resources to create new pilot projects, existing HCPs that are in the process of coordinating permitting might be used instead. Only through more systematic assessment will it become clearer whether the purported benefits of these experimental efforts are being realized, or the perceived challenges are proving too great to overcome.

⁹⁹ See generally Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty through a Learning Infrastructure*, 59 EMORY L. J. 1 (2009).