

<i>NATIONAL MARINE FISHERIES SERVICE POLICY 01-117</i> Effective on: xx, 2024	
To be reviewed on: October 1, 2029	
Fisheries Management	
Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes	
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<i>SUMMARY OF REVISIONS:</i> Revised May 2024 to reflect changes to further improve coordination with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) Fishery Management Councils (Councils) during the Endangered Species Act (ESA) section 7 consultation process as it relates to Council actions. This procedural directive was initially issued on January 19, 2015 and last renewed September 2018.	
Signed _____	
Name	Date
Title	

I. Introduction

A. Background

This policy directive (PD) was originally finalized in 2015 to implement recommendations from the Council Coordinating Committee (CCC) and the Marine Fisheries Advisory Committee (MAFAC)¹ for better integrating Fishery Management Councils (Councils) into the Endangered Species Act (ESA) section 7

¹ Recommendations for ESA Section 7 Consultations on MSA Fishery Management Actions. December, 2013. MAFAC Endangered Species Act Working Group. Marine Fisheries Advisory Committee (MAFAC).

consultation process. Those recommendations responded to a 2012 CCC request for better integration of Councils into the National Marine Fisheries Service (NMFS) ESA section 7 consultation process. After almost a decade of practice under this PD, NMFS and the Councils conducted a significant review and concluded that, while the PD has been largely successful, there are several areas that warrant improvement. Thus the PD has been updated to incorporate those refinements, which reflect feedback from the CCC, the Councils, and NMFS.

B. Overview

This PD is designed to facilitate NMFS's engagement with the Councils in the ESA section 7 consultation process for Federal fishery management actions. It includes information on the unique role of Councils, the basic principles of the ESA, the mechanics of the section 7 consultation process, and the roles of the National Marine Fisheries Service (NMFS, Office of Sustainable Fisheries (SF) and Office of Protected Resources (PR)) and the Councils in section 7 consultation. The PD promotes early coordination with Councils throughout the section 7 consultation process, includes recommendations for Council involvement in designing fishery management measures needed to minimize adverse effects on listed species and critical habitat, and articulates the parameters of engagement given statutory and regulatory requirements and timeframes.

C. Applicability

This policy directive applies to fishery management actions that: 1) implement fishery management measures developed and recommended by the Councils pursuant to the MSA; and 2) may affect threatened and endangered (T&E) species or designated critical habitat under NMFS' jurisdiction. It does not apply to fisheries managed solely by the Secretary of Commerce (Secretary) or to state fisheries managed solely within state waters. It does not apply to ESA consultations on species or designated critical habitats under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS), nor in the case of consultations conducted on activities taken by other action agencies.

II. Objectives

The main objective of this PD is to foster NMFS' engagement with Councils with respect to ESA section 7 consultations pertaining to council-recommended fishery management actions. It promotes early coordination and cooperation with Councils prior to consultation initiation and acknowledges the importance of the relationship between NMFS and Councils on ESA consultations for fisheries. It more explicitly describes the section 7 consultation process and the opportunities for and timing of Council engagement at various stages in that process.

Integration of Councils' fisheries management planning processes with the ESA section 7 process, along with enhanced early coordination and collaboration (e.g., pre-consultation), will result in more efficient development of regulations and policies that accomplish the goals of the ESA, MSA, and the National

Environmental Policy Act (NEPA).

As with other opportunities for Council engagement in ESA-related actions (e.g., development of species recovery plans, input on ESA proposed species listings and critical habitat designations), the process works best when NMFS (SF and PR) and the Councils engage early in the process to proactively incorporate Council input or needed conservation measures into Council-recommended fishery management actions.

III. The Unique Role of Fishery Management Councils Under the Magnuson-Stevens Fishery Conservation and Management Act

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), FMP amendments, and regulations. FMPs and regulations must comply with all applicable laws, including the ESA.

Composed of Federal, state, and territorial fishery management officials, participants in commercial and recreational fisheries, tribal representatives, 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 (SF) for fisheries in need of conservation and management. Section 303(c) of the MSA requires Councils to submit to NMFS (SF) 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 may approve, disapprove, or partially approve a proposed FMP or FMP amendment recommended by the Council. NMFS may only approve Council recommendations that are consistent with applicable laws, including the MSA and its national standards, the ESA, NEPA, and the Marine Mammal Protection Act. NMFS has other authorities under which to take action outside of the Council process, as necessary, to comport with its governing statutes. Such actions, however, are beyond the scope of this policy directive.

