



Report of the CCC Working Group addressing NMFS ESA Policy Directive

Prepared for the October 2023 Council Coordination Committee Meeting

Introduction

In 2015, the National Marine Fisheries Service (NMFS) issued Policy Directive 01-117 on the Integration of Endangered Species Act (ESA) Section 7 with Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA) Processes (ESA Policy Directive). The ESA Policy Directive implemented recommendations from a joint working group of the Council Coordination Committee (CCC), Marine Fisheries Advisory Committee (MAFAC) and NMFS to improve integration of the Fishery Management Councils into the ESA Section 7 consultation process.

The CCC reviewed the implementation status of the ESA Policy Directive at the May 2021 meeting and recommended strengthening the relationship between NMFS and Councils on ESA consultations for fisheries by updating the policy directive to improve the process and timing for Council involvement. These recommendations led to the January 2022 CCC call on this topic, at which each of the Councils provided their experiences and perspectives on the ESA Policy Directive, and NMFS indicated they would use the information to identify potential changes to the Policy Directive or its implementation. At the May 2022 CCC meeting, NMFS indicated that they did not find that a major update to the Policy Directive was needed at this time, but that they would like to continue working on ESA-MSA coordination with the Councils. The CCC adopted a motion to form a working group to consider potential changes to the ESA Policy Directive addressing issues identified by the CCC through the May 2021 and January 2022 meetings.

At the October 2022 meeting, the CCC reviewed the report of the Working Group formed at the May 2022 CCC meeting to consider changes to the ESA Policy Directive 01-117 to integrate ESA Section 7 with MSA. The Working Group created a [redline version of the Policy Directive](#) with changes to help resolve the high priority issues identified by the Councils. NMFS indicated that they do not want to reopen the Policy Directive to make changes until they complete region-specific discussions among SF, PR and Council staff. NMFS sent a questionnaire to the Working Group with a deadline to respond by November 4, 2022, and planned to convene regional discussions in early 2023. The CCC recommended that NMFS review and implement as soon as possible, and prior to the regional coordination effort to be led by NMFS. In the CCC's letter dated Nov 28, 2022, the Executive Directors requested scheduling a call to discuss the redline changes once NMFS has completed a detailed review.

Following the October 2022 CCC meeting, the Working Group developed a joint response to the NMFS questionnaire. The joint response incorporated the recommended redline changes, as well as regional examples from each of the Councils. The Executive Directors met virtually with NMFS staff on February 23, 2023, to discuss the redline changes to the ESA Policy Directive and next steps. During the call, NMFS staff reiterated that the agency will not be changing the policy

directive until the regional discussions are completed, recognizing that the problems and approaches are not uniform between regions.

Summary of the Regional Coordination Meetings

NMFS convened regional coordination meetings between April and August 2023. Pacific, Gulf of Mexico, South Atlantic, and North Pacific Councils completed their regional meetings prior to the May 2023 CCC meeting, with their summaries reported out at the May meeting. The Caribbean, Mid-Atlantic, New England, and Western Pacific Councils' meetings were completed following the May 2023 CCC meeting. Highlights from each meeting are summarized below.

PFMC (April 26, 2023)

- The WC Region and PFMC have generally worked well regarding potential or forthcoming ESA/MSA matters. There was agreement that our process had noteworthy successes.
- We also agreed that the process works well when the terms and conditions/reasonable and prudent measures require PRD, SFD, and the Council to coordinate on the feasibility of measures for future implementation. There is a significant amount of knowledge within the Council process that Regional staff can benefit from when developing any ESA action.
- Framework actions are important regarding ESA and MSA integration. Amending an FMP to bring it into ESA compliance in time will be very difficult and time consuming most of the time. Thus, frame working, like we've done with our salmon FMP, will be important (many salmon stocks have a conservation standard specified as "ESA consultation standard" rather than a specific tonnage or harvest rate).
- Next steps with the Region are not immediately clear.

GMFMC (April 27, 2023)

- Council and RO staff (PR and SF) met virtually and agreed that our current working relationship is effective, and active communication is underway to ensure early coordination to resolve differences or misunderstandings early in the process by including the correct staff. The group also recognized that there are not as many ESA-driven Gulf Council fishery action/issues in the Gulf region as may be in other regions. It also came to light the Gulf has just started to deal with marine mammals and fisheries due to the recent Rice's whale speed limit petition and this is something that many of the other regional management councils may often encounter. It was noted the interactions with the MMPA and MSA are not outlined in the policy guidance nor does the ROA speak to the processes for MMPA issues.
- While the Gulf ROA was last updated in 2015, which was at the same time as the national policy guidance, the general principles of NMFS-Council roles, responsibilities and obligations, the procedures for interacting on ESA consultations are not very specific. We discussed developing an integrative agreement in the future if needed instead of adding a lot of ESA considerations into the Gulf ROA.
- PR staff discussed the challenges PR faces with preparing BiOps and the frequency of BiOps that can be produced annually and reported out to the Council based on existing resources. Recognizing that some consultations will inevitably be of more impact to the Council and fisheries, Council and RO staff should be proactive with early coordination and setting expectations/timeline to allow for iterative dialogue. This will likely be through our current interdisciplinary planning team (IPT) that is made up of Council staff, RO staff, General Counsel, and Science Center staff.

