

**Appendix 1. ESA Working Group Draft Matrix
Options for Improving Communication with Councils during ESA Section 7 Review**

Goal: Improve communications among SF, PR, and councils during ESA section 7 consultations

Note: The working group agrees that the best long-term solution needs to incorporate early coordination of MSA, NEPA, and ESA activities. This matrix is focused only on the ESA components.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
Council Involvement Prior to initiation of formal consultation					
1. Early Involvement: Interdisciplinary Plan Team ESA 7(a)(1), (2)	Early communication and coordination. Representatives from SF, PR, and Council work together on a team drafting documents in support of developing recommendations	Ongoing participation of Councils from initiation of action through submission of FMPs and implementing regulations for Secretarial review.	Early exchange of information	Extra work in terms of providing information on potential impacts as alternatives develop and are modified. Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	

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<p>2. Technical Assistance / Not formalized</p> <p>ESA 7(a)(1)</p>	<p>Early communication and coordination by request and as time allows. Representatives from SF, PR, and Council work together during early planning stages to support development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation.</p>	<p>Throughout MSA FMP Process up to initiation of Informal or Formal Consultation</p>	<p>Continual Exchange of Information. No formal teams</p>	<p>Indirect participation in Drafting</p> <p>Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.</p>	
<p>3. Technical Assistance / Formalized</p> <p>ESA 7(a)(1)</p>	<p>Early communication and coordination under established framework (Roles and Responsibilities) and scheduled meetings. Representatives from SF, PR, and Council work together during all planning stages to support of development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation. Meet outside of planned actions to leverage lessons-learned through adaptive management approach</p>	<p>Throughout MSA FMP Process up to initiation of Informal or Formal Consultation</p>	<p>Continual Exchange of Information. Formal Mechanism with designated Points of Contact.</p>	<p>Indirect participation in Drafting; Will require additional staff time and resources</p> <p>Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.</p>	<p>May require dedicated staffing similar to establishing liaisons for FMP/Councils.</p>

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Technique	What it does	Timing	Pros	Cons	Additional Considerations
4. Early Involvement: PR liaison to each FMP ESA 7(a)(1) – (4)	PR assigns staff to serve as liaison, attend Council meetings, exchange information about fisheries and protected species	Throughout MSA process. Ongoing PR participation/attendance at Council meetings to share information about protected species impacts and to monitor developing fishery management actions	Dedicated Biologist for FMP Actions; Real-time expert advise and feedback during Council Meetings	Time consuming and not always necessary. Manpower/ Time Intensive, Expensive Unless combined with other options (5-9 below), this option on its own would not provide the Councils’ desired review of draft biological opinions.	May require dedicated staffing similar to establishing liaisons for FMP/Councils
Techniques for Council Review of Draft BO					
5. Council Status: As Action Agency or as a “co-lead” or “cooperating” agency along with SF.	If the Council is an action agency, then it is required to consult with PR to insure that its actions will not cause jeopardy.	Formal consultation would be initiated at Council’s request, or at the joint request of SF and each Council	This would provide the Council with direct communication with PR regarding the action on which the Council is consulting (presumably the action would be development of a management recommendation).	“Action agencies” have various duties and responsibilities for compliance with various laws. Action agencies can be held accountable in court, which can lead to fees, discovery, document production requirements, burdens on staff, and sanctions. In addition, it is not clear whether NOAA GC would represent them or they would have to obtain separate legal counsel. It is not clear what type of communication the	This may not be legally possible in the absence of Congressional intent that Councils be treated as action agencies for purposes of ESA or other statutes. Previously, when councils have been listed as codefendants with NMFS, NOAA has succeeded in having them removed from the lawsuit. Council costs and vulnerabilities associated with being defendants in litigation should be considered here.

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				<p>Council and PR would have with SF during consultation on the Council's action.</p> <p>SF would remain responsible for compliance with the ESA as SF would be the action agency for purposes of implementing regulations/issuing permits. This could result in 2 sets of consultations.</p>	<p>Because of the requirement that Council meetings be public, the same consideration regarding waiver of privilege for draft biological opinions applies.</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>
Technique	What it does	Timing	Pros	Cons	Additional Considerations
6. Council Status: As Applicant	<p>SF would determine whether the Council is an applicant and how the Council as applicant would participate in the consultation. The ESA regulations provide certain procedural protections to applicants such as allowing them to provide information, participating in the development of RPAs, reviewing a draft upon request, and providing comments back through SF, and concurrence in extensions.</p> <p><i>Applicant</i> refers to any</p>	Recognition of a Council as an applicant could occur upon the request of a Council. Effects of the special status designation would occur during formal consultation.	Applicants would not be subject to the same litigation risks as action agencies (as described above in option 5).	<p>This would be similar to option 4 above (sharing of draft BO) with the addition that applicants have certain rights in the process, such as the right to participate in the development of the BO, and any terms and conditions associated with it. However, applicant communication with the consulting agency (PR) must be channeled through the action agency (SF) unless the applicant is also designated as a non-federal representative</p>	<p>SF, as the action agency, determines whether a party is an applicant. If it has not already done so, SF should provide input into NMFS' determination on this point.</p> <p>Even if SF does not determine Councils to be applicants, the Consultation handbook states that SF may still cooperate with non-applicants, and in that case, PR should as well.</p> <p>The issue of confidentiality of</p>

