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Fisheries Management

Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes

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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 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. In addition, in 2022, a NMFS Working Group finalized a set of tools to support section 7 compliance and documentation for MSA fishery management actions. Those tools are incorporated into this PD in section VII.

B. Overview

This PD is designed to facilitate NMFS' 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 NMFS, (Offices of Sustainable Fisheries (SF) and 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 Magnuson-Stevens Fishery Conservation and Management Act (MSA); and 2) may affect threatened and endangered (T&E) species or designated critical habitat under NMFS' jurisdiction. With the exception of section VII, it does not apply to fisheries managed solely by the Secretary of Commerce (Secretary). It does not apply 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

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).

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' 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 initiated 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 purposes of the ESA are to provide a means whereby the ecosystems upon

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).

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 (section 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 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.

B. ESA Section 7 Consultations in General

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 §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

While formal consultation is required if an action may affect a listed species or its designated critical habitat (50 CFR §402.14(a)), informal consultation is an optional process that includes all discussions, correspondence, etc., between the NMFS (PR) and NMFS (SF). It is designed to assist NMFS (SF) in determining whether formal consultation is required. Because of the Councils' role in

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.

developing fishery management measures, these conversations and communications are most effective when all parties (Councils and NMFS (PR and 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 (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 either: 1) conclude the action will not violate section 7(a)(2), or 2) identify RPAs, will also include an Incidental Take Statement (ITS). The ITS refers to the biological opinion's analysis that the incidental take of listed species resulting from the action will not violate section 7(a)(2). 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 NMFS 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 subject to section 7 consultation 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 section 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

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 main 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.

The checklist and tools set forth in section VII of this PD identify important pieces of information and points in the process where communications with Councils could be particularly beneficial. Managers should use those tools to support coordination with Councils throughout the fishery management process.

1. Consultation triggered by a new Council-initiated fishery management action

NMFS' 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).

NMFS (SF) 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 and scope of fishery management actions and consultations, there may be cases where a 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. Consultations Involving Ongoing Fishery Management Actions

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

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.

then be initiated solely to consider the status quo measures programmatically. In this scenario, there is no pending Council recommendation under consideration triggering the need to consult or reinitiate consultation. Instead, there is some external driver that requires reinitiation of consultation, such as a new species listing or new information.

Sometimes these 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 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, it is preferable that the RPA 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 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 consultations triggered by new fishery management actions and consultations triggered by other reinitiation requirements (e.g., exceedance of incidental take, newly listed species that may be adversely affected). 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.

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 PD 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.

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

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.

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' 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 RA 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 PD. 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 IV 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 V.C and V.D.3 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 V.D.3 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

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

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.

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.

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 section 7(a)(1)

NMFS' 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. Section 7 Compliance and Documentation Tools

This section serves as an ESA compliance and documentation tool for fishery managers. This section applies to HMS as well as to Council-recommended fishery management actions. Subsections A – C each focuses on a different situation that may trigger a need for section 7 determinations: new fishery management actions, new species listings or designations of critical habitat, and new scientific information.

A. New Fishery Management Actions: Checklist for Supporting Section 7 Compliance Determinations

1. Overview

This subsection presents a checklist that is intended to guide NMFS fishery managers as they make determinations about the nature of ESA section 7 compliance that is required for specific fishery management actions, and to assist them in documenting those determinations. Specifically, this document will assist in determining whether the proposed fishery-related action will:

- a. Warrant a new consultation on a fishery and/or FMP that has not previously undergone ESA section 7 consultation (formal or informal);
- b. Trigger reinitiation of an existing ESA section 7 consultation on the FMP(s); and/or
- c. Be able to proceed while consultation on the FMP(s) is undergoing consultation or reinitiation (i.e., comply with sections 7(a)(2)&7(d)).

This section focuses on situations where there is a new fisheries management action and the agency is evaluating if the agency action is being modified in a manner that causes an effect not considered in the biological opinion. Additional considerations apply when evaluating the other reinitiation triggers, and reinitiation

may be required under these triggers even if there is no new fishery management action. Subsections B and C below provide additional guidance for situations involving new species listings/critical habitat designations and new scientific information.

