Final Report of the
ESA Working Group

Presented to the
Marine Fisheries Advisory Committee
(MAFAC)

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I. Executive Summary

A Working Group was convened in October 2012 under the authority of the Marine Fisheries Advisory Committee (MAFAC) to increase confidence and transparency in the science and processes used for section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions. In May 2012, NOAA Fisheries (NMFS) received separate requests to establish this Working Group from MAFAC and the Council Coordinating Committee (CCC) following a panel discussion of ESA issues at the May 2012 CCC meeting.

The Working Group is composed of four Council Members, four MAFAC Members, and three NOAA Fisheries Staff. Its Terms of Reference (Appendix A) identified the scope of work, roles of the members and staff, and a 12 month time frame for completing its recommendations. This report details the Working Group products and recommendations to MAFAC.

Section 7 of ESA requires federal agencies to consult with NOAA Fisheries and/or the US Fish and Wildlife Service (USFWS) to insure actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of threatened or endangered species. Fishery management actions, developed through the MSA's Regional Fishery Management Council (Council) process, are subject to the consultation requirements of section 7. In fishery management ESA consultations, the NMFS Office of Sustainable Fisheries (SF) is the action agency consulting with the NMFS Office of Protected Resources (PR).

Although Councils are not the action agency or applicant for ESA consultations, Councils possess expert technical knowledge on fisheries management that may inform the consultation process. Prior to and during the consultation process, the action agency (SF in the case of MSA actions) may seek Council scientific and commercial data and knowledge on impacts fisheries actions may have on listed species and designated critical habitat. NMFS may also work with the Councils to identify changes to fisheries practices that minimize the impacts to listed species and/or designated critical habitat; incorporate the Council data, where appropriate, in its analyses; and consider the Council's input when identifying any reasonable and prudent alternatives.

In practice, there has been regional variability in the collaboration process among SF, PR, and the Councils. ESA consultations in fishery management are often difficult, and these difficulties have been amplified in several fisheries, undermining the cooperation necessary to keep a fishery open while protecting species and avoiding jeopardy.

To assess current practices, the Working Group, helped to organize and participated in a webinar held on October 24, 2012. The webinar presented different case studies from three different regions to highlight best practices and potential areas for improvements in ESA consultations on MSA fishery management actions (link to webinar presentations). Subsequently, a priority list of issues was developed that became the basis of a work plan. Subgroups formed to develop different work products, and members worked by email and teleconference. An in-person meeting was organized in May, 2013 at the six-month mark.

The two priority areas of work were:

- Improve collaboration and communication among Councils, Sustainable Fisheries, and Protected Resources regarding fishery management plans, with a strong emphasis on early, informal collaboration.
- Improve transparency of data and the scientific basis for biological opinions.

Improve Collaboration and Communication

Working Group discussions quickly focused on the importance of early, informal collaboration. The formal ESA consultation process begins once the Council chooses a preferred alternative action, very late in the fishery management process. Early collaboration can identify action alternatives that are sensitive to ESA concerns, thus reducing the likelihood that the preferred alternative will result in jeopardy. The Working Group developed a list of nine options and assessed the pros and cons of each option. These options ranged from wider use of the "Interdisciplinary Plan Team" process to designation of a Council as the "Action Agency" in a formal consultation. The Working Group supported and developed recommendations expanding on Option 9 - development of a memorandum of understanding (MOU) between NMFS and a Council that would specify the SF's and the Council's respective roles in the early, informal development of alternatives and the later formal ESA section 7 consultation.

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 MSA and that a range of authorities exist under ESA, National Environmental Policy Act (NEPA) and other laws to better integrate Councils into the section 7 consultation process. To implement this concept, the Working Group further recommends that NMFS issue a policy guidance memo to the Councils and NMFS Regional Administrators. The Working Group developed a draft "integration memo" (Appendix D) outlining a process by which Councils may request involvement on an action-specific basis or through an overarching agreement with their respective NMFS Regions. The Working Group also identified good places for communication and collaboration in the processes of Councils, SF and PR, and depicted these in an idealized flow chart.

Additionally, the Working Group examined two case studies in which the potential for adverse impacts on a protected species arose suddenly, and fishery management changes were implemented within six to nine months without closing the fisheries. Both are examples of effective collaboration among Councils, SF, and PR.

***Improve Transparency of Data and the Scientific Basis for Biological Opinions*.**

The Working Group recommends that the NMFS develop a national policy on the application of best scientific information available (BSIA) standards to ESA section 7 consultations (including biological opinions and informal consultations) to further implement and clarify existing policy on information standards under the ESA, 59 FR 34271. The recommended policy would provide standardized guidance to NMFS offices that engage in ESA interagency cooperation pursuant to section 7. We are not recommending any specific procedures at this time, but NMFS should consider, as part of the recommended policy development, whether BSIA standard procedures are needed. The Working Group believes that the agency's recent rule addressing BSIA in the context of the MSA's National Standard 2 is a useful starting point for this ESA policy development.

The Working Group identified and discussed key factors that could be used to rank the relative strength of different sources of information and a framework that we believe the agency should

carefully consider incorporating in the recommended policy. These key factors are: Relevance and timeliness, objectivity and transparency, verification and validation, certainty, and sources of information.

II. Improving Collaboration and Communication Among Councils, Sustainable Fisheries, and Protected Resources Regarding Fishery Management Plans

A. Recommendation

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 provide for opportunities for 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, when 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. It is expected that NMFS generally will grant a Council's request for involvement in an ESA section 7 process. However, NMFS may deny the request in circumstances that include NMFS' determination that the Council's requested level of involvement would violate federal law or the order of a court in ongoing litigation or existing deadlines do not provide sufficient time for the level of involvement requested. A draft memo developed and agreed to by the Working Group is provided (Appendix D).

B. Integration Memorandum and Flow Chart

Identification of areas of agreement (Appendix C) kicked off the early discussions of the Working Group. Members noted that formal PR consultation begins once the Council chooses a preferred alternative, but this, and the subsequent Biological Opinion (BiOp) come late in the fishery management process, after a suite of alternatives have been developed. However, Councils want to know which alternatives will avoid jeopardy before choosing a preferred alternative. If communication among SF, Council, and PR would occur during the development

of alternatives in Fishery Management Plans (FMPs), it would increase the likelihood that the preferred action will avoid jeopardy.

The Working Group members generally agreed that the protected resources process should incorporate early coordination of MSA, NEPA, and ESA activities. A much greater emphasis should be placed on early, informal consultations. To operationalize this, members of the Working Group developed a matrix of potential options for early engagement between NMFS and the Councils and the pros and cons of each option. These are compiled in Table 1.

