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Fisheries Management

Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes

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SUMMARY OF REVISIONS:

Renewed in September 2018. This initial directive was put into effect on January 19, 2015.

I. Introduction

The Endangered Species Act (ESA), in Section 7(a)(2), requires federal agencies ("action agencies") to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of threatened or endangered species or adversely modify or destroy such species critical habitat in consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service (NMFS) ("consulting agencies"), depending on the species or habitat affected. The consulting agencies' determinations of whether a proposed action is likely to result in jeopardy or adverse modification is reached through the section 7 consultation process set forth at 50 CFR Part 402. Informal consultation is an optional process in which the action agency and the consulting agency consider the effects to ESA listed species from a proposed action, and it concludes if the relevant consulting agency or agencies concur with an agency's determination that its planned action may affect, but is not likely to adversely affect listed species or their critical habitat. Formal consultation is required if one or both consulting agencies do not concur with the action agency's determination or if the action agency determines that its action may affect listed species or their critical habitat.

Formal consultation may be initiated when the action agency provides a written request with sufficient information about the proposed action and its effects on listed species and designated critical habitat. Formal consultation concludes with the consulting agency's issuance of a biological opinion (BO), which contains the consulting agency's conclusion as to whether the action is likely to jeopardize listed species or destroy or adversely modify critical habitat. If the BO concludes

that the proposed action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, the consulting agency proposes "Reasonable and Prudent Alternatives" (RPAs) that would allow the action to proceed with modifications to avoid jeopardy or adverse modification. In this case, the action agency should either modify the proposed action to bring it into compliance with the ESA, or not take the action. The consulting agency and action agency should work together to avoid jeopardy conclusions and, when this is not possible, work together to develop RPAs. The BO also includes an "incidental take statement" (ITS) that specifies the number of individuals, or extent of a population, of a listed species that will be "taken" – defined broadly under the ESA to include harm and harassment as well as killing, hunting and capture – incidental to the planned action, and exempts that take from the ESA section 9 prohibitions on take. An action agency must reinitiate the consultation process if the specified amount or level of take is exceeded.

This policy was developed in response to a 2012 Council Coordinating Committee (CCC) request for better integration of Councils into the NMFS's ESA section 7 consultation process.

II. Objective

This policy directive implements recommendations from the CCC and the Marine Fisheries Advisory Committee (MAFAC) for better integrating Councils into the ESA section 7process. It is NMFS's policy that integration of Councils' fisheries management planning processes with the ESA section 7 process, along with enhanced coordination and collaboration, will result in more efficient development of regulations and policies that accomplish the goals of the ESA, National Environmental Policy Act (NEPA), and the Magnuson-Stevens Act (MSA).

III. Authorities and Responsibilities

This policy directive establishes the following authorities and responsibilities. This policy applies to ESA section 7 consultations that are conducted on fishery management activities that: (1) are governed by fishery management plans developed by the Councils pursuant to the MSA; and (2) may affect endangered or threatened species or designated critical habitat under NMFS' jurisdiction.

This policy does not apply to fisheries managed solely by the Secretary. It does not pertain to consultations on species or critical habitat under the jurisdiction of the U.S. Fish and Wildlife Service. It does not apply in the case of consultations conducted on activities taken by other action agencies.

There are generally three opportunities for collaboration with the Councils when section 7 of the ESA applies. The first occurs when a Council is in the process of developing a new or modified management measure and NMFS determines that the action may affect endangered or threatened species or designated critical habitat. The

second opportunity is during formal or informal consultation between the unit of NMFS functioning as the action agency (Sustainable Fisheries (SF)), and the unit of NMFS functioning as the consulting agency (generally Protected Resources (PR)), once a proposed action has been identified. Another opportunity occurs when a change external to the Council process triggers the need for initiation, or reinitiation, of consultation on the fishery action. For example, reinitiation is triggered by a change in species listings, a designation or revision of critical habitat, an exceedance of the amount or level of incidental take specified in an ITS, or if new scientific information becomes available that may affect the findings of an existing BO. NMFS has determined that this policy is applicable to all three situations. NMFS and the Councils are encouraged to use this policy and guidance to foster broad cooperation and communication pertaining to our joint stewardship and management responsibilities.

IV. Measuring Effectiveness

a. Recognition of the Unique Roles of Councils

The MSA establishes the basis for Federal management of United States fisheries and vests primary management responsibility with the Secretary of Commerce. The Secretary has delegated this responsibility to the NMFS. The MSA management system is unique insofar as Congress has established eight regional fishery management councils and given them special responsibilities for recommending fishery management plans (FMPs) and amendments and regulations. FMPs and regulations must comply with all applicable law including the ESA.