While the types of information and considerations outlined in the checklist below are presented as a tool to inform a decision whether consultation or reinitiation of consultation is required after a particular fishery management action is fully fleshed out by either a Council or the Atlantic Highly Migratory Species Program, in keeping with this PD's approach of promoting early coordination with Councils, the checklist may also serve as a useful tool for front-loading ESA concerns with a Council during the development of the fishery management action or during ongoing management and implementation.

As a Council develops an action through its iterative public process, SF and PR may refer to the checklist to assist in advising the Council about potential consultation implications of alternatives under consideration. The checklist might also help identify information requirements that could be communicated to the Councils and opportunities for the Councils to provide expert input into the process. Practitioners should consult the relevant policies and agreements in effect in their regions for specific guidance on these points.

2. Understanding and Defining the Scope of your Fishery-Related Action/Consultation.

- Each NMFS Region's Sustainable Fisheries Program and the Office of Sustainable Fisheries' Atlantic Highly Migratory Species Program satisfies the consultation requirement on MSA actions by maintaining a valid section 7 consultation or consultations that comprehensively address(es) the effects of the fishery management regime (FMP and amendments and implementing regulations) on any listed species that may be affected for each managed fishery.
- Each subsequent fishery management action is considered in light of the existing section 7 consultation(s) (or No Effect determination/record) for whether the effects of the new action will modify the fishery management regime in a manner that causes an effect to ESA-listed species or their critical habitat in a manner that was not previously considered. *See* 50 C.F.R. 402.16(a)(3).
- For FMP actions, the action subject to section 7 consultation is "the authorization of a fishery (or fisheries) through approval of an FMP (or FMPs if applicable) and promulgation of regulations implementing the plan (or plans), as amended to date and the [identify action that potentially triggers reinitiation or necessitates a new consultation (e.g., approval of and promulgation of regulations implementing the Amendment)]".
- For Experimental Fishing Permits (EFP), Scientific Research Permits

(SRP), and Exempted Educational Activity Authorizations (EEAA) that fall under the scope of an existing FMP section 7 consultation (informal or formal), identify what FMP and consultation document the activity is covered under, and describe the proposed activity and associated FMP exemptions being authorized under the proposed EFP, SRP, or EEAA.

- There also may be some fishery-related consultations that need to be considered under section 7 that are independent of FMPs (e.g., Scientific Research Permits, Exempted Fishing Permits that do not fall under the described scope in a biological opinion's proposed action description). For those actions, you will need to be clear on who is conducting the Federal actions and what your federal action is (X Region is proposing to issue a SRP for...., X Region is proposing to fund...).

3. Checklist Template

Step 1: Assemble Key Information on the Proposed Fishery-Related Action

Depending on the type of fishery-related action being considered, fill out all applicable pieces of information requested in the list and table below. The information will help you deconstruct the action and identify the stressors (e.g., gear, vessels) from the action on ESA-listed species and/or designated critical habitat. This will then help you identify all effects (direct and indirect) of the action on ESA-listed species and/or designated critical habitat.

Proposed Action’s Title:

Project Number (if applicable, such as for an EFP):

Applicant Name/Affiliation (if applicable, such as an EFP):

Sustainable Fisheries (SF) Preparer:

Brief Description of Proposed Action (including purpose):	
Type of Action: (FMP framework, specs, amendment, EFP, EEAA, SRP)	
Location: Identify the Broad-scale boundaries of the action. (FMP action e.g., Gulf of Mexico Exclusive Economic Zone; EFP e.g., statistical areas x, y, z)	
Timeframe, if applicable (e.g., if an EFP, EEAA, SRP, or specifications)	
Additional Action Information That May Help In Evaluating Effects? (E.g., Number of vessels, gear type(s), amount of effort and duration of fishing activities (#sets/tows, #trips, soak or tow durations, etc.), Will the action lead to changes in these fishing effort metrics?):	
What NEPA Document Supports this Action? (EA, EIS, or CE)	
For EFPs, SRPs: Are Magnuson Stevens Act Exemptions Requested? Yes/No	