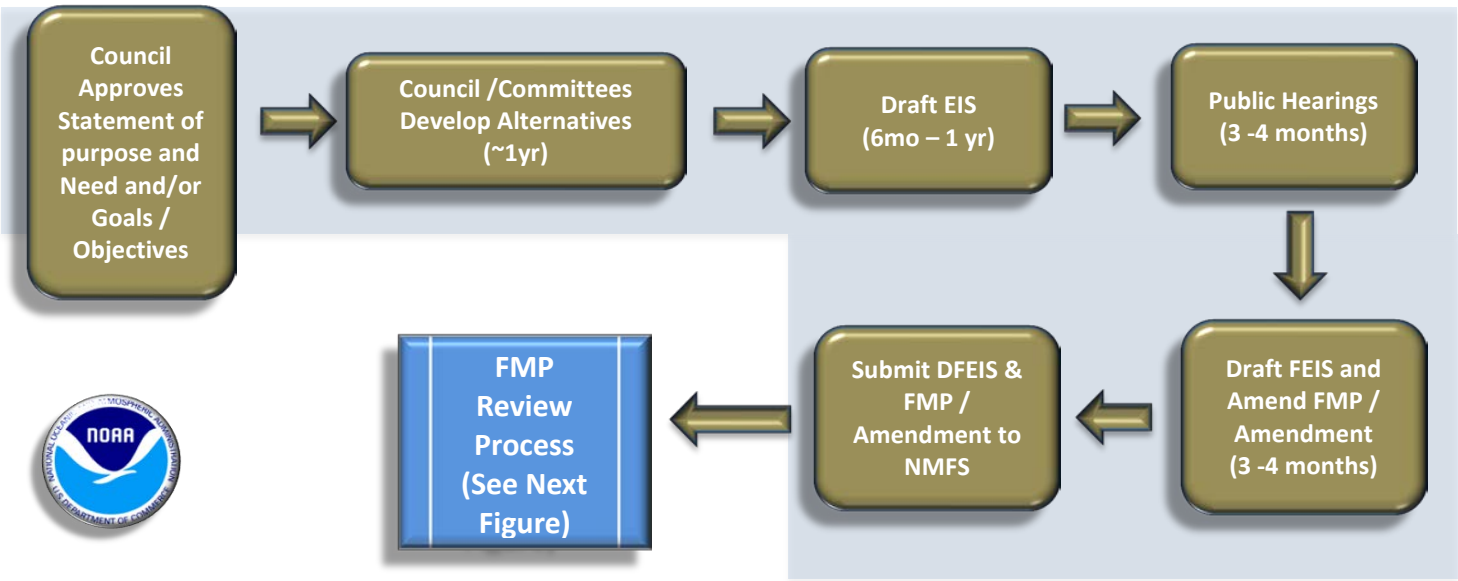
Aided by the analysis of options, the Working Group coalesced around Option 9: Development of an overarching MOU between SF and a Council would specify the SF's and the Council's respective roles in a consultation. This led to the development of a draft memorandum that would describe a process for Councils and SF to integrate their ESA and MSA processes. The draft integration memo calls for the following (see the full draft integration memo in Appendix D):

- A 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.
- Councils could request involvement in an ESA process, and SF could request Council technical assistance and/or participation in an ESA consultation.
- Councils could request the opportunity to advise SF throughout the ESA process (define action and alternatives; identify BSIA on fisheries management practices; prepare Biological Assessments; through SF, comment on draft Biological Opinion, draft Reasonable and Prudent Alternatives, and draft Reasonable and Prudent Measures for Incidental Take Statement).
- A letter from the Council would specify the level of involvement the Council is seeking and designate the points of contact for coordination.
- In response, NMFS would determine the level of coordination with the Council and the points of contact.
- At the regional level, Councils and NMFS could develop written MOUs or Regional Operating Agreements outlining roles and responsibilities for the Regional Office and Council during ESA informal and formal consultations.

Next, Working Group members developed a flow chart to identify potential points for early informal integration across the Council, SF, and PR processes. For example, PR can provide technical assistance to Councils and SF as the Council develops alternatives and prepares the draft EIS. PR, SF, and, the Council can conduct informal consultations during the development of the draft EIS and the public hearings on the draft EIS. As the draft EIS is revised into the final Fisheries Management Plan Amendment, SF can request the assistance of the Council to review draft opinions.

The flow chart also suggests potential points of contact for informal consultation, as described n ESA 7(a)(2). In this process, SF determines whether a protected species or critical habitat may be adversely affected. If so, SF works with the Council to incorporate species conservation measures in the draft Fisheries Management Plan Amendment while requesting formal consultation with PR. Once the formal consultation begins, PR follows prescribed steps with defined time limes, however the Council may advise SF and PR during the formal portion of the consultation.

Figure 1. Fisheries Management Planning Process



Note: The steps in shaded box represent one possible example of a schedule for council development of a proposed fishery management action. These steps vary in sequencing and duration depending on Council-specific procedures, priorities and resources.

Figure. 2. FMP Review Process from Figure 1.

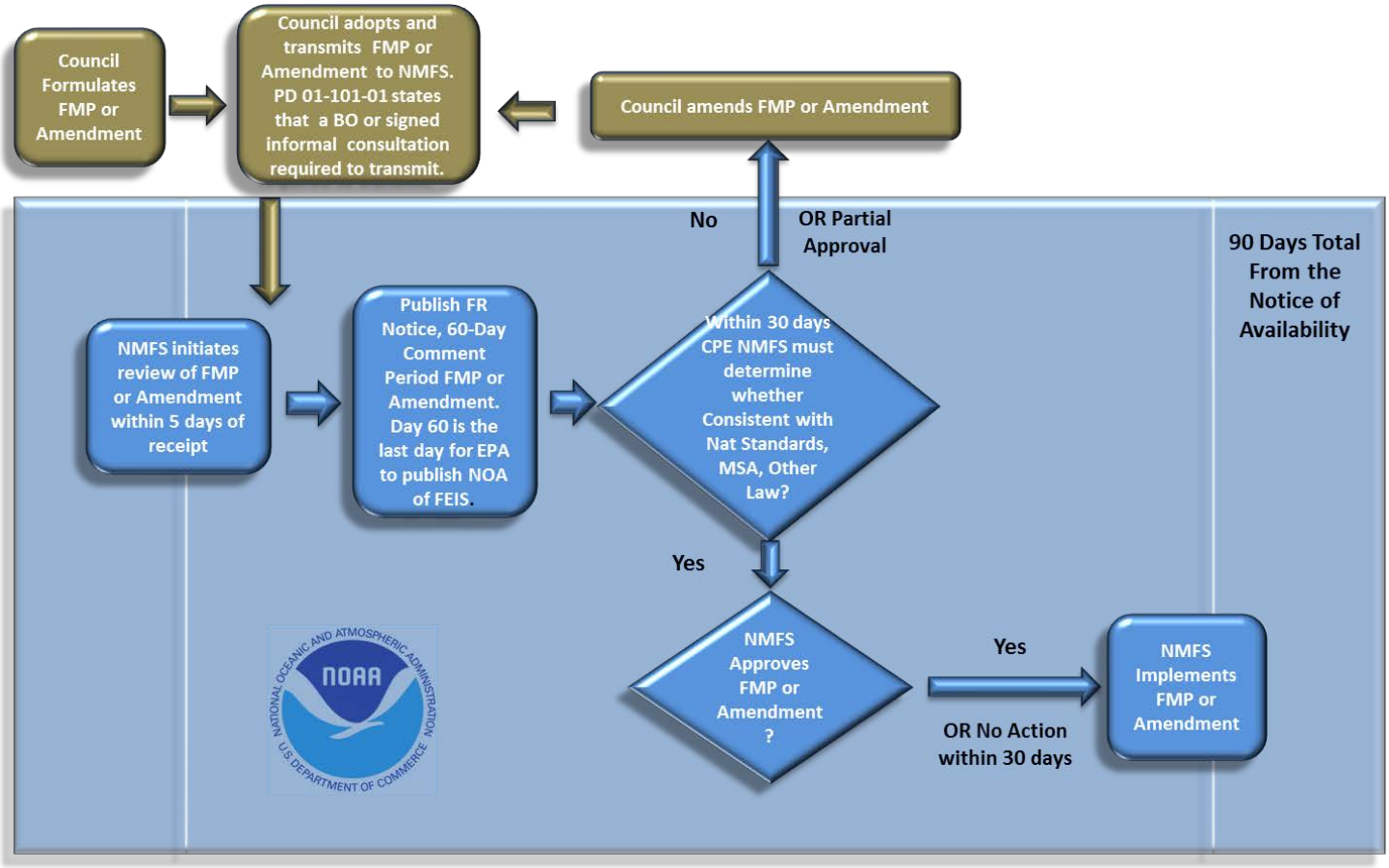


Figure 3. Incorporating ESA section 7 in Council and NMFS fishery management plan processes.