- Council staff and RO staff noted that the explicit review of Council involvement in ESA procedures has been helpful, and getting more regular updates even if they are short status updates on timing of upcoming BiOps work could be beneficial to help with communication and any upcoming outcomes that may require additional staff resources and Council time.

SAFMC (May 8 and 11, 2023)

- Council and SERO SF and PR staff agree that our working relationship is beneficial to all. The MSA/ESA Integration Agreement developed in 2016 provides a detailed outline for how the Council can be involved in Section 7 consultations. All involved feel it would be helpful to update this document to reflect current Council practices, but overall it is still effective.
- While the Council receives protected resources updates and every Council meeting, Section 7 consultations do not operate on the Council meeting timeline and it would be ideal to have SERO PR and Council staff meet on a more regular basis. Monthly meetings between the two groups will be scheduled and details on how staff interacts will be added into the RO once updated.
- Providing new Council members training on protected resources, including ESA Section 7 consultations, MMPA, and the Council's integration agreement would be beneficial.
- The Council has not had a significant Biological Opinion issue since the policy directive and subsequent integration agreement were implemented.
- It would be helpful for the Council to receive status reports on the number of observed takes in each fishery so that they could be proactive should issues arise.

NPFMC (May 10, 2023)

- Council and RO staff (PR and SF) agree that our current working relationship is effective, and active communication is underway to ensure early coordination and to resolve differences before they can develop into disputes. This has not always been the case prior to 2016, but our region has not had a major BiOp issued since the Policy Directive came into effect. Communication primarily occurs between the Council and SF, with direct discussion with PR leadership as specific project-needs arise.
- While the Alaska ROA contains the general principles of NMFS-Council roles, responsibilities and obligations, the procedures for interacting on ESA consultations are only referenced in passing. The RO does have an internal guidance for SF and PR regarding formal and informal ESA consultations on fishery issues, which has now been shared with the Council as part of this process. The Council and RO may consider adding additional language to the ROA at its next review.
- PR staff discussed the challenges PR faces with preparing BiOps, and mismatches with the Council/SF practice of iteratively sharing NEPA documents. Recognizing that some consultations will inevitably be of more impact to the Council and fisheries, Council and RO staff should be proactive with early coordination and setting expectations/timeline to allow for iterative dialogue.
- While at present the regional relationship is positive, NPFMC staff continue to support the CCC WG's recommended changes to national guidance in the Policy Directive that strengthen the role of Council involvement in both the ESA consultation process and in measures that modify fishery management, not limited only to RPAs. NPFMC does not anticipate that these changes would result in a different practical outcome in our region at present, but they provide appropriate guidance should working relationships break down.
- Council and RO staff noted that the explicit review of Council involvement in ESA

procedures has been helpful, and should periodically be undertaken, particularly as staff change roles.

CFMC (June 12, 2023)

- The CFMC agrees the early coordination with Southeast Regional Office (SERO), Southeast Science Center (SEFSC) and Protected Resources Division (PRD) has facilitated the preparation and consultation process for management actions as well for Section 7 that needs to be shared ahead on staff level. Such early coordination has taken place for example in the monthly meetings arranged by the SEFSC as well through the Interdisciplinary Plan Team (IPT) which serves as an avenue that whichever changes happened need the PR to participate in the process.
- The CFMC is working well with SERO and the SEFSC. An update to the ROA is forthcoming.
- The Council has not had a jeopardy opinion so PRD haven't had RPAs. PRD has not had RPMs in the past. The latest BO has Terms and Conditions which did not require a change in management. The current BO does include actions that involve Council staff but these are more related to outreach, and are worded as NMFS in coordination with the Council. PRD wants the Council to be their partner, so they are presenting BO terms and how people can engage. As a coordination effort, the Council's Outreach and Educational Advisory Panel (OEAP) has been essential to the efforts relating ESA and Ecosystem Based Fishery Management (EBFM).
- Most regional efforts have been focused on the Island-based FMPs, PRD and SF coordinated on working through BA and BO. There was not much controversy because as the Council, PRD and SF had previously worked through the "impacts" issues.
- The CFMC recognizes the importance of having opportunities to interact and have a closer relationship with local governments to coordinate with them when it comes to endangered species. They are the ones that do most of the enforcement. Staffing and funding are the limiting factor to the local government and how to integrate that more into the process.