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	<p>person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.</p> <p>50 CFR 402.02</p>			<p>(see below).</p> <p>NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent for other parties to seek similar treatment.</p>	<p>council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. .</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>
Technique	What it does	Timing	Pros	Cons	Additional Considerations
<p>7. Council status: As non-federal representative</p>	<p><i>Designated non-Federal representative</i> refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment. See 402.08.</p> <p>50 CFR 402.02.</p>	<p>Designation of a Council as an a non-federal representative could occur upon the request of a Council, prior to the development of a DEIS. Thereafter, the Council could engage in informal consultation with PR (with involvement of SF) to develop a. Considerations as an applicant would also provide a Council with the ability to have input into the development of a BO based upon the content of the BA.</p>	<p>Non-Federal Representatives would not be subject to the same litigation risks as action agencies (as described above in option 5. Non-fed rep status would allow the Council to work directly with PR to engage in informal consultation during the development of proposed fishery management and would also help expedite development of a non-</p>	<p>Potential for additional time added to consultation process unless a Council develops a clear working relationship with PR and SF. This relationship could be memorialized in an MOU identifying roles and responsibilities.</p> <p>NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent</p>	<p>The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. .</p>

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			jeopardy BO by NMFS.	for other parties who don't have the MSA-based duties of councils, to seek similar treatment.	The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.
Technique	What it does	Timing	Pros	Cons	Additional Considerations
8. During Formal Consultation: Sharing of Draft BO with Council regardless of regulatory status of Councils under ESA	SF can request a copy of a draft BO, and may share it with the Council regardless of regulatory status of Councils under ESA	This would occur after the Council selects a preferred alternative and formal consultation has begun. Section 7 consultation cannot begin until there is a sufficiently identified proposed action. Once consultation begins, ESA regs provide for a 90-day consultation period, followed by a 45 day period for drafting the BO, for a total time period of 135 days after the action agency requests initiation and provides a description of the proposed action. These periods can be extended, and most consultations are typically longer than 135 days. Sharing of the draft BO would occur late in the 45-day drafting period. Thus, this would be late in the process for modifying Council recommendations and attempts to solicit meaningful Council and/or public comment would be likely to significantly extend the timing of completion of the BO.	Could give Councils an opportunity to see what PR is thinking – how data are being interpreted. Would allow Councils to assist in development of proposed action, Reasonable and Prudent Measures, and a Reasonable and Prudent Alternative if the actions cannot be tailored to avoid jeopardy.	Would occur late in the process, and could slow down completion of the fishery management plan or action or the BO.	While this approach would not accomplish as much coordination as early communication and frontloading techniques, it might be appropriate in certain situations, such as cases in which there is no corresponding Council process in which to frontload. Sharing a draft BO most likely affects assertion of privilege for the document. Due to MSA requirements for public meetings with only limited opportunities to close meetings, it is not clear how a council could consider and discuss a draft BO without treating it as a public document.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
Technique for providing clear roles throughout the process					
<p>9. Overarching MOU Approach: An MOU between SF and a Council could specify the SF's and the Council's respective roles in a consultation.</p>	<p>An MOU between SF and each Council could clarify relationships under the MSA and provide for designated roles and responsibilities pertaining to ESA compliance.</p> <p>This could be combined with an SF decision to share draft BOs and treat "as if" an applicant under option 4 above. And/or development of special terminology to describe unique roles and importance of councils under the law in fishery management process.</p> <p>The MOUs could be done individually for each region/council pair either on a general basis for particular actions. Further discussion is recommended to determine who all should be parties to the MOU – at least SF and the Council, potentially to</p>		<p>Customized MOUs could both recognize the unique roles of councils under the MSA and avoid unintentional consequences of attempting to apply existing regulatory status that may not be a perfect fit – generating risk of both adverse litigation and adverse precedent setting for other parties.</p>	<p>An untested procedure could present legal vulnerabilities.</p>	<p>The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived.</p> <p>The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.</p>

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	include PR as well, or have a separate policy agreement between SF and PR.				
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