

## **Draft ESA Working Group Recommendation Regarding ESA Integration**

The Working Group recommends that NMFS formally recognize that the Councils possess a unique relationship with NMFS as a result of authorities and responsibilities created under the Magnuson-Stevens Act (MSA) and that a range of authorities exist under Section 7 of the ESA, National Environmental Policy Act (NEPA), and other laws to better integrate Council planning activities with ESA Section 7 technical assistance and consultation processes. These authorities allow the Councils to:

- Advise the action agency (i.e., SF) throughout the ESA Section 7 consultation process, which may include assisting SF in defining the proposed action and feasible alternatives; identifying the best scientific information available (BSIA) on fisheries management practices and potential effects of the proposed action on listed species and critical habitat;
- Prepare biological assessments, biological evaluations, other ESA Section 7 consultation initiation documents for SF, or assist with preparation or review of additional information requested during consultation; and
- During a formal ESA Section 7 consultation, review and comment upon a draft biological opinion obtained through SF from PR, including a draft Reasonable and Prudent Alternative in the case of a jeopardy biological opinion, or draft Reasonable and Prudent Measures to be included in an Incidental Take Statement.

The Working Group further recommends that NMFS issue a memo to the Councils [and NMFS Regional Administrators] providing guidance for Councils seeking involvement in ESA Section 7 consultations. The guidance memo should outline a process by which the Councils may request involvement on an action-specific basis or through an overarching agreement with their respective NMFS Regions. In return, NMFS should grant the Council's request unless the requested level of involvement violates federal law or the order of a court in ongoing litigation. A draft memo developed and agreed to by the Working Group is provided [attach the draft memo to recommendation].

[DATE]

MEMORANDUM

TO: COUNCIL CHAIRS

FROM: NAME, TITLE  
NMFS

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

In January, 2012, the Council Coordinating Committee (CCC) identified the two goals of improving collaboration, and identifying options for improving communication and increasing transparency in the Endangered Species Act (ESA) jeopardy determination process for fisheries management actions.

In May, 2012, the CCC and Marine Fisheries Advisory Committee (MAFAC) requested establishment of a joint ESA working group (ESA Working Group) to make recommendations for increasing transparency and improving confidence in ESA consultations related to fishery management plans.

In October, 2012, the ESA Working Group was established to make recommendations for improving the ESA Section 7 consultation process. The ESA Working Group is composed of four Council Members, four MAFAC Members, and three NOAA Fisheries Staff. Over the past six months, the working group has met to discuss and develop various options for addressing the goals identified by the CCC in January, 2012. These options were presented to NMFS and the CCC in May, 2013, at the CCC coordination meeting.

After reviewing the analysis and recommendations developed by the ESA Working Group, NMFS has concluded that a range of authorities exist under Section 7 of the ESA, National Environmental Policy Act (NEPA), and other laws to better integrate Council planning activities with ESA Section 7 technical assistance and consultation processes as appropriate. NMFS also recognizes that the Councils possess a unique relationship with NMFS as a result of authorities and responsibilities created under the Magnuson-Stevens Act (MSA). Policy Directives issued by NMFS, including the Operational Guidelines on Development of Fishery Management Actions, as well as the recent Policy Directive concerning integration of NEPA and MSA, provide an additional basis for NMFS to enhance coordination among the Office of Sustainable Fisheries, Councils and Protected Resources throughout the ESA Section 7 process.

NMFS recognizes that any policy to align Council processes with the ESA Section 7 process should be flexible, and should allow for NMFS and a Council to scale Council involvement appropriately depending on the facts and circumstances of the action under

review. NMFS offers the following guidelines for Councils seeking involvement in ESA Section 7 consultation processes:

**A. On an Action-Specific Basis**

- (1) A Council may request in writing involvement in an ESA Section 7 process by transmitting a letter to Sustainable Fisheries (SF) similar to the form attached as Exhibit A. SF may also request the involvement of Councils during technical assistance and/or consultation phases of ESA interagency cooperation.
- (2) A Council may request the opportunity to advise the action agency (i.e., SF) throughout the ESA Section 7 process, and such involvement may include assisting SF in defining the proposed action and feasible alternatives; identifying the best scientific information available (BSIA) on fisheries management practices and potential effects of the proposed action on listed species and critical habitat; and preparing biological assessments, biological evaluations, other ESA Section 7 consultation initiation documents for SF, or assist with preparation or review of additional information requested during consultation. During a formal ESA Section 7 consultation, a Council may request the opportunity to review and comment upon a draft biological opinion obtained through SF from PR, including a draft Reasonable and Prudent Alternative in the case of a jeopardy biological opinion, or draft Reasonable and Prudent Measures to be included in an Incidental Take Statement. These opportunities for enhanced coordination and communication among Councils, SF and PR with regard to ESA Section 7 would not require special designations of Councils or affect NMFS authorities pursuant to MSA or ESA.
- (3) A letter from a Council requesting involvement in an ESA Section 7 process should specify the level of involvement in the consultation process sought by the Council; the designated points of contact at the Council for coordination purposes; and any other relevant information that will assist NMFS with integrating the ESA consultation process with NEPA and MSA processes administered by the Council. A letter from the Council requesting involvement in an ESA Section 7 process should be directed to the appropriate Regional Administrator involved in the consultation process.
- (4) In response to a request from a Council, NMFS will respond in writing to the Council, describing the level of coordination between the Council and NMFS deemed appropriate for the consultation identifying points of contact at NMFS, and providing any other relevant information that will assist NMFS and the Council in their coordination efforts. NMFS will grant a Council's request for involvement in an ESA Section 7 process unless NMFS determines that the Council's requested level of involvement would violate federal law or the order of a court in ongoing litigation. Any disputes arising between a Region and a Council regarding a Council's requested level of involvement in an ESA Section 7 Consultation process may be referred to the General Counsel, NOAA Office of General Counsel, for prompt resolution.

**B. On a Region/Council Basis**

In addition to the steps outlined above pertaining to Council involvement in an individual ESA Section 7 consultation process, it may be appropriate for NMFS and the Councils to develop a written working agreement [either within the context of the Regional Operating Agreements being developed pursuant to the recommendations of the Office of Inspector General Report, or as an MOU, or other formalized Letter of Agreement] outlining roles, responsibilities, and expectations for each Region and Council pair during ESA Section 7 consultations. Such an agreement 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 leadership from NMFS, and the relevant Council, as appropriate.

NMFS concludes that better integration of Council fisheries management planning processes with the ESA Section 7 process would result in the efficient development of regulations and policies that accomplish the goals of the ESA, NEPA, and MSA.

Please direct any questions regarding this policy to NAME at NUMBER.

DRAFT