In recognition of the unique relationship between NMFS and the Councils, NMFS has established "Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process" (PD 01-101-03) pertaining to the roles and responsibilities of NMFS and the Councils. That policy promotes early cooperation and partnership. Recognizing that each NMFS Regional Office (Region)/Council pair frequently works as a team to achieve the fishery management mission with available resources, the policy fosters

cooperation and joint prioritization between NMFS and the Councils.

While case law has established that Councils are not Federal action agencies² for the purposes of NEPA, NMFS has acknowledged through its NEPA guidance, Operational Guidelines, and this policy directive, 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 analyses required to support MSA actions, including documents developed in support of NEPA and ESA compliance.

As noted above, the Councils play a critical role in supporting NMFS's ability to comply with the ESA. For example, in order to initiate section 7 consultation on a fishery management action, NMFS (SF) must submit a written request to NMFS (PR) that includes a description of the action and potential effects on listed species and critical habitats along with a determination of effects. Consultation cannot be requested for a new action until NMFS (SF) can sufficiently describe the proposed action, which cannot happen until the Council can sufficiently describe the proposed action. Additionally, for a new action, NMFS (SF) often relies on the analysis of protected species and critical habitats in the NEPA-related documents, which may be prepared by the Council, to support NMFS' (SF) determinations of effect to ESA-listed species and/or critical habitat.

IV. The ESA and Council-recommended Fishery Management Activities

A. The Endangered Species Act

The ESA provides a means whereby the ecosystems upon which threatened and endangered species depend may be conserved, to provide a program for the conservation of such T&E species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the Act (sec. 2(b)). There are many ways in which interested parties, such as the Councils, may engage in the programs and processes set forth in the ESA. For example, Councils may comment on the proposed listing of a T&E species, or the proposed designation or modification of critical habitat. Councils may also help develop and/or comment on a species' draft Recovery Plan. This policy directive focuses on the ESA's section 7(a)(2) Interagency Cooperation program and policies as they relate to Fishery Management Councils but acknowledges the multiple ways in which the Councils may support the goals of the ESA. As described in this policy directive, NMFS (SF and PR) are committed to engaging with the Councils as early as possible to implement the requirements of ESA section 7 consultation. This can be achieved through the Council process, for instance, by incorporating conservation measures into proposed fishery management actions to reduce potential effects on listed species and critical habitat, or through early coordination to evaluate fishery impacts, discuss mitigation options, or other informal communication.

² See, for example, *Anglers Conservation Network v. Pritzker*, 809 F.3d 664 (D.C. Cir. Jan. 5, 2016), affirming *Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 132 (D.D.C. Oct. 5, 2015).

B. ESA Section 7 Consultations

Section 7(a)(2) of the ESA requires Federal action agencies (here, NMFS (SF)), in consultation with consulting agencies (here, NMFS (PR)), to “insure” that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of T&E species or result in the destruction or adverse modification of such species’ designated critical habitat.³ NMFS (PR)’s opinions as to whether a proposed action is likely to result in jeopardy to ESA-listed species or destruction or adverse modification of designated critical habitat is reached through the section 7(a)(2) consultation process set forth at 50 CFR Part 402.⁴

The section 7 consultation process involves both informal and formal consultation. This policy directive discusses each process relative to NMFS’ SF or PR role.

1. Informal Consultation

Formal consultation is required if an action may affect a listed species or its designated critical habitat (50 CFR §402.14(a)). However, informal consultation is an optional process that includes all discussions, correspondence, etc., between the NMFS (PR) and NMFS (SF), and is designed to assist NMFS (SF) in determining whether formal consultation is required. Because of the Councils’ role in developing fishery management measures, these conversations and communications are most effective when all parties (Councils; NMFS (PR & SF)) work together early in the process. Through this optional process, NMFS (SF) may determine that its action may affect, but is not likely to adversely affect (NLAA), a listed species or its designated critical habitat. If NMFS (PR) concurs with the determination, NMFS (PR) will provide a Letter of Concurrence to NMFS (SF) that states agreement with NMFS (SF)’s NLAA determination, and there is no need to proceed to formal consultation.