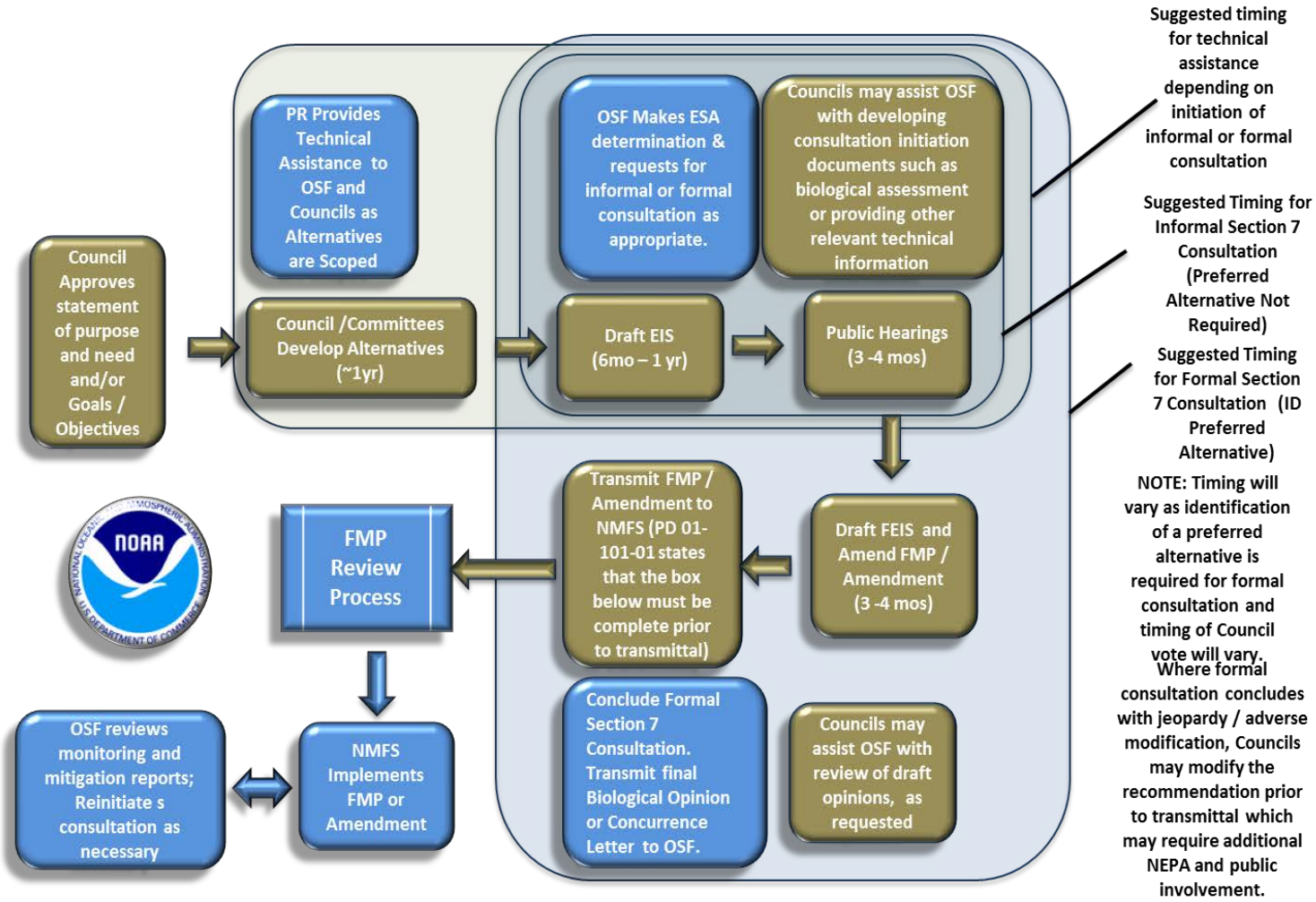


Figure 4. Informal consultation section 7 (a)(2).

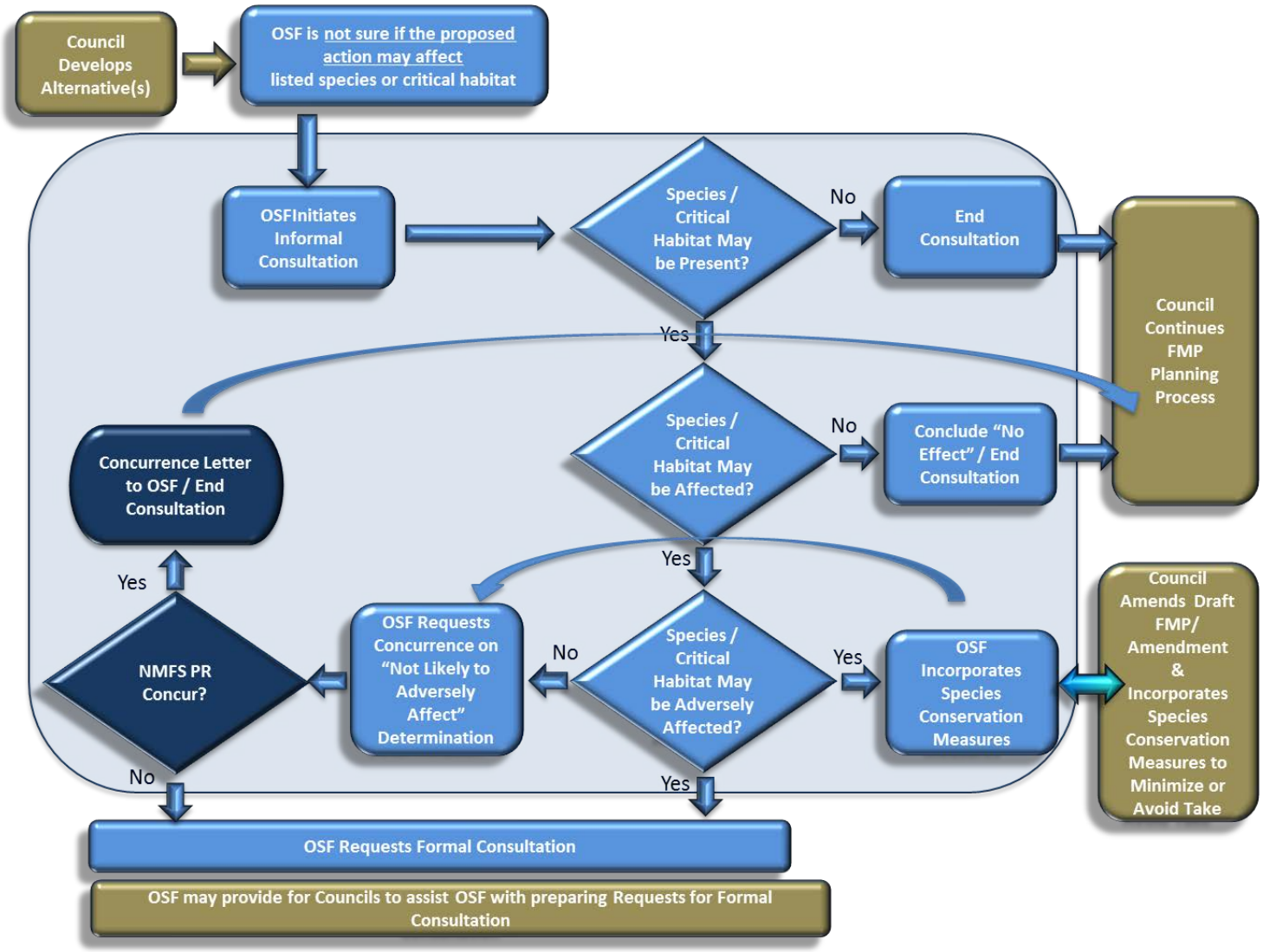


Figure 5. Formal consultation for section 7(a)(2).