Step 2: Choosing your ESA section 7 Compliance Pathway

1. Has the fishery and/or FMP(s) been previously considered in an existing consultation (formal or informal)?	Yes	No
<p>Coordinate within your Division and with Protected Resources (PR), as needed, to view the active Biological Opinion(s) (formal consultations), if they are not available on this website. For FMPs in which an informal consultation was completed, obtain or confirm that you have the most recent applicable consultation.</p> <p><i>Note:</i></p> <ul style="list-style-type: none"> • Formal consultations are completed via a biological opinion for actions that may affect, and are likely to adversely affect ESA listed species and/or critical habitat. • Informal consultations are completed via a letter of concurrence for actions that may affect, and are not likely to adversely affect ESA listed species and/or critical habitat. 		
1a. If No , proceed to the Yellow <u>New Consultation Path</u> to determine if a new consultation is necessary.		
1b. If Yes : insert the name and date of the consultation covering the fishery and/or FMP proceed to the next question		
If the response to 1. is Yes:		
<u>1.b.1. Is that Consultation currently under reinitiation?</u>		
<i>Coordinate with your section 7 consultation biologist (in PR or SF) to determine if any of the triggers to reinitiate consultation have been met since the last consultation on the FMP(s) was/were completed.</i>		
If the response to 1.b.1. is No:		
Proceed to Blue <u>Reinitiation Path</u> to determine if the proposed action triggers <u>reinitiation</u> of that consultation.		
If the response to 1.b.1. is Yes:		
Confirm with the section 7 biologist (in PR or SF) that consultation on the FMP has already been requested and that the 7(a)(2)/7(d) memo reinitiating consultation has been issued.		
If the memo:		
a.) <u>has</u> been issued, insert the date of the <u>reinitiation</u> memo here [_____], and proceed to the Orange 7(a)(2)/7(d) pathway to determine whether the proposed action violates 7(a)(2)/7(d).		
b.) <u>has not</u> been issued, coordinate with your section 7 biologist (in PR or SF) to determine if you should proceed to the Orange 7(a)(2)/7(d) pathway to conduct an analysis.		

New Consultation Path: Is formal or informal consultation needed?

As noted in the introduction, there may be some fishery-related consultations that need to be considered under section 7 that are independent of FMPs (e.g., SRPs, EFPs that do not fall under the described scope in a biological opinion's proposed action description). In addition, some FMP(s) may not have an existing ESA section 7 consultation in place (e.g., it's a new FMP, FMP previously was determined to result in no effects to listed species or critical habitat). Under such circumstances, this pathway will help determine whether your proposed fishery-related action warrants a new consultation on the fishery and/or FMP(s).

To help answer the questions below and for background information on ESA-listed species, critical habitat, and the section 7 consultation process, consult:

- The Council's NEPA documents that support the action and/or
- Your Region's section 7 Consultation website

<p>Will ESA-listed species or critical habitat potentially be present or be exposed (directly or indirectly) to any stressors emanating from the <u>action</u>?</p>	<p>Yes</p>	<p>No</p>
<p>Things to consider:</p> <ul style="list-style-type: none"> ● Are ESA-listed species potentially present within or near the action area? To what degree does the action overlap, in time and space, with the occurrence and distribution of these species? ● Is there the potential for the action to interact* with ESA-listed species that may be in or near the project area? (e.g., action uses gear known to incidentally encounter, entangle, or capture (via bycatch) ESA-listed species; there is a potential for vessel strike). ● Will the action alter prey availability or change habitat characteristics? ● Will the action shift fishing/vessel activities to other areas? Could the shift affect ESA-listed species (e.g., fishing activities shift from an area of low co-occurrence with ESA-listed species to an area with high co-occurrence, potentially increasing interaction risks)? ● Will the action result in effects to critical habitat? To help answer this, consider the following questions: <ol style="list-style-type: none"> 1) Will the action take place within or near designated critical habitat**; if yes, 2) Does the action have elements that have the potential to affect one or more of the listed essential (physical and biological) features of a species' critical habitat (this may include impeding access to or use of the habitat and these features)?; if yes to (1) and (2), 3) (a) indicate which unit(s) (if units) and habitat types the project occurs in, (b) list and define the essential features of that habitat type, and (c) <u>identify</u> the essential features that may be affected by the project. <p><i>* We use the term, "interact," to recognize that in addition to capture or entangle, there are other types of interactions (e.g., vessel strike, encountering gear without entanglement/capture).</i></p> <p><i>** Information on designated critical habitat can be found on our website; refer to the critical</i></p>		
<p><i>habitat final rule for information on the essential physical and biological features of a species' critical habitat.</i></p>		
<p>Provide information that supports this conclusion:</p>		