2. Formal Consultation

When an action may affect listed species and the effects will be greater than NLAA, then a determination of likely to adversely affect (LAA) is appropriate. NMFS (SF) may reach this determination on its own or, if NMFS (PR) does not concur with NMFS (SF)’s NLAA determination, NMFS (PR) will inform NMFS

³ Section 7 consultations for Federal fishery management actions require NMFS to consult with itself (i.e., NMFS serves as both action agency and consulting agency). While NMFS Regional Offices may vary in the way they assign action agency vs. consulting agency roles to section 7 programs, for the purpose of this policy directive, “consulting agency” generally refers to NMFS Office of Protected Resources within NMFS headquarters and Protected Resources Divisions at the NMFS Regional Office level (PR). “Action agency” generally refers to the Office of Sustainable Fisheries within NMFS headquarters and Sustainable Fisheries Divisions within NMFS Regional Offices (SF). We refer to “NMFS” when discussing signing/approval of a BiOp or regulations at the Headquarters or Regional Office level since higher level leadership, such as Regional Administrators, typically sign BiOps and sign off on regulations.

⁴ While both the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) are responsible for carrying out the requirements and programs of the Endangered Species Act (ESA), this policy directive (PD) is focused on listed species within NMFS’ jurisdiction.

(SF) that a formal consultation is required. Formal consultation is initiated when NMFS (SF) provides a written request with sufficient information about the proposed action and its effects on listed species and designated critical habitat. Formal consultation is concluded with a biological opinion (opinion) that includes NMFS (PR)'s opinion as to whether NMFS (SF) has "insured" its action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat.

At the conclusion of formal consultation, if the opinion 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, NMFS (PR), utilizing the expertise of NMFS (SF) and the Councils, identifies "Reasonable and Prudent Alternatives" (RPAs), if any, that 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; and
- Not be likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat (50 CFR §402.02).

After an opinion with a RPA is signed, NMFS (SF) must determine whether it will adopt the RPA (50 CFR 402.15(b)) or, if not, how it will otherwise comply with the ESA's statutory mandate not to undertake actions that are likely to jeopardize the continued existence of a listed species or that are likely to result in the destruction or modification of designated critical habitat. Prior to or during formal consultation, NMFS (SF) is encouraged to work with NMFS (PR) to design or modify the action in a manner that avoids or minimizes impacts on listed species or designated critical habitat. At any time during the consultation process, NMFS (SF) can request that consultation cease while a modification of the action is identified to avoid the likelihood of jeopardy or destruction or adverse modification.

Opinions that: 1) conclude the action will not violate 7(a)(2), 2) conclude the incidental take of listed species resulting from the action will not violate 7(a)(2), or 3) identify RPAs that will not violate 7(a)(2) also include an Incidental Take Statement (ITS). The ITS specifies the amount or extent of a listed species that will be "taken" incidental to the proposed action. "Take" is defined broadly under the ESA to include harm and harassment as well as pursuing, killing, hunting, or capturing. As part of the ITS, the Services may specify Reasonable and Prudent Measures (RPMs) that are necessary or appropriate to minimize the impact of the incidental take to the species as well as Terms and Conditions (T&Cs) to implement the RPMs that must be complied with for the incidental take caused by NMFS (SF)'s action to be exempted from the ESA section 9 statutory prohibitions on take. Importantly, RPMs, along with the T&Cs that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes 50 CFR §402.14(i)(2) (this is known as the "minor change rule"). While only minor changes are allowed for actions that do not violate 7(a)(2), RPMs are also required to monitor the impacts of incidental take, provide reports about the impacts as the action progresses, and assess if the amount of take

anticipated in the ITS is exceeded.

3. Reinitiation

The NMFS (SF) must reinitiate consultation in several different circumstances when discretionary Federal involvement or control over the action has been retained or is authorized by law as specified in 50 CFR §402.16(a). These circumstances include: 1) if the amount or extent of taking specified in the ITS is exceeded; 2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; 3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the opinion or written concurrence; or 4) if a new species is listed or critical habitat designated that may be affected by the identified action.

C. ESA Consultations and the Council Process

The two scenarios under which the ESA section 7(a)(2) requirements apply to the Council process are described further below. In both of these situations, early Council involvement will facilitate a coordinated and streamlined process for developing any measures necessary as part of RPMs or RPAs, and can also ensure practical and effective measures are developed through a transparent stakeholder-based process that takes into account MSA National Standards.

1. Consultation triggered by a new fishery management action

NMFS's review, approval, and implementation of Council-recommended fishery management actions via promulgation of regulations are Federal actions for the purpose of ESA section 7. NMFS will engage in consultation with itself in circumstances where it determines that proposed fishery management actions may affect listed species or their designated critical habitat.

NMFS may only approve a proposed fishery management action that is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Prior to final Council action to recommend proposed FMPs, FMP amendments, and/or regulations, NMFS (both SF and PR) is encouraged to work proactively with the Councils to craft the fishery management action in a way that avoids or minimizes impact to listed species or their designated critical habitat. As part of this collaborative process, NMFS (SF and PR) may suggest alternatives or modifications to the developing fishery management action, including conservation measures to change the timing, location, or duration of the action, to "insure" the fishery management action is not likely to jeopardize listed species or result in destruction or adverse modification of critical habitat.