Composed of Federal, state, and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with experience or training in fishery conservation and management, the Councils' primary responsibility is to develop and recommend fishery management measures and actions for any fishery under their jurisdiction that requires conservation and management. Specifically, MSA section 302(h)(1) requires Councils to prepare and submit FMPs to NMFS for fisheries in need of conservation and management. Section 303(c) of the MSA requires Councils to submit to NMFS proposed regulations that the Councils deem necessary and appropriate to implement the FMP. The MSA mandates an open, public process for the development of fishery management measures and actions through the fisheries management council system. For MSA fishery management actions, NMFS's authority to modify Council-recommended fishery management plans and plan amendments is restricted: NMFS may approve, disapprove, or partially approve a proposed FMP or FMP amendment recommended by the Council, and the sole basis for disapproval of any such recommendation is that it is not consistent with applicable law, including NEPA, the MSA and its national standards, or the ESA. NMFS may not modify regulations in a way that is inconsistent with an underlying

FMP or amendment.

In recognition of this unique relationship between NMFS and the Councils, in 2013, NMFS issued a Policy Directive on "National Environmental Policy Act Compliance for Council- Initiated Fishery Management Actions under the Magnuson-Stevens Act," that pertains to roles and responsibilities for NEPA compliance. That policy promotes early cooperation and partnership. Recognizing that each Region/Council pair frequently works as a team to achieve the fishery management mission with available resources, the policy fosters continued cooperation and joint prioritization between NMFS and the fisheries management councils.

While recognizing that Councils are not Federal action agencies for the purposes of NEPA, the policy also acknowledges that the Councils are indispensable elements in the MSA statutory scheme and as such, are an integral part of the Department of Commerce team. Given the unique relationship between NMFS and the Councils, either NMFS or Council staff may draft the NEPA document as long as NMFS participates early, provides information or advice as needed, conducts appropriate outreach with other agencies and constituents, and independently evaluates each NEPA document's adequacy prior to using it in some fashion to satisfy its NEPA responsibilities.

Similarly, the Councils play a critical role in supporting NMFS's ability to comply with the ESA. For example, in order to initiate the consultation, the Action Agency must submit a written request to the Consulting Agency that includes a description of the action and potential effects on listed species and critical habitats along with a determination of effect. (50 CFR 402.14(c)). This means consultation cannot begin until the Council can sufficiently describe the proposed action. Additionally, the Action Agency often relies on the analysis of protected species/critical habitats in the NEPA document, which may be prepared by the Council, to support its determinations on effect to ESA-listed species and/or critical habitat. Another example of the Council's critical role in supporting NMFS ability to comply with the ESA occurs during the formal consultation process when a BO concludes that a proposed fishery action *is* likely to jeopardize the continued existence of an ESA-listed species or result in destruction or adverse modification of critical habitat. Alternatives must be developed in these circumstances and, as a result, the Consulting Agency and Action Agency must work together to develop RPAs that will remove jeopardy or adverse modification to the species and/or critical habitat and, therefore, allow the action to proceed. RPAs must:

- Be consistent with the intended purpose of the action;
- Be consistent with the scope of the Federal agency's legal authority;
- Be economically and technologically feasible for the agency to implement;
- Not jeopardize the continued existence of listed species or result in

adverse modification of critical habitat

When RPAs are provided, NMFS should either modify the proposed action in order to comply with the ESA or not take the action. However, since NMFS cannot modify council- recommended FMPs or amendments, it is imperative that NMFS work closely with the Councils to accommodate ESA requirements.

b. Fostering Council Involvement

NMFS recognizes that any policy to align Council processes with the ESA section 7 process should be flexible, and should allow for NMFS and a Council to scale Council involvement appropriately depending on the facts and circumstances of the action under review. NMFS offers the following guidelines for enhancing coordination and collaboration among SF, PR, and Councils throughout the ESA section 7 consultation processes:

1. Existing Arrangements

This policy recognizes that some region/council pairs have existing working relationships pertaining to ESA compliance for MSA fishery management actions. This policy does not supersede those agreements. Rather, it offers an additional opportunity for further coordination if the Council requests a more specific role. There is no need to prepare an additional agreement where both NMFS and the Council are satisfied with current arrangements.