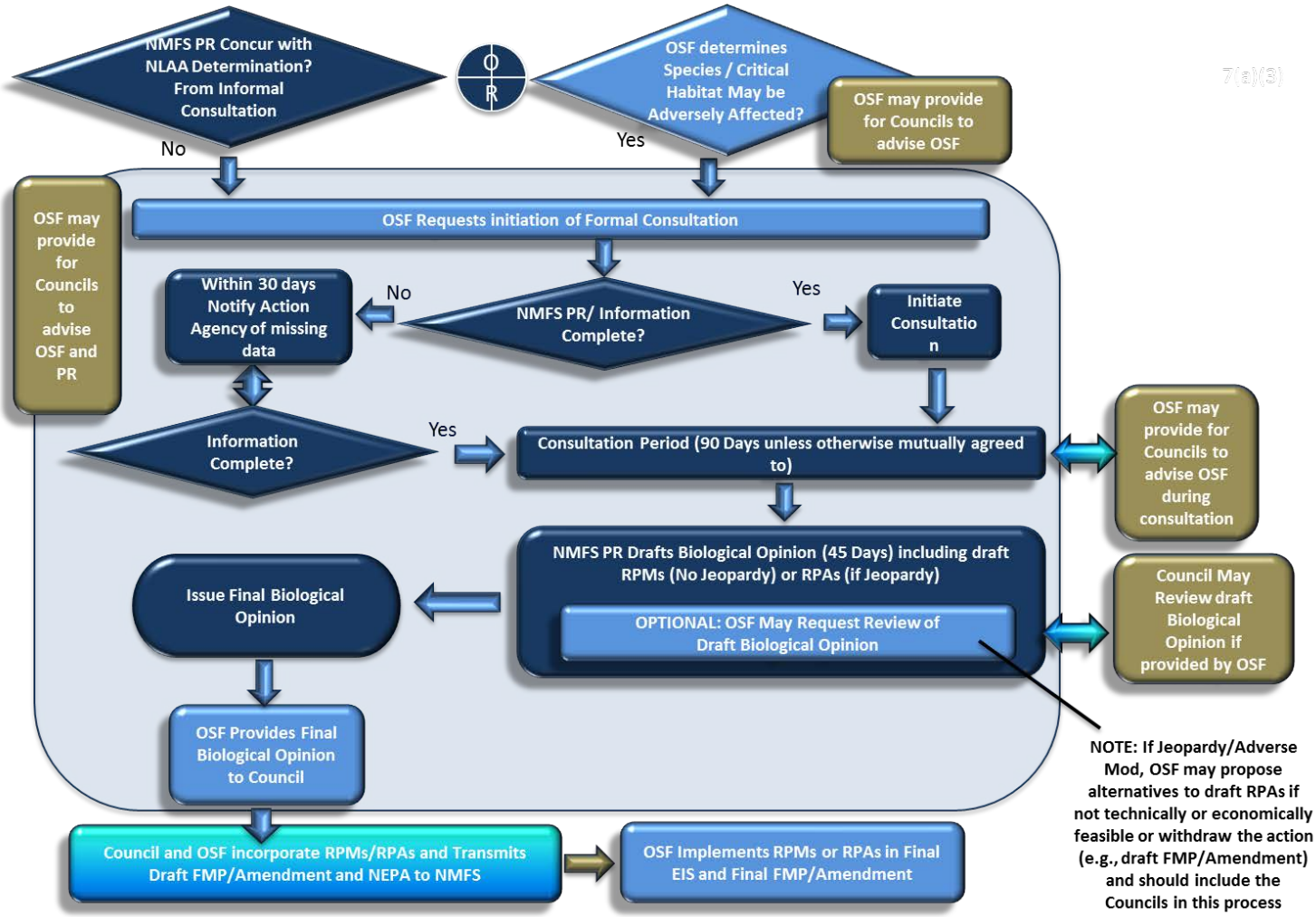


Table 1. Matrix of options for improving communication with Councils during ESA section 7 review.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
Council Involvement Prior to initiation of formal consultation					
1. Early Involvement: Interdisciplinary Plan Team **ESA 7(a)(1), (2)**	Early communication and coordination. Representatives from SF, PR, and Council work together on a team drafting documents in support of developing recommendations	Ongoing participation of Councils from initiation of action through submission of FMPs and implementing regulations for Secretarial review.	Early exchange of information	Extra work required in terms of providing information on potential impacts as alternatives developed and are modified. Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	
2. Technical Assistance / Not formalized **ESA 7(a)(1)**	Early communication and coordination by request and as time allows. Representatives from SF, PR, and Council work together during early planning stages to support development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation.	Throughout MSA FMP Process up to initiation of Informal or Formal Consultation	Continual Exchange of Information. No formal teams	Indirect participation in Drafting Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	
3. Technical Assistance / Formalized **ESA 7(a)(1)**	Early communication and coordination under established framework (Roles and Responsibilities) and scheduled meetings. Representatives from SF, PR, and Council work together during all planning stages to support of development of alternatives considering ESA resources. Identify information needs and potential issues prior to consultation. Meet outside of planned actions to leverage lessons-learned through adaptive management approach	Throughout MSA FMP Process up to initiation of Informal or Formal Consultation	Continual Exchange of Information. Formal Mechanism with designated Points of Contact.	Indirect participation in Drafting; Will require additional staff time and resources Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	May require dedicated staffing similar to establishing liaisons for FMP/Councils.

Work represents staff development of options for consideration, and not NMFS's position on these issues. Further, this matrix has not been formally analyzed by General Counsel to determine legal feasibility of all options.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
4. Early Involvement: PR liaison to each FMP **ESA 7(a)(1) – (4)**	PR assigns staff to serve as liaison, attend Council meetings, exchange information about fisheries and protected species	Throughout MSA process. Ongoing PR participation/attendance at Council meetings to share information about protected species impacts and to monitor developing fishery management actions	Dedicated Biologist for FMP Actions; Real-time expert advise and feedback during Council Meetings	Time consuming and not always necessary. Manpower/ Time Intensive, Expensive Unless combined with other options (5-9 below), this option on its own would not provide the Councils' desired review of draft biological opinions.	May require dedicated staffing similar to establishing liaisons for FMP/Councils
Techniques for Council Review of Draft Biological Opinion					
5. Council Status: As Action Agency or as a "co-lead" or "cooperating" agency along with SF.	If the Council is an action agency, then it is required to consult with PR to insure that its actions will not cause jeopardy.	Formal consultation would be initiated at Council's request, or at the joint request of SF and each Council	This would provide the Council with direct communication with PR regarding the action on which the Council is consulting (presumably the action would be development of a management recommendation).	"Action agencies" have various duties and responsibilities for compliance with various laws. Action agencies can be held accountable in court, which can lead to fees, discovery, document production requirements, burdens on staff, and sanctions. In addition, it is not clear whether NOAA GC would represent them or they would have to obtain separate legal counsel. It is not clear what type of communication the Council and PR would have with SF during consultation on the Council's action. SF would remain responsible for compliance with the ESA as SF would be the action agency for purposes of implementing regulations/issuing permits. This could result in 2 sets of consultations.	This may not be legally possible in the absence of Congressional intent that Councils be treated as action agencies for purposes of ESA or other statutes. Previously, when councils have been listed as codefendants with NMFS, NOAA has succeeded in having them removed from the lawsuit. Council costs and vulnerabilities associated with being defendants in litigation should be considered here. Because of the requirement that Council meetings be public, the same consideration regarding waiver of privilege for draft biological opinions applies. The team is exploring possibility of staff communication with counsel to assert attorney-