NMFS (SF) works with the Council to finalize the initiation package to submit to NMFS (PR). ESA section 7 formal consultation is usually not initiated until after

final Council action because the recommended fishery management action often changes as part of the Council process prior to being finalized. Once section 7 consultation is initiated, NMFS (PR) will either concur with NMFS (SF)'s determination of NLAA, or issue an opinion as to whether or not NMFS (SF) has insured its action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

If NMFS (PR) concurs with a NLAA determination or concludes that the action is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat, NMFS may proceed to approve the FMP or FMP amendment or promulgate the implementing regulations. Nonetheless, NMFS may disapprove the action for reasons unrelated to the ESA.

However, if NMFS (PR) concludes that the Council's recommended fishery management action is likely to jeopardize the continued existence of listed species or likely to result in the destruction or adverse modification of designated critical habitat, NMFS will not approve the action or promulgate the implementing regulations, as appropriate. In such a situation, NMFS (PR), relying on the expertise of NMFS (SF) and the Councils, will develop RPAs (if any). If time allows, NMFS (SF and PR) and the Councils are encouraged to discuss the measures in the RPA to evaluate whether it is feasible for the Council to incorporate the RPA into their recommended fishery management actions. However, the decision on which measures to include in an RPA ultimately rests with NMFS (PR).

The action agency will convey the RPA to the Council, and the Council can then decide whether to abandon the action or take a new final action on a revised FMP or FMP amendment that meets the ESA requirements. NMFS (SF and PR) will determine what, if any, additional action needs to be taken to comply with the ESA. If additional action is needed, and the Council chooses not to act, NMFS may take action pursuant to its other authorities under the MSA or ESA. If the Council elects to adopt a measure that is designed to have similar effects as proposed in the RPA, but is not identical to the RPA, NMFS (PR) would evaluate the effects of the new proposed action to determine whether they are as described in the RPA or if they are different enough to warrant reinitiation under 50 CFR 402.16(a)(2).

If an ITS with RPMs and implementing terms and conditions are included (as described in section IV.B.2 above), the RPMs cannot violate the minor change rule. This means that, in general, any RPM that requires the Council to undertake a new FMP or FMP amendment process, requires the Council to alter a proposed FMP or FMP amendment under consideration (i.e., modify the proposed action), or otherwise affects the level, timing, method, allowable gear, or areas for harvesting management unit species is more than a minor change and would not be an appropriate RPM.⁵ However, given the complex nature of fishery management

⁵ While RPMs and their implementing T&Cs should not implicate new Council actions, NMFS may well recommend that the Council undertake a revision to a proposed FMP or FMP amendment as part of a RPA designed to insure that the proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

actions and consultations, there may be cases where an RPM specifies Council action that would not violate the “minor change rule” (e.g., non-regulatory data gathering requirements, convening a workshop, developing a report).

In all of these situations, early Council involvement will facilitate a coordinated and streamlined process for developing any measures necessary as part of RPMs or RPAs, and can also ensure practical and effective measures are developed through a transparent stakeholder-based process that takes into account MSA National Standards.

2. Ongoing Fishery Management Actions: Programmatic or Reinitiated Consultations

The suite of management measures that govern a Federal fishery have generally been adopted over time as a series of different management actions. These actions either underwent individual evaluation under section 7 or the totality of the regulatory program was addressed through a programmatic section 7 consultation and subsequent program reviews. In either event, there may be circumstances when NMFS (SF and PR) chooses to conduct a review of the regulatory program under section 7 either to initiate a programmatic consultation or because one of the reinitiation triggers for an existing consultation has been met and analyzing and addressing effects programmatically is preferred. A programmatic consultation may then be initiated solely to consider the status quo measures programmatically. In this scenario, there is no pending Council recommendation under consideration.

Sometimes programmatic consultations are time sensitive and there may be limited opportunities for Council engagement. But, in most instances, there are opportunities for NMFS (SF and PR) and the Councils to plan for the consultation. In this situation, the Council may (and is encouraged to) consider proactive measures to minimize potential impacts of the overall regulatory program on listed species or designated critical habitat in advance of the consultation. These considerations are most effective when NMFS (SF and PR) and the Councils work together to consider potential impacts of the current regulatory program and any potential management measures that may be undertaken to avoid or minimize those impacts. These collaborations are considered pre-consultation technical assistance. These collaborations can result in a formal consultation on the status quo regulatory program as modified by additional mitigation measures rather than just a formal consultation on the status quo regulatory program.