2. Early Coordination and Cooperation

This policy fully supports the MAFAC report's conclusion that early collaboration can reduce the likelihood that the preferred alternative will result in jeopardy or destruction or adverse modification. This policy stresses and calls for early involvement between PR, SF and the Councils prior to initiation of consultation. Specifically, early involvement from PR through technical assistance and/or assignments of liaisons is encouraged.

In addition, engaging Consulting Agency staff in reviewing and providing appropriate information for sections of NEPA documents can provide greater certainty that the documents will address effects of the action on ESA-listed species, provide a means for the public to understand the effects through the NEPA public review process, and ensure that the Council has adequate information to make its recommendations.

3. "ESA/MSA Integration Agreements"

NMFS regional offices and Councils may choose to develop written

agreements providing for specific types of Council participation in the ESA section 7 process, i.e., "ESA/MSA Integration Agreements." As stated above, Council involvement will be most effective if based on early and continuous communication and cooperation with the Action Agency and the Consulting Agency. This policy recognizes that there may be cases where the Action Agency and/or Consulting Agency may seek input from a Council during consultation. Additionally, there may be cases when the Regional Administrator (RA) for a NMFS regional office decides to share a draft BO with the Council. According to the ESA regulations, the Action Agency may request a copy of the draft BO for the purpose of reviewing RPAs, and the Consulting Agency shall provide it. (50 CFR 402.14(g)(5). The Consultation Handbook[11] indicates that, if the action agency supports participation by a party who may not fit the definition of "applicant," the consulting agency should try to work with that party, although the procedural opportunities afforded to "applicants" would not apply to that party (Consultation Handbook, p. 2-12).

Any ESA/MSA Integration Agreement should provide for early and continuous cooperation and communication between Consulting Agency, Action Agency, and the Councils and may allow for sharing of draft BOs only in accordance with the criteria provided below.

a. On an Action-Specific Basis

NMFS may request input and participation from Councils during technical assistance and/or consultation phases of ESA section 7 consultation. A Council, through either the Chair or the Executive Director, may also request involvement in an ESA section 7 process by transmitting a letter to the appropriate RA.

When NMFS either requests Council involvement or agrees to a Council's request for involvement, the agreement may allow the Council to advise the Action Agency throughout the ESA section 7 process as appropriate. Such involvement may include assisting NMFS with any or all of the tasks described in the section 7 consultation regulations including: describing the proposed action for purposes of initiating consultation; identifying feasible alternatives; providing Council views as to the "best scientific information available" on fisheries management practices and potential effects of the proposed action on listed or proposed listings of species and designated or proposed designations of critical habitat; preparing draft biological assessments, biological evaluations, and other ESA section 7 consultation initiation documents;

[1] U.S. Fish and Wildlife Service and NMFS, "Endangered Species Act Consultation Handbook: Procedures for Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act," March 1998 (hereinafter, "Consultation Handbook.")

and preparing or reviewing additional information requested by the Action Agency or the Consulting Agency during consultation.

If a Council requests an opportunity to review a draft BO during a formal ESA section 7 consultation, the RA may decide to provide an opportunity for Councils to review a draft BO, including reviewing draft RPAs in the case of a jeopardy BO, or draft Reasonable and Prudent Measures (RPMs) to be included in an ITS.

These opportunities for enhanced coordination and communication among Councils, the Action Agency, and the Consulting Agency with regard to ESA section 7 do not require designations of Councils as particular special parties described under the ESA regulations nor do they affect NMFS's authorities pursuant to MSA or NEPA.

NMFS's requests to Councils should specify the level of Council involvement sought by NMFS in the technical assistance, pre-consultation, informal consultation, formal consultation, and/or other process; the designated points of contact at NMFS for coordination purposes; and any other relevant information that will better integrate the ESA consultation process with the Council process and assist NMFS with its responsibilities under the ESA.

In response to Council requests, NMFS will respond in writing to the Council, describing the level of coordination between the Council and NMFS deemed appropriate for the consultation, identifying points of contact at NMFS, and providing any other relevant information that will assist NMFS and the Council in their coordination efforts. It is expected that NMFS generally will grant a Council's request for involvement in an ESA section 7 process. However, NMFS may deny the request in circumstances that include NMFS' determination that the Council's requested level of involvement would violate federal law or the order of a court in ongoing litigation or when existing deadlines do not provide sufficient time for the level of involvement requested.

b. On a Region/Council Basis

In addition to the steps outlined above pertaining to Council involvement in an individual ESA section 7 consultation process, when requested by a Council, NMFS regions and the requesting Council may develop a generally-applicable, written working agreement (either within the context of, or modifications to, their Regional Operating Agreements, or through another form of formal written documentation such as a Memorandum of Understanding (MOU), outlining roles, responsibilities, and expectations for each Region and Council pair during ESA section 7 consultation process. Such an agreement should be clearly titled as the

"ESA/MSA Integration Process," should clarify the circumstances covered by the agreement, and should state that NMFS retains discretion to conduct any individual ESA section 7 consultation differently from the process spelled out in such an agreement. Such a written agreement may be signed by NMFS, and the relevant Council, as appropriate.

c. Criteria

In developing a written agreement on either an action-specific or a generalized basis, the regions and Councils should comply with the guidance set forth below.

i. Roles of NMFS Offices.

