

<b><i>NATIONAL MARINE FISHERIES SERVICE PROCEDURE 02-110-22</i></b> Effective on: May 1, 2023					
To be reviewed on: May 1, 2028					
Protected Species Management Conservation of Threatened And Endangered Species Policy Directive 02-110					
Legal Review and Quality Assurance Standards for ESA Section 7 Consultations					
<b>NOTICE:</b> This publication is available at: <a href="https://www.fisheries.noaa.gov/national/laws-and-policies/policy-directive-system">https://www.fisheries.noaa.gov/national/laws-and-policies/policy-directive-system</a>					
<b>Author name:</b> Lisamarie Carrubba <b>Office:</b> Protected Resources	<b>Certified by:</b> Kim Damon-Randall <b>Office:</b> Protected Resources				
<b>Type of Issuance:</b> Revision					
<b><i>SUMMARY OF REVISIONS:</i></b> Revised February 2023 to update the name and context related to the current tracking system. This procedural directive was initially issued on April 8, 2018 to consolidate and update two directives: (1) 02-110-12 Delegations of Authority for Section 7 Consultations Under the ESA (last revision March 2015); and (2) 02-110-13 Improvement Plan for Section 7 Consultations Under the ESA (last renewed July 2014).					
Signed _____ <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none;">Name</td> <td style="width: 50%; border: none;">Date</td> </tr> <tr> <td style="border: none;">Title</td> <td style="border: none;"></td> </tr> </table>		Name	Date	Title	
Name	Date				
Title					

I. Introduction

This directive clarifies the legal review requirements and quality assurance review procedures for section 7 consultation products (biological opinions and letters of concurrence) under the Endangered Species Act (ESA). Clarification is needed to standardize the legal review and quality review procedures across NOAA Fisheries Protected Resources Office and all Regional Offices implementing section 7 of the ESA. The directive adopts procedural requirements to implement NOAA Delegation of Authority Transmittal Memorandum No. 60.

II. Objective

To streamline the legal review process of low litigation and low environmental risk actions and maintain a high level of quality of the agency’s Section 7 consultations via a quality assurance standard under the ESA.

### III. Guidance

#### 3.1 *Legal Review*

*Review for Legal Sufficiency.* As specified below, certain Section 7 consultation documents must receive review and approval for legal sufficiency by the appropriate sub-office of NOAA General Counsel. A consultation document is legally sufficient if:

1. There is a credible basis to conclude the document is within the agency's authority and consistent with constraints imposed by statutes or regulations;
2. There is a credible basis to conclude the agency has complied with all applicable procedural requirements; and
3. The agency has articulated a rational explanation for the decision in the document.

For actions delegated to a Regional Administrator, the appropriate sub-office of NOAA General Counsel is the Regional Section. For all other actions, the appropriate office is General Counsel, Fisheries and Protected Resources Section.

##### 3.1.1 *Letters of Concurrence*

NOAA General Counsel review of letters of concurrence for legal sufficiency is not required unless: (1) the action is associated with known existing litigation against NMFS, the action agency, or the applicant; (2) the action and consultation are controversial such that litigation over the consultation is reasonably foreseeable; or (3) the consultation presents a novel legal issue. In the event that the NMFS official with the delegated authority to sign the letter of concurrence believes that one or more of these circumstances may be present, the official shall coordinate with the appropriate NOAA General Counsel section. After coordination, the official shall determine whether NOAA General Counsel review is required. When not required, NMFS nevertheless may request NOAA General Counsel review of any letter of concurrence.

##### 3.1.2 *Biological Opinions and Incidental Take Statements*

NOAA General Counsel review of biological opinions and incidental take statements for legal sufficiency is required unless waived by NOAA General Counsel. The appropriate Regional Section Chief, the Fisheries Section Chief, or their Deputy Section Chief may waive review of individual consultation actions or of categories of consultation actions. Any such waiver must be in writing and based on a finding that all five of the following criteria are met:

1. The action is substantially similar to actions that have previously been the subject of consultations that received NOAA General Counsel review;
2. The consultation does not raise any legal issues that have not been reviewed by NOAA General Counsel in similar consultations;
3. The action is not associated in any way with known existing litigation against NMFS, the action agency, or the applicant;
4. The action and consultation are not controversial such that litigation over the consultation is not reasonably foreseeable nor are there any known congressional interests in the particular action or consultation (beyond inquiries as to timing); and
5. The listed species for which the consultation is conducted have been the subject of

recent biological opinions that received previous NOAA General Counsel review.