In the rare instances when NMFS (PR) finds that the existing regulatory program is likely to jeopardize the continued existence of listed species or likely to result in the destruction or adverse modification of critical habitat, NMFS (PR) will develop, in conjunction with NMFS (SF) and the Council, a RPA, if necessary, to meet the regulatory standards. Generally, such an RPA will recommend regulatory changes to the existing status quo regulatory program. Recognizing the difficulty in taking immediate regulatory action, any RPA should recommend a timeframe allowable to undertake recommended regulatory changes and ensure that the delay in

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implementing additional conservation measures is not itself likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. As described further in section IV. E of this PD, if possible, the RPA should be structured as a period of time in which recommended modifications can be developed through the Council process in cooperation with NMFS.

The ESA section 7 process for programmatic consultation and reinitiated consultations is the same as described above for new fishery management actions and is not repeated here. NMFS has determined that this policy is applicable to both scenarios (i.e., consultations on new fishery management actions and programmatic/reinitiated consultations on ongoing fishery actions). NMFS (SF and PR) 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.

V. Fostering Council Involvement in Section 7 Consultations

This section of the document provides guidance on how Councils can participate when it is necessary to modify fishery management measures to comport with ESA requirements. NMFS recognizes that any policy to align Council processes with the ESA section 7 process should be flexible, and should allow for NMFS (SF and PR) and a Council to scale Council involvement appropriately depending on the facts and circumstances of the action under review. NMFS offers the below guidelines for enhancing coordination and collaboration between NMFS (SF and PR) and Councils throughout the ESA section 7 consultation process.

A. Existing Arrangements

This PD 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, as there is no need to prepare an additional agreement where both NMFS and the Council are satisfied with current arrangements. Rather, the PD lays out additional options to foster Council involvement in the section 7 consultation process.

B. Early Coordination and Cooperation

This PD fully supports the MAFAC report's conclusion that early collaboration can reduce the likelihood that a preferred fishery management alternative will result in a finding that the proposed action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. This policy emphasizes the importance of early collaboration by NMFS (SF and PR) and the Councils prior to initiation of consultation. Specifically, early involvement of NMFS (PR) through technical assistance and/or assignments of liaisons to a given Council is encouraged.

Early coordination with Councils applies to the consultation types described in section IV of this policy directive, and includes ESA-related actions outside of the Council action process (e.g., recovery planning, listings, critical habitat designations) that may trigger reinitiation of a fishery management-related consultation. In addition, engaging NMFS (PR) staff in reviewing and providing appropriate information for sections of MSA- and NEPA-related analyses 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.

C. 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 ongoing communication and cooperation with NMFS (SF and PR). This policy recognizes that there may be cases where NMFS (SF) and/or NMFS (PR) 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 opinion with the Council. NMFS (SF) may request a copy of the draft opinion for the purpose of reviewing RPAs, and NMFS (PR) shall provide it (50 CFR 402.14(g)(5), recognizing that this may extend the consultation timeframe. The Consultation Handbook⁶ indicates that, if NMFS (SF) supports participation by a party who may not fit the definition of “applicant,” NMFS (PR) should try to work with that party, although the procedural opportunities afforded to “applicants” do not apply to that party (Consultation Handbook, p. 2-12).

Any ESA/MSA Integration Agreement should provide for early and ongoing cooperation and communication between NMFS (SF and PR) and the Councils and may allow for sharing of draft opinions only in accordance with the criteria provided below.

1. On an Action-Specific Basis

NMFS (SF) may request input and participation from Councils during technical assistance and/or consultation phases of ESA section 7 consultation.⁷ 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.

⁶ FWS and NMFS, “Endangered Species Act Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act,” March 1998 (hereinafter, “Consultation Handbook.”)

⁷ Here, NMFS SF, typically the action agency, serves as the conduit through which to engage the Council. NMFS PR, as the consulting agency, may request to engage directly with the Council but should seek assistance of SF.

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When NMFS (SF) either requests Council involvement or agrees to a Council's request for involvement, the agreement may allow the Council to advise NMFS (SF) throughout the ESA section 7 process, as appropriate. Such involvement may include assisting NMFS (SF) with any or all of the tasks assigned to the action agency in the section 7 consultation regulations including: describing the proposed action for purposes of initiating consultation; identifying feasible alternatives; providing views as to the "best scientific and commercial 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; and preparing or reviewing additional information requested by NMFS (PR) during consultation.