The ESA section 7 regulations specify roles for Action Agencies and Consulting Agencies. To implement this policy, each region must identify which office is acting in which of these roles and the offices must fulfill the roles set forth in the regulations. In most instances, this means that the Action Agency communicates directly with the Council for the purposes of developing initiation documents, collecting scientific information regarding the fishery and interactions with ESA species and critical habitat, and developing alternatives to minimize interactions resulting in take of species.

The Consulting Agency should communicate with the Action Agency, and Councils if appropriate, early and often regarding affected species and critical habitat and fisheries and scientific information needed for the consultation. This can be achieved by making presentations at Council meetings, participating on interdisciplinary teams with the Action Agency and Councils, and providing other forms of early communication and technical assistance. The Action Agency should maintain its role as liaison throughout the section 7 process. During formal consultation, the Action Agency must facilitate direct communication with the Council; determine how to address the Council's concerns on its (the Action Agency's) record, and then communicate issues to the Consulting Agency, which may be the same or different from those communicated by the Council. The Consulting Agency must maintain a record that supports the manner in which it addresses comments submitted by the Action Agency and other decisions during consultation.

ii. Record Considerations when sharing draft BOs.

If the RA determines that a draft BO should be shared with a

Council, it is likely that the Council will provide comments. While the section 7 regulations specify that the purpose of sharing a draft BO is for analyzing RPAs, it will not be possible to limit the comments that are submitted to specific topics such as RPAs. It is not necessary for NMFS to develop a separate "comment and response" document addressing Council comments on a draft BO. However, both the Action Agency and Consulting Agency should make sure that their records appropriately consider and address any comments received. For the Action Agency, it may be appropriate to respond to Council input orally during a Council-meeting, or in writing in any relevant follow-up report.

The Consulting Agency would not be required to respond to each individual comment. However, the final BO should describe any additional considerations that affect the analysis, provide the rationale supporting the final decision, and include any modifications to the document that are appropriate in light of relevant information.

iii. Information Quality Act (IQA) Compliance for Release of Draft Biological Opinions to Councils.

Pursuant to the IQA (P.L. 106-554 § 515), NOAA has guidelines regarding the quality, objectivity, utility, and integrity of information that it disseminates. Dissemination means agency initiated or sponsored distribution of information to the public. Dissemination does not include distribution limited to: government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; or responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to: correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes. ESA section 7 consultation documents that are posted on a public internet website or Public Consultation Tracking System are publicly disseminated.

Release of draft BOs to Councils would constitute dissemination to the public. Therefore, pre- dissemination review and certification including review by NOAA General Counsel and the RA must be completed prior to release. NOAA Information Quality Guidelines are posted on the NOAA Office of the Chief Information Officer Webpage.
http://www.cio.noaa.gov/services_programs/info_quality.html

During formal consultation, NMFS may agree to release preliminary drafts of RPAs or RPMs prior to release of the entire draft opinion if otherwise consistent with this policy. However, during formal consultation no other individual components of a BO may be released to the Council out of context of the entire cleared draft.[2] For example, NMFS will not release a draft effects analysis as a stand-alone document.

iv. Staff, Budget, and Timing Considerations.

In developing these regional agreements, NMFS and the Councils should carefully weigh the costs and benefits of sharing draft BOs that have been cleared in accordance with section IV.B.3.c.iii of this policy. This choice can have workload, budgetary and timing implications. Specific timing considerations are as follows.