### *3.2 Quality Assurance Plan*

Each Regional Office and the Office of Protected Resources shall continue to have a Quality Assurance Plan (QAP) consistent with the requirements of Transmittal Memo #60B (Delegation of Authority for Section 7) and this Directive. By June 30, 2018, each Regional Administrator and the Office Director shall review and update as necessary their existing QAP.

### *3.3 Quality Assurance Standards*

Quality assurance standards are necessary to ensure consistency across NMFS Section 7 program in the implementation of section 7 consultations, and maintain high quality and legally sufficient documents. The quality assurance standards include standard guidance, training, periodic program reviews, national and regional Section 7 coordinators, tracking and reporting of consultations, and the maintenance of Section 7 records across NMFS Section 7 program.

*3.3.1 Standard Guidance.* Development of standard guidance is fundamental to ensuring conformity with agency policy and procedure. The Office of Protected Resources, in cooperation with Regional Offices, and NOAA General Counsel develops and maintains guidelines and guidance to staff and managers on the consultation process. This will include updating and revising the Section 7 Consultation Handbook to address advances and changes in policy, law, and technical and procedural knowledge.

*3.3.2 Training Program.* The objectives of the training program are to ensure that all NMFS consultation managers and personnel have received the training necessary to: (a) comply with applicable legal requirements, agency policy, and guidance; (b) meet expectations for quality Section 7 consultations and consultation products; and (c) maintain proficiency in the conduct of consultations.

For the purposes of this document, training consists of formal curricula delivered in a classroom setting, workshops, Section 7 Coordinator and NOAA General Counsel updates, or relevant materials provided in-person or electronically.

The NMFS Section 7 program consists of three tiers of training: tier 1 comprises formal classroom style training in Section 7 process, procedure, and analysis; tier 2 is tailored to specific Regional or topical needs; and tier 3 consists of requirements to keep skills current in the field of biology, writing, and other appropriate fields.

#### Tier I. Formal Basic, Advanced, and Management Section 7 Training

*Basic Section 7 Training Program.* Within the first year of their employment as consulting biologists, all employees who are responsible for, or participate in, Section 7 consultations or who review biological opinions or other documents produced by those consultations will be required to complete a basic Section 7 course developed by Office of Protected Resources and Regional offices, the U.S. Fish and Wildlife Service's National Conservation Training Center, or both. The curricula for the basic Section 7 training courses will ensure that consultation personnel

understand the legal and regulatory requirements applicable to Section 7 consultation; processes for gathering, analyzing, and reporting using the best scientific and commercial data available; and applicable agency policy and guidance on the conduct and review of Section 7 consultations and consultation documents. This is an ongoing training program.

*Advanced Section 7 Training Program.* The Office of Protected Resources and Regional offices will develop an advanced Section 7 training program designed for more experienced Section 7 staff or personnel who have received the basic Section 7 training program and have two or more years of experience with Section 7 consultations. The curricula for the advanced Section 7 training will ensure that consultation personnel conduct consultations on complex actions using methods that are transparent, objective, and replicable and that comply with the best standards and practices of the relevant sciences. Each regional office shall provide an opportunity for this training to senior consulting biologists as appropriate and as resources permit.

*Section 7 Training Programs for Managers.* The Office of Protected Resources, in conjunction with the Regions, will provide Section 7 training to managers who directly supervise Section 7 personnel. These training sessions will consist of an 8-hour overview or separate two to four-hour modules that ensure these managers understand the legal and regulatory requirements applicable to Section 7 consultation, processes for ensuring and controlling quality in consultations and consultation documents, and applicable agency policy and guidance on the conduct and review of Section 7 consultations and consultation documents. These sessions will also include discussion and guidance on the decision-making process, application of policy, and documentation and accountability to ensure consistency between management decisions and to ensure complete and defensible administrative records.

*Coordination with NOAA General Counsel.* The Office of Protected Resources and Regional offices shall coordinate with their respective NOAA General Counsel section on any written materials developed for purposes of the Section 7 training referenced in this directive to ensure consistency with applicable legal requirements.

#### Tier II. Regional or Topically Focused Training

National and Regional Section 7 Coordinators provide ongoing training to Section 7 staff by providing guidance to Section 7 staff. In addition, training tailored to meet Regional needs and Region-specific issues is also of value to Section 7 staff.