If a Council requests an opportunity to review a draft opinion during a formal ESA section 7 consultation, the RA may decide to provide an opportunity for the Council to review a draft, including draft RPAs in the case of a draft jeopardy opinion, or draft RPMs and associated T&Cs to be included in an ITS, recognizing that this may extend the consultation timeframe.

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

When possible, the Council and NMFS (SF and PR) contacts should agree on a coordinated schedule for Council involvement and input, coordination of development of any conservation measures, and sharing of allowable portions of a given draft opinion. The schedule should be agreed upon by NMFS (SF and PR) and the Council early in the consultation process, and should include considerations for any associated Council action timing. It may be helpful to confirm the level of coordination in writing and identify the appropriate points of contact within NMFS (SF and PR) and any other relevant information that may assist with coordination efforts.

If NMFS independently concludes that existing deadlines do not provide sufficient time for the level of involvement requested, NMFS (SF) will consult with the Council on a level of involvement that can be accommodated and NMFS (PR) may extend the consultation deadline in accordance with 50 CFR §402.14(e). Any schedule accommodations must adhere to timeline requirements specified in the ESA and its implementing regulations. NMFS (PR or SF) may need to make adjustments to the schedule as consultation progresses should unforeseen events or

priorities arise. In addition, while NMFS (SF and PR) will make every effort to accommodate some level of Council involvement, there may be rare circumstances in which a Council's requested level of involvement is not possible (e.g., due to regulatory or court-ordered deadlines or other Federal law). In these circumstances, NMFS (PR) will find ways to communicate with the Council about the procedural status of an ESA consultation, for instance by presenting an update at a Council meeting or via formal correspondence, even though the Council may not be involved in a consultation.

NMFS and the Councils are encouraged to develop and incorporate alternative dispute resolution procedures into existing Regional Agreements to address issues that may arise regarding the level of Council involvement that is requested or can be accommodated for a particular consultation.

2. 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), outlining roles, responsibilities, and expectations for each Region and Council pair during the 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.

D. 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.

1. 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 as set forth in the regulations. In most instances, this means that NMFS (SF) communicates directly with the Council for the purposes of developing an initiation package and a coordinated time frame that adheres to the schedules or setting of schedules for consultation in accordance with 50 CFR 402, collecting commercial or scientific information, and developing conservation measures to avoid or minimize the effects of fishery management actions to listed species or designated critical habitat, and minimize the impact of incidental take of listed species, if applicable.

NMFS (PR) should communicate with NMFS (SF) and Councils, early and often, regarding affected species and critical habitat and fisheries and scientific information needed for the consultation. This can be achieved through presentations at Council meetings, participation on interdisciplinary teams with NMFS (SF) and Councils, and other forms of early communication and technical assistance. NMFS (SF) should serve as a liaison for NMFS (PR) and the Council throughout the section 7 process. During formal consultation, NMFS (SF) must facilitate direct communication with the Council; determine how to address the Council's concerns on its (NMFS [SF]'s) record, and communicate issues to NMFS (PR), which may be the same or different from those communicated by the Council. NMFS (PR) must maintain a record of its requests for additional information from NMFS (SF) to inform the consultation, including how the information was used in the effects determination. NMFS' (PR) record should also support the manner in which it addressed comments submitted by NMFS (SF) and other decisions during consultation.

2. Record Considerations When Sharing Draft Opinions

If a NMFS Regional Administrator determines that a draft opinion should be shared with a Council, the draft final document will undergo an internal review in accordance with the requirements for legal review and quality assurance (NMFS Policy Directive 02-110) prior to release. While the section 7 regulations specify that the purpose of sharing a draft opinion is to analyze the RPAs, it is not possible to limit the comments that are submitted to specific topics such as RPAs if a draft of the opinion is provided in its entirety. It is not necessary for NMFS (PR) to develop a separate "comment and response" document addressing Council comments on a draft opinion. However, both NMFS offices (SF and PR) should ensure their records appropriately consider and address any comments received. For NMFS (SF), it may be appropriate to respond to Council input orally during a Council-meeting, or in writing in any relevant follow-up report.

NMFS (PR) would not be required to respond to each individual comment. However, the final opinion 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.

3. Information Quality Act (IQA) Compliance for Release of Draft 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 laws. 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 the Environmental Consultation Organizer (ECO) are publicly disseminated.