<p>If you answered No, you have determined: ESA consultation is not required because the proposed action will have no effect on listed species or designated critical habitat. Sign the No Effect determination below; your checklist is completed.</p>
<p>If you answered Yes, you have determined: The proposed action “may affect” listed species. Work with your section 7 biologist to determine if formal or informal consultation is required and prepare a request for initiation of section 7 consultation as appropriate</p>

Determination Regarding No Effect

We have determined that the activity conducted as a consequence of this action would have no effects on ESA-listed species or critical habitat, as either (1) ESA-listed species or critical habitat do not occur in or near the action area or (2) there is no pathway for stressors from the proposed activities to affect listed species. We have determined that no ESA section 7 consultation is necessary.

SF Signature: _____ Date: _____

Reinitiation Path: Is Reinitiation Required?

Reinitiation of formal consultation is required if:

- (1) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in the Biological Opinion (or informal consultation);
- (2) the amount or extent of incidental take is exceeded;
- (3) 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; or
- (4) a new species is listed or critical habitat designated that may be affected by the action.

Address the following questions to determine whether reinitiation of consultation is warranted.

A. Does the proposed action present potential effects not considered in the previous consultation (Trigger (1))?	Yes	No
<p>Things to consider:</p> <ul style="list-style-type: none"> ● Relative to current operating conditions under the fishery/FMP, will the proposed action result in a change in fishing behavior and/or effort (e.g., additional gear set or towed, longer soak or tow duration, additional vessels, shifts in where and/or when fishing occurs)? Will the change in fishing behavior and/or effort introduce a new interaction risk to ESA-listed species that had not been previously considered for the fishery/FMP? ● Will the proposed action introduce a gear type that has not been previously used in the fishery, and therefore, has not been considered in previous consultations on the fishery? Will the new gear introduce a new interaction risk to listed species that had not been previously considered for the fishery/FMP? ● Will the proposed action result in effects to critical habitat that may increase or are different than previously considered? To help answer this, consider the following questions: <ul style="list-style-type: none"> 1) Does the proposed action occur within or near critical habitat; if yes, 2) Does proposed activity have any elements that have the potential to affect one or more of the listed essential features (some rules refer to physical and biological features)?; if yes to (1) and (2), 3) You should: (a) indicate which unit(s) (if units) and habitat types the project occurs in, (b) list and define the essential features of that habitat type, and (c) identify the essential features that may be affected by the project. 		
<p>Provide information that supports this conclusion:</p>		