Joint MAFMC and NEFMC (July 28, 2023)

- Both Councils emphasized the importance of adopting the red line edits.
- The group felt that there are ways to communicate earlier on, such as staff to staff discussions during RPM development, as opposed to presentations to the full councils. Staff noted that the redline specifically adds provisions for Council participation in RPM development.
- The Councils, SFD, and PRD staff agreed that more staff to staff conversations earlier in BiOp and RPM/RPA development would be valuable and can be further explored. They discussed the importance of early coordination, the potential benefits of a Regional Integration Agreement (IA), and the need for continued discussions to improve the process. Council staff felt that an IA could be used to address specific regional issues, and should not take the place of the redline changes to the PD.
- Both Councils noted their appreciation for the significant work that PRD does to support Council work. In the context of document submission and approval, the NEFMC highlighted specific instances when feedback from PRD arrived later in the process (after the Council votes on measures and submits a document). The group agreed that this could be addressed with earlier communication between Councils and NMFS.
- All parties agreed that with the ongoing sturgeon issues there is an opportunity to keep up with the frequent communication through the FMAT/PDT which includes membership from

GARFO SFD, PRD, NEPA, staff from both Councils, the Science Center, and the Commission. The Councils were not included in the Action Plan resulting from the original RPM due to FACA concerns and discussed how this can be avoided in the future. The Councils are now hoping to be more involved as a new BiOp has been triggered while the joint sturgeon action is ongoing.

WPFMC (August 9, 2023)

- Council, PIRO PRD and SFD agreed that communication and coordination on the consultation process has significantly improved with the change in leadership in the past year. All agreed that working together to address ESA issues is the preferred approach.
- Council ED and staff indicated that the current policy is useful, but can be further improved as set forth in the redline. The improved coordination is in line with the redline changes, and updating the Policy Directive with those changes would help ensure the coordination/communication is the standard regardless of future leadership changes.
- One of the improvements over the past years was the timing of PIRO providing the draft BiOps for Council review. Drafts were provided in advance of the SSC and Council meeting to allow for review of the draft BiOp through the scheduled Council meeting process. PIRO PRD acknowledged it was a lot of work to meet the Council meeting deadline (especially due to review process for clearing the draft for Council review, which becomes a public document), but made it a priority and set a goal to provide drafts in advance of the meetings because they recognized the importance of doing so.
- Regarding Council involvement in developing RPMs/RPAs, PIRO PRD acknowledged that there is usually a time limitation in developing RPMs/RPAs within the consultation timeframe, as they need to get through the jeopardy analysis before determining whether and what RPMs/RPAs are needed. Considering this time limitation, and the expertise that the Council can provide in developing additional mitigation measures when needed, the group agreed that the RPMs could be set up as a process following BiOp to evaluate/develop measures through the Council process (e.g., establish working group under the Council process to develop measures). However, the group also agreed that as a general matter, mitigation measures for ESA-listed species should be developed outside of the BiOp process. PIRO SFD and PRD staff involvement in the Council's Plan Teams have improved in recent years, and the Annual SAFE Report development and review process through the Plan Teams provides a mechanism to identify potential issues early and begin discussions on mitigation measures through the Council process.
- The group also discussed the importance of involving industry in developing mitigation solutions. Council ED suggested establishing a group that includes industry and meet several times a year to discuss protected species issues.

Preparations for the October 2023 CCC Meeting

Following the regional meetings NMFS staff leading the regional meetings (Marla Hamilton, Office of Protected Resources, and Marian Macpherson, Office of Sustainable Fisheries) communicated to each of the regions that NMFS will determine what needs to change in the Policy Directive and additional recommendations needed at the individual region/Council levels, and will provide a report out of the regional discussions at the October CCC meeting. At the time, they indicated that if time permits NMFS will share the updates and recommendations to the region and Council prior to the October CCC meeting.

Recommendations/Considerations for CCC Discussion

The Working Group notes that the regional meetings did not identify new significant issues, and reiterates the importance of addressing changes to the Policy Directive, as outlined in the redline recommendations to the CCC that were presented in October 2022. Key changes proposed in the redline versions were as follows:

- Add overarching policy statement – work through the MSA Council process to address fishery impacts on ESA-listed species rather than relying exclusively on RMPs/RPAs
- Strengthen language for NMFS to involve Councils early in consultation process & agree to a coordinated schedule for involvement
- Add language for involving Councils in development of RPMs in addition to RPAs
- Add language for resolving disputes during coordination process

The Working Group met on October 6, 2023, to review NMFS' presentation on ESA/MSA integration (made available two days prior). Without a companion document, the Working Group found it difficult to evaluate whether NMFS' proposed changes were consistent with the intent of the CCC's redline version. NMFS is also proposing to add new sections to the Policy Directive, including guidance for coordinating development of RPAs, RPMs and Terms and Conditions, but no details were provided on what would be included in these sections. The Working Group was disappointed that no timeline was provided on next steps, and **suggests that the CCC work with NMFS to develop a clear timeline for next steps. The Working Group requests a meeting to discuss the draft changes to the policy directive prior to NMFS completing the revisions with regions and General Council. Section 7 consultation trainings should occur after changes to the Policy Directive are approved.**

Working Group Members

- WPFMC – Asuka Ishizaki (chair)
- MAFMC – Karson Cisneros
- PFMC – Merrick Burden
- SAFMC – Christina Wiegand
- NEFMC – Jonathon Peros
- GMFMC – Carrie Simmons
- NPFMC – Diana Evans
- CFMC – Liajay Rivera