Release of draft opinions to Councils may constitute dissemination to the public. Therefore, pre-dissemination review and certification, including review by NOAA General Counsel and the RA to meet the requirements for legal review and quality assurance (NMFS Policy Directive 02-110) 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 (PR) will take steps to release for review draft portions of a subject opinion that can be shared (e.g., the proposed action, RPA, RPM) prior to release of the entire draft opinion, consistent with this policy. If NMFS (PR and SF) believes that a change in management measures may be needed to a fishery under Council jurisdiction (e.g., changes to the level, timing, method, allowable gear, or areas for harvesting management unit species), for instance to avoid the likelihood of jeopardy to a listed species or to reduce the impact of anticipated incidental take of a listed species, as noted above, NMFS (PR) will work with NMFS (SF) to engage the Councils early in the draft RPA or RPM development process to allow opportunity for Council input and to ensure the opinion can be completed within statutory and regulatory deadlines.

If NMFS (PR) is unable to share portions of the draft opinion due to time constraints, litigation, or other reasons, NMFS (SF and PR) will meet together with Councils and/or Council staff as early as possible to discuss potential changes and impacts to fishery management actions and other relevant information.

4. Staff, Budget, and Timing Considerations

In developing ESA/MSA Integration Agreements, NMFS and the Councils should carefully weigh the costs and benefits of sharing draft opinions that have been cleared as described earlier in this policy directive. This choice can have workload, budgetary, and timing implications. Specific timing considerations are detailed below.

To initiate formal consultation, NMFS (SF) must submit a written request that includes a description of the action and potential effects on ESA-listed species and designated critical habitat along with a determination of effect for each species and its critical habitat, if present (50 CFR §402.14(c)), as stipulated in Section I of this policy. Thus, the consultation initiation package generally cannot be completed for submission to NMFS (PR) until the Council can sufficiently describe and, therefore, provide the recommended action to NMFS (SF). Consultation also cannot begin until NMFS (PR) has received all requested information from NMFS

(SF) if the initiation package is not complete when submitted. Once all requested information has been received by NMFS (PR), the ESA requires that the formal consultation be concluded within 90 days (unless there is mutual agreement between NMFS (PR) and NMFS (SF) to extend per ESA section 7(b)(1)(A)). An opinion documenting NMFS (PR)'s conclusion as to whether NMFS has insured its action will not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat must be completed 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 opinion is 135 days, NMFS (PR) sometimes exceeds this time period due to mutually-agreed upon extensions.⁸

With respect to timing, the proposed process of having the Council review a draft opinion that has been cleared as described in section IV.2.c.i of this policy would likely prevent NMFS (PR) from completing the consultation and finalizing the opinion within 135 days. Thus, NMFS (SF and PR) 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 review of a draft opinion on its agenda. The process of Council review could also affect the timing of completion of associated MSA- or NEPA-related analyses and/or Council actions relying on the outcome of the consultation.

Before agreeing to release a draft opinion that has been cleared as described in section IV.2.c.i of this policy, NMFS (SF and PR) must consider and document whether there is a need for an extension of the 135-day period to provide sufficient time for Council review and consideration of their comments prior to finalizing the opinion.

5. Freedom of Information Act Considerations

Sharing a draft opinion that has been cleared internally by NMFS with Councils for consideration by the full Council affects the document's status. Once shared in this manner, 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.⁹

⁸ 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.

⁹ As indicated above, there are instances in which NMFS SF works with Council staff to prepare materials to support the consultation. These materials are often not shared publicly with the full Council and are not treated as public documents by NMFS. Application of FOIA to these types of documents will be addressed on a case by case basis.

E. Cooperative Development of RPAs and RPMs

When it is apparent that a developing action may affect listed species or critical habitat, and therefore consultation will be necessary, NMFS (SF), NMFS (PR), and Councils should immediately begin collaborating on the action to avoid or minimize effects of the action. Early Council involvement will facilitate a coordinated and streamlined process for developing any conservation measures necessary as part of the proposed action, RPAs, and RPMs and their implementing T&Cs, and will also ensure practical and effective measures are developed through a transparent stakeholder-based process that takes into account MSA National Standards.

If the consulting agency determines that an ongoing fishery management action or program is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat during formal consultation, the Council should be engaged as early as possible in the development of the RPA. NMFS should determine whether providing the Council with a specified period of time in which to recommend modifications can constitute an acceptable RPA that meets the regulatory requirements of a RPA. If consistent with the ESA and applicable laws, NMFS should utilize this as the primary approach. Similarly, the Council should be engaged as early as possible in the development of RPMs and their implementing terms and conditions when needed.

VI. Approaches for Ongoing Council Engagement

NMFS and the Councils should work together to proactively identify approaches and opportunities for ongoing engagement with the goal of managing fisheries that include conservation measures to minimize the effects of an action or program and best management practices.