To initiate formal consultation, the Action Agency must submit a written request that includes a description of the action and potential effects on ESA-listed species along with a determination of effect for each species and its critical habitat, if present. (50 CFR 402.14(c)). This means the request for consultation cannot begin until the Council can sufficiently describe and therefore, provide the proposed action to the Action Agency. Consultation also cannot begin until the Consulting Agency has received all requested information from the Action Agency. Once all requested information has been received by the Consulting Agency, the ESA requires that the formal consultation be concluded within 90 days (unless mutual agreement between the Consulting Agency and the Action Agency to extend) (ESA section 7(b)(1)(A)), and that a BO documenting the Consulting Agency's opinion about how the action affects the listed species must be provided within 45 days (unless extended) of the conclusion of the consultation (50 CFR 402.14(e)). While the default total time established by the statute and regulations between initiation of consultation and completion of the final BO is 135 days, the Consulting Agency sometimes exceeds this time period due to mutually-agreed extensions.[3]

[2] This statement does not preclude frontloading activities or the sharing of information between NMFS and council staff to describe the proposed actions. The proposed action should be sufficiently described prior to initiation of the formal consultation clock.

[3] According to the Consultation Handbook, "initiation of consultation" for purposes of starting the 90-day time period on formal consultation occurs when the consulting agency determines the information submitted is complete. Consultation Handbook, section 4.4, pp. 4-5 - 4-8.

With respect to timing, the proposed process of having the Council review a draft BO, that has been cleared in accordance with section IV.B.3.c.iii of this policy, would likely prevent the Consulting Agency from completing the consultation and finalizing the BO within 135 days. Thus, the Action Agency and the Consulting Agency should mutually consider whether there is a need to extend the deadline to accommodate Council review. Factoring in the time required for review, clearance, and publication of Council meeting agendas in the Federal Register, a Council would need several weeks advance time in order to place on its agenda review of a draft BO, which has been cleared in accordance with section IV.B.3.c.iii of this policy. The process of Council review could also affect the timing of completion of associated NEPA documents and/or Council actions relying on the outcome of the BO.

Before agreeing to release of a draft BO that has been cleared in accordance with section IV.B.3.c.iii of this policy, the Action Agency and the Consulting Agency must consider and document whether there is a need for an extension of the 135 day period to provide sufficient time for Council review.

v. Freedom of Information Act Considerations

Sharing a draft BO, which has been cleared in accordance with section IV.B.3.c.iii of this policy, with Councils and the public, affects the document's status. Once shared, NMFS no longer considers it an intra-agency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5)). Because Councils are public bodies, documents shared with them are considered public.

V. References

This policy directive is supported by the glossary of terms listed in Attachment 1.

Signed  9/27/2018

Chris Oliver Date

Assistant Administrator for Fisheries

Attachment 1

Glossary of Terms

Action Agency – For fishery management actions, the "action agency" is NMFS's Office of Sustainable Fisheries or regional Sustainable Fisheries Division.

Consulting Agency - For most marine/anadromous species, the "consulting agency" is NMFS's Office of Protected Resources or regional Protected Resources Division. However, in some cases, program offices within Sustainable Fisheries may conduct ESA consultations, depending on the species involved (e.g., salmon fisheries in the West Coast Region). This document uses the term "consulting agency" to refer to the office within NMFS that is acting as the consulting agency.

Section 7 Consultation – There are generally two types of consultation: informal and formal. An "informal" consultation includes all discussions and correspondence between an action agency and consulting agency to assist in determining the effects of an action or when the action agency determines that a proposed action may affect, but is not likely to adversely affect, ESA-listed species or critical habitat. A "formal" consultation is required when a proposed action may affect listed species and/or adversely modify or destroy critical habitat.

Biological Opinion – As part of a formal consultation, the consulting agency prepares a BO. This document states the consulting agency's opinion on whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify a listed species' critical habitat. (50 CFR 402.14(h)).

Biological Assessment – A Biological Assessment (BA) is a document developed by the action agency to evaluate the potential effects of a proposed action on listed species and critical habitat. (See 50 CFR 402.12.) It can be used to support the action agency's determination(s) during an informal consultation or can be used to initiate formal consultation. BAs are only required for major construction projects.

Biological Evaluation - A generic term used to document analyses and Section 7 determinations when a BA is not required. Biological Evaluations often consist of NEPA documents (Environmental Assessments/Environmental Impact Statements) and other supporting documents. This document accompanies the request for consultation for FMP related actions.

Jeopardy – Under the ESA, jeopardy occurs when an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced. (See 50 CFR 402.02)

Incidental Take Statement – BOs that contain a "no jeopardy" determination include Incidental Take Statements (ITS). The ITS includes a description of the expected amount or extent of take of ESA listed species resulting from the proposed action. The ITS also includes reasonable and prudent measures (RPMs) and terms and conditions that must be carried out by the action agency in order to be exempt from take prohibitions in the ESA.