



**Report of the CCC Working Group
addressing NMFS ESA Policy Directive**

Prepared for the May 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. If the process is not completed by that timeframe, NMFS indicated they would report back to the CCC at its May 2023 meeting. 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.

Updates Since the October 2022 CCC Meeting

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, Sam Rauch reiterated that NMFS will not be changing the policy directive until the regional discussions are completed, recognizing that the problems and approaches are not uniform between regions. NMFS staff indicated that they had initiated contacting regional offices and Councils to start setting up the regional coordination meetings with the intent of completing meetings with WCR, SERO and AKR before the May 2023 CCC meeting, and SERO, GARFO and PIRO after the CCC meeting. NMFS also indicated they will provide an update of what they are learning through the coordination at the May 2023 CCC meeting, and they plan to bring draft changes to the policy directive to the October 2023 CCC meeting.

Status and Highlights of the Regional Coordination Meetings to Date

Four of the Councils have met with their regional office counterparts and NMFS Headquarters staff to date. 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.

Remaining Meetings after May 2023 CCC Meeting

- CFMC: June 12, 2023
- MAFMC: TBD
- NEFMC: TBD [NMFS contacted ED - expect a meeting sometime in July]
- WPFMC: August 9, 2023

Considerations for CCC Discussion

The Working Group remains focused on the importance of addressing changes to the Policy Directive, as outlined in the redline recommendations to the CCC that were presented in October 2022. We recognize that regional meetings can help to cement or kickstart early regional coordination and regular communication, as needed. We note, however, that the scheduling of these meetings has spanned a six-month period, and so far, have been largely duplicative with material that was covered in the written surveys and the October 2022 Working Group report. To date, we have not seen a strong connection between discussions at the regional meetings and the specific changes to the policy directive that the CCC continues to support.

At the meeting the RFMC Executive Directors held with Sam Rauch in February 2023, the agency committed to bringing back draft policy directive changes to the October 2023 CCC meeting. As these are not being discussed at the regional meetings, it would be helpful if NMFS can provide any specific changes with sufficient time for the CCC ESA Working Group to review prior to the October 2023 CCC meeting.

Working Group Members

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