Work represents staff development of options for consideration, and not NMFS's position on these issues. Further, this matrix has not been formally analyzed by General Counsel to determine legal feasibility of all options.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
					client privilege.
6. Council Status: As Applicant	SF would determine whether the Council is an applicant and how the Council as applicant would participate in the consultation. The ESA regulations provide certain procedural protections to applicants such as allowing them to provide information, participating in the development of RPAs, reviewing a draft upon request, and providing comments back through SF, and concurrence in extensions. *Applicant* refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action. 50 CFR 402.02	Recognition of a Council as an applicant could occur upon the request of a Council. Effects of the special status designation would occur during formal consultation.	Applicants would not be subject to the same litigation risks as action agencies (as described above in option 5.	This would be similar to option 4 above (sharing of draft BO) with the addition that applicants have certain rights in the process, such as the right to participate in the development of the BO, and any terms and conditions associated with it. However, applicant communication with the consulting agency (PR) must be channeled through the action agency (SF) unless the applicant is also designated as a non-federal representative (see below). NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent for other parties to seek similar treatment.	SF, as the action agency, determines whether a party is an applicant. If it has not already done so, SF should provide input into NMFS' determination on this point. Even if SF does not determine Councils to be applicants, the Consultation handbook states that SF may still cooperate with non-applicants, and in that case, PR should as well. The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. . The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.
7. Council status: As non-federal representativ	*Designated non-Federal representative* refers to a person designated by the Federal agency as its representative to conduct	Designation of a Council as a non-federal representative could occur upon the request of a Council, prior to the	Non-Federal Representatives would not be subject to the same litigation risks as	Potential for additional time added to consultation process unless a Council develops a clear working relationship with	The issue of confidentiality of council documents would exist here. It is not clear how councils would be able

Technique	What it does	Timing	Pros	Cons	Additional Considerations
e	informal consultation and/or to prepare any biological assessment. See 402.08. 50 CFR 402.02.	development of a DEIS. Thereafter, the Council could engage in informal consultation with PR (with involvement of SF). Considerations as an applicant would also provide a Council with the ability to have input into the development of a BO based upon the content of the BA.	action agencies (as described above in option 5. Non-fed rep status would allow the Council to work directly with PR to engage in informal consultation during the development of proposed fishery management and would also help expedite development of a non-jeopardy BO by NMFS.	PR and SF. This relationship could be memorialized in an MOU identifying roles and responsibilities. NMFS and FWS may have some overarching concerns about expanding the use of this provision and precedent for other parties who don't have the MSA-based duties of councils, to seek similar treatment.	to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. . The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.
8. During Formal Consultation : Sharing of Draft BO with Council regardless of regulatory status of Councils under ESA	SF can request a copy of a draft BO, and may share it with the Council regardless of regulatory status of Councils under ESA	This would occur after the Council selects a preferred alternative and formal consultation has begun. Section 7 consultation cannot begin until there is a sufficiently identified proposed action. Once consultation begins, ESA regs provide for a 90-day consultation period, followed by a 45 day period for drafting the BO, for a total time period of 135 days after the action agency requests initiation and provides a description of the proposed action. These periods can be extended, and most consultations are typically longer than 135 days. Sharing of the draft BO would occur late in the 45-day drafting period. Thus, this would be late in the	Could give Councils an opportunity to see what PR is thinking – how data are being interpreted. Would allow Councils to assist in development of proposed action, Reasonable and Prudent Measures, and a Reasonable and Prudent Alternative if the actions cannot be tailored to avoid jeopardy.	Would occur late in the process, and could slow down completion of the fishery management plan or action or the BO.	While this approach would not accomplish as much coordination as early communication and frontloading techniques, it might be appropriate in certain situations, such as cases in which there is no corresponding Council process in which to frontload. Sharing a draft BO most likely affects assertion of privilege for the document. Due to MSA requirements for public meetings with only limited opportunities to close meetings, it is not clear how a council could consider and discuss a draft BO without treating it as a public document.

Work represents staff development of options for consideration, and not NMFS's position on these issues. Further, this matrix has not been formally analyzed by General Counsel to determine legal feasibility of all options.

Technique	What it does	Timing	Pros	Cons	Additional Considerations
		process for modifying Council recommendations and attempts to solicit meaningful Council and/or public comment would be likely to significantly extend the timing of completion of the BO.			
Technique for providing clear roles throughout the process					
9. Overarching MOU Approach: An MOU between SF and a Council could specify the SF's and the Council's respective roles in a consultation.	An MOU between SF and each Council could clarify relationships under the MSA and provide for designated roles and responsibilities pertaining to ESA compliance. This could be combined with an SF decision to share draft BOs and treat "as if" an applicant under option 4 above. And/or development of special terminology to describe unique roles and importance of councils under the law in fishery management process. The MOUs could be done individually for each region/council pair either on a general basis for particular actions. Further discussion is recommended to determine who all should be parties to the MOU – at least SF and the Council, potentially to include PR as well, or have a separate policy agreement between SF and PR.		Customized MOUs could both recognize the unique roles of councils under the MSA and avoid unintentional consequences of attempting to apply existing regulatory status that may not be a perfect fit – generating risk of both adverse litigation and adverse precedent setting for other parties.	An untested procedure could present legal vulnerabilities.	The issue of confidentiality of council documents would exist here. It is not clear how councils would be able to take any meaningful action on draft documents outside of a public process; if the Council discussed or considered the documents during public meetings, any applicable privileges would most likely be waived. The team is exploring possibility of staff communication with counsel to assert attorney-client privilege.

Work represents staff development of options for consideration, and not NMFS's position on these issues. Further, this matrix has not been formally analyzed by General Counsel to determine legal feasibility of all options.

C. Models for Successful Interim Actions

The Working Group recognized that the Integration Memo and flow chart are intended to address non-emergency situations, when there is time for a deliberative MSA – ESA process. However, there are situations in which quick fisheries management action is required. The group discussed two examples of interim actions in the Southeast Region, one in the South Atlantic and the other in the Gulf of Mexico.

These actions were accomplished in six to nine months. One action was triggered by an increased annual catch limit in the black sea bass pot fishery that appeared likely to adversely affect large whales by extending the fishing season into the months when large whales were present on the fishing grounds. The other action was triggered by a science center report indicating that sea turtle bycatch in the Gulf of Mexico bottom longline reef fish commercial fishery exceeded ITS.

In the black sea bass example, the Council had a regulatory amendment in place to open the black sea bass fishery with a higher ACL. Due to the potential for large whale entanglement, the anticipated regulatory amendment would have required a formal consultation and biological opinion. The fishery would have remained closed until the following year while the formal consultation was completed. NMFS suggested the alternative of establishing a seasonal closure of the pot fishery during the large whale months. The Council supported this alternative and incorporated the seasonal closure along with the increased catch limit in the regulatory amendment.

The Gulf of Mexico Council used two temporary emergency rules to allow the bottom longline reef fish fishery to continue, with additional sea turtle conservation measures, during the period that formal consultation was reinitiated. PR determined that continuing the fishery during the consultation re-initiation period did not violate section 7. The Council and SF (Interdisciplinary Planning Team) immediately began development of a draft plan amendment to reduce bycatch of sea turtles in the fishery. A final amendment was approved nine months later.

Example 1. Black Sea Bass and ESA-listed Large Whales Regulatory Amendment in South Atlantic Fishery Management Council.

Total Time Elapsed: 6 months (March 2013-August 2013)

Triggering Event: A new stock assessment allowing an increased annual catch limit (ACL) for the black sea bass (BSB) fishery, including the pot sector which poses an entanglement risk to large whales. An increased ACL would extend the fishing season into months when large whales are in the fishing area.

Mechanisms for Early Consultation: PR asked SF to develop model projections of pot fishery closure dates to determine whether pots and entangling gear would be in the water during months when large whale are present. Regional Administrator (RA) notified that formal consultation would be necessary. RA proposed seasonal closure for the pot gear during large whale months to

prevent entanglement. Both the Council and PR supported the seasonal closure combined with the increased ACL.