A. NMFS Involvement in Council Committees and Advisory Panels

Councils may choose to utilize committees to maintain ongoing communications regarding protected species issues in their areas. A Council may also choose to establish an ad hoc committee or working group to explore alternatives for changes to the FMP to address ESA-related concerns. For example, Councils may invite NMFS (PR) to provide regular updates to existing committees, or Councils may choose to establish a Protected Species Committee or a liaison to transmit information. NMFS will cooperate with any such request for ongoing communications from a Council.

B. Inclusion of Councils on Working Group Bodies

In some cases, NMFS has established Working Groups composed of various stakeholder bodies when there is a potential need for modifications to management in order to address ESA concerns.

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Where NMFS foresees potential use of such a Working Group, NMFS should work with its General Counsel in advance to develop a structure for such a Working Group to allow for the relevant Council to participate in a manner consistent with FACA and other applicable law. For example, NMFS may request that such a Working Group be established by the Council as an ad-hoc committee or as part of an existing committee or team.

NMFS Regions (SF and PR) should proactively consider the use of working groups and are encouraged to design a working group structure so that Councils can participate in a way that complies with FACA.

C. Development of Conservation Programs under 7(a)(1)

NMFS's preferred approach to addressing protected species in the context of fisheries management is to work proactively and cooperatively with Councils. This may include early engagement through communication, technical assistance, and cooperation in the development and implementation of conservation programs for the action agency to meet their ESA section 7(a)(1) obligations. Section 7(a)(1) of the ESA directs Federal agencies to use their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of the threatened and endangered species. Components of 7(a)(1) conservation programs can inform and be part of conservation measures to minimize the potential impacts of a proposed action on listed species and their designated critical habitats. Improvement in the status of T&E species from 7(a)(1) programs allows for more flexibility in authorizing or carrying out fishery programs.

VII. References

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

Signed

Janet Coit
Assistant Administrator for Fisheries

Date

Attachment 1

Glossary of Terms

Action Agency – generally means a Federal agency engaging in an activity fitting the definition of an action (authorizing, funding, or carrying out, in whole or in part per 50 CFR §402.02)) and responsible for ensuring its action does not violate the mandate under 7(a)(2) and 7(a)(3) of the ESA. For fishery management actions, the “action agency” is, generally, NMFS’s Office of Sustainable Fisheries or a regional Sustainable Fisheries Division.

Biological Assessment – refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 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.)

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.

Biological Opinion – is prepared by the Service and is a document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. (See 50 CFR §402.14(h)).

Conservation Measures - those actions included in the proposed action by the action agency or applicant that avoid, minimize, or offset effects of the action to listed species and/or critical habitat. These actions can also include actions to benefit or promote the recovery of listed species, pursuant to section 7(a)(1), that are included by the Federal agency as an integral part of the proposed action.

Consulting Agency (Service) - refers to the National Marine Fisheries Service or the U.S. Fish and Wildlife Service, as appropriate. For the purpose of this policy directive, the term “consulting agency” is, generally, NMFS’s Office of Protected Resources or the regional Protected Resources Division conducting the section 7 consultation for a fishery management action. In some cases, program offices within Sustainable Fisheries may act as the “consulting agency” depending on the species involved (e.g., salmon fisheries in the West Coast Region).

Fishery Management Council - the MSA establishes 8 regional bodies, featuring appointed fishery constituents, to develop and recommend fishery management measures and data collection programs for fishing conducted within the 200-mile U.S. Exclusive Economic Zone (EEZ). This is done with the approval and implementation of the Secretary of Commerce, who

has stewardship responsibilities under MSA for fishery resources in the EEZ.

Formal Consultation - is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act. (See 50 CFR §402.14)

Incidental Take Statement – a section after the conclusion of a Biological Opinion (or implementation of any reasonable and prudent alternatives) that “...(i) specifies the impact of such incidental taking on the species, (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, (iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii), and (v) specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.” See 50 CFR §402.14(i))

Informal Consultation - is an optional process that includes all discussions, correspondence, etc. between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required. (See 50 CFR §402.13)

Jeopardy (jeopardize the continued existence of) – to engage in an action that, reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species . (See 50 CFR §402.02)

Reasonable and prudent alternative - refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. (See 50 CFR §402.02)

Reasonable and prudent measure - refers to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent of incidental take. (See 50 CFR §402.02)

Regional Administrator - means the Administrator for each of NMFS's Northeast Southeast, West Coast, Alaska, and Pacific Islands Regions, or a designee.