



Implementation Status of 2015 NMFS Policy Directive on the Integration of ESA Section 7 with MSA Processes

Summary Prepared for the May 2021 Council Coordination Committee Meeting

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. In short, the ESA Policy Directive:

- Recognizes unique role of Councils in ESA consultations and does not require that the Councils be designated as special parties under ESA regulations (e.g., action agency, applicant)
- Calls for early involvement between NMFS Protected Resources, NMFS Sustainable Fisheries and the Councils prior to initiation of consultation, and allows for Council involvement in frontloading formal consultations
- Provides process for Councils to request an opportunity to review draft Biological Opinions (BiOps), including review of draft Reasonable and Prudent Alternatives (RPAs) or Reasonable and Prudent Measures (RPMs).
- Provides guidance for each Council-NMFS regional office pair to establish process on a case-by-case basis or establish a regional agreement.

In April 2021, WPFMC sought input from the Executive Directors on how each Council has utilized the ESA Policy Directive. Since 2015, five of the eight Councils (NEFMC, MAFMC, SAFMC, PFMC, WPFMC) have had ESA consultation issues requiring the Council's attention, while the remaining three (NPFMC, GMFMC, CFMC) have not had ESA consultations that determined Council action was necessary and therefore the Policy Directive 01-117 was not utilized.

For most of the Councils that have used the ESA Policy Directive, lack of communication and coordination on ESA consultations from NMFS remains the primary issue, and Councils are typically not provided advanced review of RPMs or RPAs to provide input on their development before a draft or final BiOp is available to the public. The ESA Policy Directive included a number of discretionary provisions for NMFS, which have effectively limited the Councils' involvement in the consultations, contrary to the intent of the Policy Directive. PFMC has had a more cooperative response from NMFS, with the West Coast Regional Office typically initiating the request for Council's assistance, and utilizing the Council process to develop measures to address ESA issues in advance of or concurrent with ongoing consultations.

The ESA Policy Directive may benefit from an update based on the Councils' experiences since 2015. The Council Coordination Committee may wish to consider working with NMFS to address the following improvements:

- Strengthen the relationship between NMFS and Councils on ESA consultations for fisheries by adding more specificity on how NMFS involves the Councils in ESA consultations and timing of Councils involvement
 - Require more direct communication from Protected Resources Division to the Councils early in the process to ensure effective and meaningful Council involvement
 - Consider providing draft BiOps and draft RPMs/RPAs to Council staff for input in advance of these drafts being made available to the public
 - Consider developing a process for NMFS to work with the Council on ESA issues through the normal Council process rather than through RPMs and RPAs resulting from consultations.