Mechanism for Implementation: Regulatory Amendment in the South Atlantic Snapper Grouper Fishery Management Plan.

- *March 2013*. SF informed PR that the preliminary BSB Stock Assessment by the SSC indicated an increased ACL would be warranted and the anticipated expanded harvest (and months of harvest) could pose a possible entanglement risk for large whales. .
- *March 2013*. PR asked SF to develop a model to project BSB pot closure dates under the expected BSB ACL. SF models predicted that under the new ACL, BSB harvest would be operating during large whales months.
- *April 2013*. Based on these model predictions, PR determined that formal consultation for the snapper-grouper fishery would be warranted if the BSB ACL was increased as anticipated. PR briefed the RA that formal consultation would be necessary; and, the biological opinion could not be completed before the BSB fishing season was projected to close, meaning an increase ACL could not be implemented until the following year.
- *April 2013*. BSB Assessment finalized and reviewed by the SSC. BSB rebuilt and ACL should increase.
- *May 2013*. SAFMC held an emergency meeting to allow BSB to open June 1 with a higher ACL, under a regulatory amendment. RA informed the SAFMC that the increased BSB ACL would trigger formal consultation and a biological opinion. However, if SAFMC approved a trap/pot seasonal closure during the large whale season in the regulatory amendment a formal consultation would not be necessary and the increased ACL could be implemented. The SAFMC agreed to this approach.
- *July 2013*. Proposed Rule for Regulatory Amendment published.
- *August 2013*. Final Rule for Regulatory Amendment published.

Example 2. Bottom Longline Reef Fish Commercial Fishery and ESA-Listed Sea Turtles Emergency Action and Plan Amendment in the Gulf of Mexico Fishery Management Council

Total Time Elapsed: Nine months for emergency rule implementation (September 2008-May 2009) 16 months for final amendment (September 2008 – January 2010)

Triggering Event: Science Center report indicated that sea turtle bycatch in the bottom longline reef fish commercial fishery exceeded ITS.

Mechanisms for Early Consultation: IPT formed to prepare scoping document for EIS. Development of a temporary emergency rule and full plan amendment move forward at the same time. PR determines that continued fishing during the consultation re-initiation period does not violate section 7. Council requests temporary emergency rule creating time/area closure to prevent bycatch, which becomes effective in May. In June, PR presents consultation assessment and Science Center presents sea turtle assessment to Council. In August, Council develops preferred alternatives for amendment to Reef Fish Plan. In October PR completes biological

opinion. Also in October, the emergency rule is extended and modified to incorporate preferred alternative.

Mechanism for Implementation: Emergency Rule in May 2009, Emergency Rule in October 2009, Final Amendment in January 2010.

- *September 2008*: SF requests re-initiation of consultation, triggered by new Science Center bycatch report.
- *October 2008*: PR notifies Council that management actions may be warranted to reduce bycatch. Council passes motion to begin scoping document to minimize bycatch. IPT (interdisciplinary planning team of Council and NMFS staff) formed to prepare scoping document for EIS.
- *January 2009*: PR determines continued fishery during the consultation re-initiation period does not violate section 7. Council requests a temporary emergency rule to address bycatch immediately.
- *April 2009*: updated take estimates come in. Temporary emergency rule published creating time/area closure effective mid-May 09.
- *June 2009*: PR presents a consultation assessment to Council. Science Center staff presents loggerhead sea turtle assessment to Council Reef Fish Committee.
- *August 2009*: Regional Administrator requests that additional gear area closures and a limit on the number of hooks be part of the proposed action in the biological opinion.
- *August 2009*: Council takes final action on Amendment 31, specifying a preferred alternative to address sea turtle bycatch in the fishery.
- *September 2009*: SF provides PR with an estimate of the reduction in fishery effort accomplished by the preferred alternative. Consultation package is complete.
- *October 2009*: PR completes the biological opinion.
- *October 2009*: NMFS implements an emergency rule limiting number of hooks and prohibiting BLL gear shoreward of 35 fathoms.
- *October 2009*: Biological Opinion determines the fishery will not jeopardize continued existence of listed sea turtles. ITS with RPMs and Terms and Conditions is issued.
- *November 2009*: DEIS is filed with EPA for Amendment 31
- *January 2010*: Amendment 31 is published.

Issues that may need further attention

The Working Group is optimistic that the mechanisms described in the draft integration memo and the points of integration depicted in the flow chart will provide a flexible and effective process for Councils, SF, and PR to collaborate on species protection in MSA fishery management actions. During our discussions one potential area was identified for further investigation by NMFS: there may be a need to develop an additional agreement with USFWS when protected species managed by USFWS (jointly or exclusively) require Fishery Management Plan consultations.

III. Improving Transparency of Data and the Scientific Basis for Biological Opinions

During the course of the ESA Working Group's deliberations on how better to integrate ESA section 7 consultations with Magnuson-Stevens Act (MSA) fishery management processes, the Working Group concluded that a significant source of confusion and potential conflict is the selection of data and analyses used in ESA biological opinions. The ESA directs the National Marine Fisheries Service (NMFS) to use the best scientific and commercial data available, and legislative history of the ESA directs the agency to resolve uncertainty in available information by providing the benefit of the doubt to listed species. The Working Group believes that greater transparency and consistency in the application of these principles, which we collectively refer to here as "best scientific information available" (BSIA), would address many of the underlying concerns that drove the agency's request advice on ESA/MSA integration.

A. Recommendation

The Working Group recommends that the NMFS develop a national policy on the application of BSIA standards to ESA section 7 consultations (including biological opinions and informal consultations) to further implement and clarify existing policy on information standards under the ESA, 59 FR 34271.

Our Working Group focused on MSA-specific consultations, but acknowledges that the policy would likely apply to all ESA section 7 consultations regardless of action agency. The recommended policy would provide standardized guidance to NMFS offices that engage in ESA interagency cooperation pursuant to section 7.

We are aware that NMFS already has various internal procedures that pertain to BSIA such as ESA consultation quality assurance reviews and Information Quality Act pre-dissemination reviews. We are not recommending any specific procedures at this time, but NMFS should consider, as part of the recommended policy development, whether BSIA standard procedures are needed.

The Working Group anticipates that policy would lead to more – and more systematic – discussion within biological opinions about how the agency ensured that the opinions used BSIA. We believe that an important goal of the policy is not just ensuring the use of BSIA, but also increasing the transparency of the agency's considerations of what constitutes BSIA, both in general and in relation to the specific issues considered in a particular consultation.

The Working Group believes that the agency's recent rule addressing BSIA in the context of the MSA's National Standard 2 is a useful starting point for this ESA policy development. We have provided key factors that could be used to rank the relative strength of different sources of information and a framework that we believe the agency should carefully consider incorporating in the recommended policy.

B. Key Factors for Determining the Best Scientific Information Available for ESA Section 7 Consultations

As stewards of trust resources, the public places a high degree of trust in the scientific opinions and conservation policy of NOAA Fisheries biologists. As such, it is imperative that we develop and adhere to rigorous standards and procedures that minimize subjectivity and ensure the best scientific information available (BSIA) is used.

Biologists that develop conservation policy deal with two types of information: established knowledge and emergent knowledge[1]. Established knowledge refers to facts that are true regardless of context; for example, salmon are fish[2,3]. Conversely, emergent knowledge is relatively new, often consists of claims that are still being verified and validated through the scientific process, and is more likely to be controversial. The novelty of the information places a greater burden on subject matter experts when selecting which emergent knowledge to apply in practice. Although subject matter experts strive to remain objective in ESA section 7 consultations, some degree of subjectivity is introduced every time information is selected and interpreted.