<p>B. For the next 3 questions, work with your ESA section 7 biologist or counterpart (in PR or SF) to determine whether the other triggers have been met since the last <u>consultation on the FMP (s)</u> was completed.</p>	<p>Yes</p>	<p>No</p>
<p>1. Has the amount of incidental take been exceeded (Trigger (2))?</p> <p><i>Note: Consult the Biological Opinion incidental take statement and compare the authorized take levels to available incidental take monitoring information (e.g., bycatch estimates, and reports). If the previous consultation was an informal, then the answer to this question is no unless there is take of a species we didn't anticipate being taken (e.g., we determined no leatherbacks would be taken but a leatherback take was documented (i.e., none were authorized but we had one)).</i></p>		
<p>2. Is there new information that indicates that any actions under this FMP may affect ESA-listed species or critical habitat differently than in the previous consultation(s) (Trigger (3))?</p> <p><i>Note: "Yes" if new information reveals new or greater effects to ESA-listed species or designated critical habitat because of changes external to the proposed action being considered. See Appendix 1 for more information.</i></p>		
<p>3. Will any action under this FMP affect a new ESA-listed species or newly designated critical habitat (Trigger (4))? Refer to the action plan associated with the new ESA-listed species or newly designated critical habitat. See Appendix 2 for more information on developing action plans for new species listings or critical habitat designations.</p>		
<p>If you answer No to all 4 <u>reinitiation</u> questions above, you have preliminarily determined: <u>The reinitiation triggers have not been met.</u> Document your full determination using the information that supports this conclusion (above) in a No <u>reinitiation</u> required memorandum and request NOAA GC clearance.</p>		
<p>If you answer Yes to any one of the questions above, you have determined: <u>Reinitiation of consultation may be necessary.</u> Contact your section 7 biologist to determine next steps, including consideration of the 7(a)(2)/7(d) path, below.</p>		

7(a)(2)/7(d) Path: Is your action compliant with section 7(a)(2)/7(d)? Is the existing section 7(a)(2)/7(d) analysis still valid with implementation of your action?

The 7(a)(2)/7(d) pathway is a way for our agency to determine and document if: (1) allowing the proposed action to continue during the reinitiation period is consistent with our section 7(a)(2) obligation (i.e., during the reinitiation period we are still meeting our obligation to ensure our actions are not likely to jeopardize any listed species or result in the destruction or adverse modification of critical habitat), and (2) we are not making any irreversible or irretrievable commitment of resources during the reinitiation period that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives that might be provided at the conclusion of these consultation (i.e., that we are not violating section 7(d)).

The section 7(a)(2) determination made via this pathway is only applicable to the proposed action during the reinitiation period and does not address the agency's long-term obligation to ensure its actions are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. Only with the completion of the new biological opinion can a section 7(a)(2) analysis be completed for the long-term, foreseeable future.

Section 7(d) was intended by Congress to prevent "steamrolling" a project by an action agency, wherein a project is developed to a stage at which options that may have been available at the onset of the project, and that would have avoided jeopardizing listed species, are no longer reasonable and prudent because of a foregone commitment of resources to the original design of the project.

The questions below help to determine if we are meeting our section 7(a)(2)/7(d) obligation during the reinitiation period.

<p>Does implementing the proposed action before the reinitiated consultation is completed jeopardize a listed species or destroy or adversely modify its critical habitat (violates 7(a)(2)) and/or irreversibly or irretrievably commit resources (violates 7(d))?</p>	<p>Yes</p>	<p>No</p>
<p>Factors to consider:</p> <p>Could the proposed action result in:</p> <p>(a) The number or severity of interactions with ESA-listed species increasing;</p> <p>(b) Changes in effects to critical habitat;</p> <p>(c) Changes in where and/or when fishing is occurring;</p> <p>(d) Changes in effort (e.g., use of a different gear type, increase in number of vessels participating in fishery, increase in the amount of gear fished)</p> <p>(e) Irreversible or irretrievable commitment of resources such that the overall nature and operation of the fishery has been changed.</p> <p><i>Note: For (e), NOAA Fisheries believes that prosecution of fishing authorized and managed under an FMP in no way constitutes an irreversible or irretrievable commitment of resources. FMPs and their implementing regulations are always subject to future changes. NMFS has discretion to amend its regulations and may do so at any time, subject to the Administrative Procedures Act, National Environmental Policy Act, and other applicable laws. This rationale for compliance with 7(d) is generally applicable to all FMP-related actions.</i></p>		
<p>Provide information that supports this conclusion:</p>		
<p>If No, you have preliminarily determined: Authorizing the proposed action and allowing the fishery [or these fisheries] to continue to operate during the <u>reinitiation</u> [or consultation] period will not violate section 7(a)(2) or 7(d). Document your full determination using the information that supports this conclusion (above) in a 7(a)(2)/7(d) memo and route, including NOAA GC.</p>		
<p>If Yes, further coordination is needed. Set up a meeting with PRD and NOAA GC for further guidance on next steps.</p>		