*Continuing Training and Information Dissemination to Regional Section 7 Coordinators.* The Office of Protected Resources will organize periodic meetings with Regional Section 7 coordinators to provide additional training, discuss current policy and consultation issues, and review the outcome of recent litigation. The Office of Protected Resources will work with Regional Section 7 Coordinators and NOAA General Counsel to develop and maintain a website containing templates for consultation documents, current Section 7 guidance and policies, and recent court opinions.

*Regionally Developed Training for Regional Staff.* Each Region will develop regional training and other means of information dissemination on the Quality Assurance Standards and regulatory and legal updates from NOAA General Counsel.

Tier III. Continuing education and maintenance of skills in the field of biology, writing, and other appropriate fields

The Office of Protected Resources and Regional Offices will provide opportunities to Section 7 staff to take continuing education courses to maintain current skills in their field. The national and regional Section 7 coordinators will alert and advise supervisors on specific training opportunities for consulting biologists. Each non-supervisory staff member will participate in at least one of the following types of training each year.

*Continuing Education.* Continuing education may consist of a course either in a classroom or web-based setting in the area of ecology, conservation, technical writing, negotiation, or other appropriate field, attendance at professional symposia, practical field experience, or advanced academic coursework.

*Periodic Section 7 Workshops.* The Office of Protected Resources in conjunction with the Regions will convene workshops and webinars periodically to provide consulting biologists with the continuing, professional education necessary to meet the evolving demands placed on Section 7 consultations. These workshops will provide Regional personnel with short courses covering Section 7 issues, including population biology and ecology, conservation biology, risk assessment methods, geographic information systems, and legal issues that affect Section 7 consultations.

*3.3.3 Periodic Program Review.* Periodically, but at least every three years, the Office of Protected Resources, will organize a team composed of Regional Section 7 Coordinators, a representative from the Office of Protected Resources, and a representative from NOAA General Counsel to review a sample of Section 7 decision documents. Each Region will have a subset of its consultations reviewed on a periodic basis. The team will include the Section 7 Coordinator from the Region being reviewed and at least one representative from another Regional Office.

Ten biological opinions and ten letters of concurrence from each Region and the Office of Protected Resources will be reviewed periodically. If a Region completes fewer than ten formal or informal consultations in a review period, each of those consultations will be reviewed. The selection of which consultation documents to include in the program review will be stratified to capture the complexity of consultations and field office or program organization in the various Regions.

The periodic review will examine whether the process requirements described in this Directive and Regional QAP have been followed. Following each review, the review team will produce a review summary report. This report will describe the degree to which the reviewed documents complied with the requirements contained in this Directive. If appropriate, the report will recommend changes to improve the level of compliance with this Directive or applicable policy and procedures.

When the report is finalized, the Office of Protected Resources will submit the report to each Regional Administrator, Assistant Regional Administrator for Protected Resources, Deputy Assistant Administrator for Regulatory Programs and the Assistant Administrator for Fisheries.

*3.3.4 National Section 7 Coordinator.* The Office Director will appoint a National Section 7 Coordinator to serve in an advisory capacity to the Director on Section 7 issues and develop,

review, and disseminate information, advice, policy, and guidance on Section 7 issues. The National Section 7 Coordinator shall be responsible for participating in developing and implementing national training programs.

*3.3.5 Regional Section 7 Coordinator.* Each Regional Administrator will appoint a Regional Section 7 Coordinator to serve in an advisory capacity to the Regional Administrator and other Regional Office leadership on Section 7 issues, and advise Regional staff responsible for conducting Section 7 consultations on policy, procedures, and guidelines on the conduct of Section 7 consultations. The Regional Section 7 Coordinator will work with the National Section 7 Coordinator and the regional sub-office of NOAA General Counsel to help ensure adequate training for Regional staff conducting Section 7 consultations. Upon request, the Regional Section 7 Coordinator will review highly controversial, precedent-setting, or novel biological opinions and any other consultations the Regional Administrator or Assistant Regional Administrator for Protected Resources deems appropriate to ensure ESA standards and procedures are applied consistently.

*3.3.6 Tracking and Reporting Consultations.* Each Regional Administrator and the Office Director shall ensure that tracking data and information for consultations conducted by their staff are entered into the Environmental Consultation Organizer (ECO) on a timely basis. At a minimum, the consultation request, initiation, and conclusion dates, final agency determinations, species considered, and other fields determined to be necessary to meet basic agency reporting needs must be completed within seven days of each of these project milestones. The consultation tracking report will serve as certification that each consultation complies with the process and policy outlined in this directive.

*3.3.7 Maintaining Records.* Each Regional Administrator and the Office Director, shall ensure that the recordkeeping requirements of the Federal Records Act are met.