Because of these dynamics, and the fact that available BSIA can change over time, it is prudent to establish a general framework for determining what constitutes BSIA at any given time. Our proposed framework includes these factors, described below in detail: relevance, timeliness, objectivity, transparency, verification, validation, and certainty.

1. Relevance and Timeliness

Relevance refers to information that is pertinent to the issue or action under consideration or species being considered. Relevant information can be about the same species, related species, or non-related species with similar life histories. It may also be about the effects of the same action in other areas, or actions with effects similar to the proposed action. In data-poor situations, using information on proxies (surrogate species or habitat-based indicators) may be prudent and necessary and in these cases, may be relevant. In considering relevance, both the context and purpose for which the data were collected is considered.

Timeliness refers to how recently the information was gathered, updated, and presented, as well as whether conditions have changed since that time. While recently obtained data are generally considered timelier, older data are not eliminated from consideration based on date alone. This is particularly true if data establish or reinforce a principle or hypothesis that was supported by additional investigation. For example, life history characteristics of some species might not

[1] Sullivan, P.J., J.M. Acheson, P.L. Angermeier, T. Faast, J. Flemma, C.M. Jones, E.E. Knudsen, T.J. Minello, D.H. Secor, R. Wunderlich, and B.A. Zanetell. 2006. Defining and implementing best available science for fisheries and environmental science, policy, and management. American Fisheries Society, Bethesda, Maryland, and Estuarine Research Federation, Port Republic, Maryland. 30 pp.
[2] Ibid
[3] Latour, B. 1987. Science in action. Harvard University Press, Cambridge, Massachusetts.

change over time. Similarly, other historical data (e.g., abundance, environmental, catch statistics, market and trade trends) provide time-series information that may help provide context for changes noted in other data over time.

There can be a general relationship between both the relevance and timeliness of any piece of information. Figure 1 provides a useful framework to help biologists compare studies or pieces of information to one another.

Figure 1. General Relationship of Relevance and Timeliness

Highly Relevant and Very Timely	**Relevant and Very Timely**	**Highly Relevant and Timely**	**Less Relevant but Very Timely**	**Relevant and Timely**	**Highly Relevant but Less Timely**	**Less Relevant but Timely**	**Relevant but Less Timely**	**Less Relevant and Less Timely**
Recent directed study, about the species and/or action in question, and from the area in question	Recent directed study, about the species and/or action in question, but from a different area	Directed study from a few years ago, about the species and/or action in question, and from the area in question	Recent directed study, but about an analogous species and/or action, and from a different area	Directed study from a few years ago, about the species and/or action in question, but from a different area	Old study about the species and/or action in question, and from the area in question	Directed study from a few years ago, but about an analogous species and/or action and from a different area	Old study about the species and/or action in question, but from a different area	Old study about an analogous species and/or action and from a different area

2. Objectivity and Transparency

BSIA should not be influenced by personal feelings or opinions. Ideally, BSIA should be accurate, with a known degree of precision. BSIA should always be presented in an accurate, clear, complete, and balanced manner, without addressable bias. When evaluating objectivity we consider both the context and purpose for which the data were collected. BSIA should acknowledge alternative scientific points of view when they meet these criteria and are clearly free of undue nonscientific influences and considerations. BSIA may include local and traditional ecological knowledge (TEK) (e.g., fishermen's knowledge about the behavior and distribution of species or observed effects of their activities on species) where appropriate and when it meets these criteria.

Transparency refers to describing how a piece of information was collected and used during consultation. It also includes identifying and acknowledging sources of uncertainty, statistical error, and other data limitations. Consultation records on BSIA should explain decisions to exclude data from analysis or why one study, approach, etc. was selected if a number of studies

were available. Where possible, documents (e.g., biological opinions) using BSIA should identify major assumptions employed in the analysis and data uncertainties or the analytical models that produced those data. Finally, BSIA should openly acknowledge any relevant gaps in scientific information.

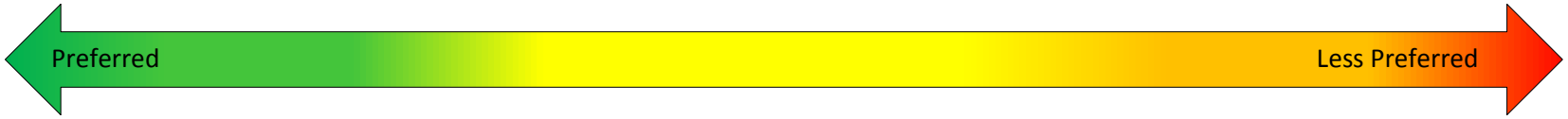
3. Verification and Validation

Verification is documentation about the data and procedures used to produce it in sufficient detail to allow it to be reproduced by others with an acceptable degree of precision.

Validation is the testing of an analytical technique or approach to ensure it performs as intended. The level of validation required depends on whether the technique or approach in question has been established and used previously and whether its limitations and strengths are well documented. A relatively novel technique or approach may require closer scrutiny of its underlying assumptions and the information considered. With respect to modeling, review should include validation of the analytical methodology used, assessment of the accuracy and precision of estimates, and whether estimates are robust to model assumptions. Ideally, model validation should use simulated data from a population with known properties to evaluate how well the models estimate those characteristics and to correct for known bias to achieve accuracy. Similarly, new data collection methods (e.g., survey design, telemetry equipment) should be evaluated relative to the current 'gold standard' for such techniques. Figure 2 illustrates the potential relationships between a verification and validation.

Figure 2. General Relationship Between Verification and Validation of Data

Thoroughly Verified and Thoroughly Validated	Verified and Thoroughly Validated	Thoroughly Verified and Validated	Partially Verified but Thoroughly Validated	Verified and Validated	Thoroughly Verified but Partially Validated	Partially Verified but Validated	Verified but Partially Validated	Partially Verified and Partially Validated
Highly documented; extensive detail provided; technique is well known; has been repeated with same or similar species, and/or similar circumstances; specific study included multiple repetitions or large sample size.	Adequate documentation provided; adequate level of detail; technique is well known; has been repeated with same or similar species, and/or similar circumstances; specific study included multiple repetitions or large sample.	Highly documented; extensive detail provided; technique is well known; has been repeated with same or similar species, and/or similar circumstances; some limitations and strengths provided.	Some documentation provided; technique is well known; has been repeated with same or similar species, and/or similar circumstances; specific study included multiple repetitions or large sample.	Adequate documentation about procedure or technique; precision described; some limitations and strengths provided.	Strong documentation and detail provided, but approach or technique is very novel and has not been duplicated multiple times.	Some documentation provided; technique is well known; has been repeated with same or similar species, and/or similar circumstances; some limitations and strengths provided.	Adequate documentation about procedure or technique; precision described; but approach or technique is very novel and has not been duplicated multiple times	Some documentation about procedure or technique; precision described; but approach or technique is very novel and has not been duplicated multiple times



4. Certainty

Certainty refers to the degree to which information has been established over time. In general, the more consistently studies show similar findings the greater confidence we can have that those findings are representative of what is likely occurring. Conversely, conflicting results do not necessarily disprove a relationship but tend to weaken confidence in the strength of that relationship. Table 1 provides examples of the varying degrees of certainty and factors that may affect certainty.

Table 1. Examples of Different Degrees of Certainty with Respect to BSIA

Level of Certainty	Description
High	The available information usually includes consistent results from well-designed, well-conducted studies from representative species or actions. At these levels of certainty future studies are unlikely to significantly change these previous conclusions.
Moderate	The available evidence is sufficient to determine likely effects or species responses, but confidence is constrained by such factors as: • Number, size, or quality of studies. • Some inconsistency in the findings of related studies. • Limited ability to generalize findings to other areas, species, or actions. As more information becomes available, it may be significant enough to change previous conclusions.
Low	The available evidence is insufficient to definitively determine likely effects or species responses. Evidence is insufficient because of: • Limited number or size of studies. • Flaws in study design or methods. • Great inconsistency in the findings of related studies. • Limited or no ability to generalize findings to other areas, species, or actions. At these levels of certainty it is likely that future studies could change previous conclusions, possibly significantly.