B. New Listings or Designations of Critical Habitat: Using Action Plans

The ESA Section 7 Regulations (50 CFR §402.16) require reinitiation of consultation if a new species is listed or critical habitat is designated that may be affected by an action previously subject to consultation. In the context of fisheries

management, when a species is proposed for listing or critical habitat is proposed for designation, Sustainable Fisheries, in coordination with Protected Resources, develops an action plan for ensuring its ESA section 7 responsibilities are addressed with respect to existing fishery management regimes (FMPs and their implementing regulations). This subsection provides general guidance and then recommends the use of ESA section 7 Action Plans for new proposed listings/critical habitat designations.

In developing an appropriate action plan for a proposed listing/critical habitat, SF and PR should assess the likelihood of interactions with managed fisheries, the status of the existing biological opinion or informal consultation, and the timing of any anticipated or ongoing consultation. The primary goal is to ensure that there is no gap in ESA section 7 coverage upon listing a new species or designating new critical habitat.

To achieve the goal of avoiding a period when the fishery management program would not have a valid section 7 consultation addressing the new listing/critical habitat designation, NMFS' SF programs should in most cases engage in mandatory or voluntary conferencing under the ESA regulations. Conferences are required if a proposed action is likely to jeopardize a proposed species or result in destruction or adverse modification of proposed critical habitat. However, the ESA Section 7 Handbook also recognizes the possibility of voluntary conferencing and provides for a lot of flexibility in how conferences are actually conducted.

Conferencing generally should be completed prior to a final listing decision and promptly adopted as the biological opinion when the species is listed or the new critical habitat is designated. In many cases, there will be an existing biological opinion or informal consultation for the managed fishery or fisheries that may affect the newly listed species/critical habitat. In these cases, the conference opinion should be adopted as a supplement to the existing biological opinion. During the conferencing process, and prior to supplementing the existing biological opinion, Sustainable Fisheries and Protected Resources should consider whether there is significant new information that would require a broader reinitiation of consultation (see Subsection C. below) and document any determination as appropriate.

In some circumstances, it may be appropriate to engage in reinitiation of consultation rather than conferencing to satisfy the section 7 requirement for new species listing/critical habitat designations. These circumstances may include where reinitiation is planned for a new fishery management action in the near future or a reinitiated consultation is imminent or ongoing, or where additional significant new information is identified during the conferencing process. However, NMFS should not delay indefinitely reinitiation on the new species/critical habitat if there is no other vehicle for consultation.

In any case in which section 7 coverage will not be in effect promptly after a new

listing/critical habitat designation, Sustainable Fisheries should use a section 7(a)(2)/7(d) memorandum to address the effects of existing fishery management regimes on the newly listed species/critical habitat pending completion of a reinitiated consultation. Those memos can be useful tools in demonstrating that the agency has considered and satisfied its substantive section 7 responsibilities.

PR and SF should consult with NOAA GC and the relevant Council/s, if any, as they develop each ESA Section 7 Action Plan.

ESA Section 7 Action Plan

Each decision memo associated with a proposed new species listing or critical habitat designation should include as an attachment, or as a separate memorandum, a Section 7 Action Plan for ensuring NMFS' ESA section 7 responsibilities are addressed with respect to existing fishery management regimes (FMPs and their implementing regulations). Each Action Plan should specify how NMFS will coordinate with the Councils in compliance with this PD and other relevant policies and agreements.

Process

- PR should inform SF that there is a species proposed for listing or proposed designated critical habitat that may be caught or otherwise affected by a managed fishery prior to initiating the clearance process for a proposed rule for a new species listing/critical habitat designation, and SF and/or PR should convey this information to the relevant Council.
- PR and SF should meet to establish a plan for covering the fishery under ESA section 7 prior to initiating the clearance process. Prior to finalizing their plan and submitting it with the clearance package, PR and SF should consult with NOAA GC and the relevant Council/s.
- Clearance packages for a proposed listing/critical habitat rule should include the ESA Section 7 Action Plan as an attachment to the Decision Memo. Clearance packages for a final listing/critical habitat rule should also include the ESA Section 7 Action Plan, and indicate whether it has been updated or revised.

Contents

- Each ESA Section 7 Action Plan should identify any domestic fisheries that may interact with the proposed species/critical habitat (if none, then an explicit statement to that effect will be sufficient, and no further plan is required).
- Each ESA Section 7 Action Plan should describe how SF/PR intend to satisfy the consultation requirement with respect to the proposed species/critical habitat, consistent with the guidance described above. The plan should take into account the likelihood of interactions with managed fisheries, the status of the existing biological opinion or informal consultation, the timing of any anticipated or ongoing consultation, and how

- NMFS will coordinate with any relevant Council/s.
- The goal of the ESA Section 7 Action Plan is to avoid or limit any gap in Section 7 coverage starting from the date of listing.
 - Each ESA Section 7 Action Plan should describe the action that will be used to complete consultation on the new species/critical habitat and set forth a schedule describing when conferencing is expected to be completed. If the action plan contemplates reinitiation instead of conferencing, the plan should explain why reinitiation will be used instead of conferencing and whether reinitiation is already underway or when it is anticipated to begin and when it will be completed.
 - An ESA Section 7 Action Plan may describe other considerations, such as priority-setting in the context of other workload.

Format

- The ESA Section 7 Action Plan should be a memo to the DAA, and may be brief. Typically, no more than two pages should be required.
- The inclusion of the ESA Section 7 Action Plan in the clearance package represents that the relevant RA and PR and SF ARAs have concurred in the plan.

C. Specific New Information: Documentation of Reinitiation Determinations

1. *Required Procedures*

The ESA section 7 regulations (50 CFR §402.16) require reinitiation of consultation if specific 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. NOAA Fisheries requires documentation of the decision whether or not to reinitiate if specific new information raises substantial questions about the analysis in a prior consultation, where there is a close call, or where a third party has made a credible suggestion that new information will change a prior analysis.

When new information pertinent to a prior consultation is identified, staff biologists in PR and SF should work closely with each other, their management, and NOAA General Counsel to evaluate the information. The action agency (SF) is responsible for making a determination whether to reinitiate.

2. *Documenting Decisions to Reinitiate*

If SF decides that reinitiation is required, the action agency (SF) will notify PR with a memo and request reinitiation, which is sufficient for purposes of documenting the decision. Depending on the project, this memo may need to be signed by the RA or SF Office Director (in the case of the Atlantic-HMS Division). SF should then inform the Council(s), as appropriate as part of the consultation process.

3. *Documenting Decisions Not to Reinitiate*

If the specific new information determination is made in the context of evaluating whether reinitiation of consultation is required for a new fishery management action, the ESA Section 7 Assessment Worksheet (Checklist) may be used to document the decision.

If there is specific new information meeting the standard described above (i.e. if there is specific new information that raises substantial questions about a prior consultation, where there is a close call, or where a third party has credibly suggested new information will change a prior analysis), but there is not presently a new fishery management action under consideration, SF should promptly make and document a new information determination. In these circumstances, a separate document should be developed by SF to document and explain how the decision was made by SF and PR. The required memo need not be lengthy but should contain sufficient analysis commensurate with the seriousness of the questions raised by the specific new information to clearly explain the rationale that reinitiation is not required. SF should provide PR with a copy of the document.

4. *Recommendations by Protected Resources*

If PR identifies specific new information pertinent to an existing consultation, the PR ARA may, after discussion with SF and NOAA GC where appropriate, recommend that SF reinitiate consultation. This decision may also require (depending on the project) speaking with the Regional Administrator or SF Office Director (in the case of the Atlantic-Highly Migratory Species [HMS] Division) before this decision is made. SF will then make the decision whether to reinitiate and will document that decision as described above.

5. *Background*

There are a number of places where staff biologists can obtain/receive specific new information, such as:

Internal

- Science Centers
- Regional Protected Resources Divisions staff and internal meetings
- HQ Office of Protected Resources (e.g., National Sea Turtle Program)
- Regional Sustainable Fisheries Divisions staff and internal meetings
- 5-year species status reviews
- Stock Assessment Reviews
- Recently completed biological opinions (BiOp)

External

- Fishery Management Councils/Atl. HMS Advisory Panel:
- Presentations, reports, and other information distribution
- Relevant workgroups, subgroups, technical and other committees, panels,

- etc.
- Information presented at academics/university seminars, conferences, or working groups
- Species list serves
- Other Federal agencies
- Technical committees forums for stocks (in addition to the Council forums)
- Non-governmental organizations
- Ongoing general and focused scientific literature review of New papers, including new scientific research about life history or abundance of a species or ongoing data collection/analysis
- Federal Register notices
- Industry information

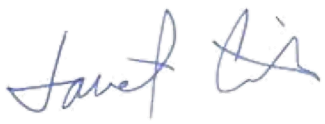
Staff biologists should consider this list as a resource to identify sources of specific new information and where appropriate, to take a comprehensive approach to identifying new information. The Regions/Atlantic HMS Division should continue the practice of reviewing information to determine if it constitutes specific new information as it becomes available. As stated above, this is especially important if a third party is recommending that we include new information during the ESA section 7 consultation process, and/or when a third party recommends that new information warrants reinstitution of an existing consultation. NOAA General Counsel should continue to be included in the data/information review process to address any legal concerns that may arise with the inclusion of information as specific new information.

While NMFS does not have explicit criteria to determine what constitutes new information, there are a number of factors that should be considered, including:

- Referring to ESA section 7 regulations at 402.16(b) - if new information revealed an effect to endangered and threatened species or critical habitat in a manner that was not considered in existing or planned ESA consultations
- Evaluating proposed new information in the context of what constitutes the best available scientific and commercial data concerning the status of the species and jeopardy analyses
- Evaluating the extent that the proposed new information indicates significant changes in trends, population estimates, distribution, habitat use, post-release mortality, bycatch and/or
- Evaluating if the proposed new information indicates a specific new or emerging threat to a species

VIII. References

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

Signed 

10/8/2024

Janet Coit
Assistant Administrator for Fisheries

Date

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' Office of Sustainable Fisheries or a regional Sustainable Fisheries Division. (1998 Endangered Species Consultation Handbook pg. 2 - 6)

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 (see biological assessment) is not required. Biological Evaluations often consist of NEPA documents (Environmental Assessments/Environmental Impact Statements) and other supporting documents. This document is part of 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. (1998 Endangered Species Consultation Handbook pg. E-8)

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' 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). (See “Service” 50 CFR 402.02)

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. (See 16 U.S.C

1852, Section302)

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)

Likely to adversely affect (LAA) – the appropriate finding if one or more of the effects to listed species or designated critical habitat are not discountable, insignificant or completely beneficial. Formal consultation would be required. (1998 Endangered Species Consultation Handbook E -12)

Not likely to adversely affect (NLAA) – the appropriate conclusion when effects on listed species or critical habitat are expected to be discountable, insignificant, or completely beneficial. (See 50 CFR 402.13; 1998 Endangered Species Consultation Handbook E - 12)

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' Northeast Southeast, West Coast, Alaska, and Pacific Islands Regions, or a designee. (See <https://www.fisheries.noaa.gov/about-us/who-we-are>)

Terms and Conditions (T&Cs) - generally are actions designed to implement Reasonable and Prudent Measures, including reporting requirements. (See 50 CFR § 402.14 ((i) (1) (iv))