5. Sources of Information

Sources of information may include studies that are published in peer-review journals or have been peer reviewed by some standard process, gray literature, expert opinion, and anecdotal information. The peer review process is an organized method that uses peer scientists with appropriate and relevant expertise to evaluate scientific information. Peer review is used to ensure that the quality and credibility of scientific information and scientific methods meet the standards of the scientific and technical community. This helps ensure objectivity, reliability, and integrity of scientific information. Peer-reviewed literature is generally considered one of the most reliable sources and is often widely available to the public.

Gray literature generally refers to agency or academic reports that undergo internal peer review but may or may not include an external peer review. This literature commonly contains reports of survey, experimental, or long-term historical data, along with changes in protocols, meta-data, and the progress and findings of standard monitoring procedures. Gray literature typically does not contain significantly new findings that would require review by a broader or more independent audience. Generally, gray literature is less available to the public than peer-reviewed literature or may not yet be published. However, with the proliferation of electronic media, gray literature is becoming more

accessible[4]. For example, the website Data.gov was created to increase the public's ability to easily find, download, and use datasets generated and held by the Federal Government. Data.gov provides descriptions of the Federal datasets (metadata), information about how to access the datasets, and tools that leverage government datasets.

The third source of information is a subject matter expert's opinion. Expert opinion, especially when shared by multiple experts, can be instructive. Depending on the subject, expert opinion may be the only form of scientific knowledge available. For example, judgments about the recovery of listed species are often largely based on expert opinion[5,6]. Expert opinions are generally not widely available to the public unless published in a secondary source.

A final source of information that might be considered is anecdotal evidence. Anecdotal evidence often becomes available through public comments at regulatory meetings, through newspaper or popular journal coverage, or through letters sent to government representatives or the media. Anecdotal information may include TEK. TEK is knowledge that is not generally available to the public but passed on from one generation to the next within various fishing and environmental communities. Occasionally, TEK can be validated. But, more often than not, scientific communities put less credence on anecdotal information because it is difficult to access, verify, and review, which can offend the public[7]. Examples of these different sources of information are provided in Table 2.

It is also important to note, information and data provided by NOAA Fisheries scientists or research activities may fall into one of these categories. When NOAA Fisheries conducts research or gathers scientific information, it is always conducted in a way that complies with the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554) and Office of Management and Budget government-wide guidelines to ensure and maximize "the quality, objectivity, utility and integrity of information disseminated by federal agencies"[8].

Table 2. Examples of the Different Sources of Information

	Information Source	Example of Source
Preferred ↑	Peer-reviewed Literature	• Professional Journals
	Gray Literature	• Agency technical papers/memoranda
	Expert Opinion	• Academic researcher or government scientist; Verified TEK
Less Preferred ↓	Anecdotal Evidence	• Public input via public hearing testimony or written comment.

[4] Sullivan, P.J., J.M. Acheson, P.L. Angermeier, T. Faast, J. Flemma, C.M. Jones, E.E. Knudsen, T.J. Minello, D.H. Secor, R. Wunderlich, and B.A. Zanetell. 2006. Defining and implementing best available science for fisheries and environmental science, policy, and management. American Fisheries Society, Bethesda, Maryland, and Estuarine Research Federation, Port Republic, Maryland. 30 pp.

[5] Schemske, D.W., B.C. Husband, M.H. Ruckelshaus, C. Goodwillie, I.M. Parker, and J.G. Bishop. 1994. Evaluating approaches to the conservation of rare and endangered plants. Ecology 75:584–606.

[6] Sullivan, P.J., J.M. Acheson, P.L. Angermeier, T. Faast, J. Flemma, C.M. Jones, E.E. Knudsen, T.J. Minello, D.H. Secor, R. Wunderlich, and B.A. Zanetell. 2006. Defining and implementing best available science for fisheries and environmental science, policy, and management. American Fisheries Society, Bethesda, Maryland, and Estuarine Research Federation, Port Republic, Maryland. 30 pp.

[7] Ibid

[8] To implement the Information Quality Act and guidelines issued by the Office of Management and Budget (OMB), NOAA issued Information Quality Guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of information which it disseminates. Links to the NOAA guidelines, OMB guidelines, and NOAA Fisheries Policies and Procedures for implementing these and OMB peer review guidance can all be found here: http://www.cio.noaa.gov/services_programs/info_quality.html

IV. Conclusion

The working group discussed a broad range of issues. Members who came to these discussions from a particular viewpoint stretched to understand the processes and views of other members. The Working Group arrived at two recommendations that have the potential to improve both fishery management and the protection of resources.

Once implemented, the recommended MOUs between NMFS and Councils specifying roles and responsibilities for both early, informal collaboration and, later, formal consultation will increase confidence in the *process* used for section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions. This recommendation provides flexibility to accommodate regional differences.

In addition, the recommendation that the NMFS develop a national policy on the application of BSIA standards to ESA section 7 consultations (including biological opinions and informal consultations) should result in increased confidence in the *science* used for section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions. As they develop a national policy, NMFS should consider using these key factors to rank the relative strength scientific information: relevance and timeliness, objectivity and transparency, verification and validation, certainty, and sources of information.

V. Appendices

A. Terms of Reference for ESA Working Group

Marine Fisheries Advisory Committee
Endangered Species Act Working Group
Terms of Reference
Updated January 2013

Purpose

Convene a working group under the authority of the Marine Fisheries Advisory Committee (MAFAC) to increase confidence in the science and process used for section 7 consultations under the Endangered Species Act (ESA) on Magnuson-Stevens Fishery Conservation and Management Act (MSA) fishery management actions.

Background

Section 7 of ESA requires Federal agencies to consult with NOAA Fisheries to insure actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of threatened or endangered species. Fishery management actions developed through the MSA's Regional Fishery Management Council (Council) process are subject to the consultation requirements of section 7. An applicant who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action may be included in the section 7 consultation process, as identified by the ESA. While the Councils are not applicants for the purposes of the ESA, they possess expert technical knowledge on fisheries management that may inform the consultation process. Prior to and during the consultation process, the action agency (NOAA Sustainable Fisheries in the case of MSA actions) may seek Council scientific and commercial data and knowledge on impacts fisheries actions may have on listed species and designated critical habitat. NOAA may also work with the Councils to identify changes to fisheries practices that minimize the impacts to listed species and/or designated critical habitat. NOAA may incorporate the Council data, where appropriate, in its analysis and consider the Council's input when identifying any reasonable and prudent alternatives.

In forming the biological opinion as to whether the proposed fishery management action will jeopardize listed species or adversely modify critical habitat, NOAA Fisheries must use the best scientific and commercial data available at the time the consultation is taking place. Biological information on the status, threats, etc. of listed species is variable; some species are well studied and others are not. The amount of data and knowledge on the impacts to listed species also varies across fisheries and Fishery Management Plans.

Interpretation under the ESA whether a proposed action further threatens a listed species (known as a "jeopardy determination"), the methodology of determining jeopardy, and the transparency in the development of biological opinions associated with fishery management actions have been controversial topics for many years. In January 2012, the Council Coordinating Committee (CCC), which is comprised of Council leadership from across the country, identified the two goals of improving collaboration, and identifying options for improving communication and increasing transparency in the ESA jeopardy determination process for fisheries management actions. To advance these goals, a panel convened at the CCC meeting on May 3, 2012, to present case studies and

lessons learned on section 7 consultations from the different Council regions. Subsequent to that meeting, the CCC and MAFAC requested establishment of a joint working group (working group) to make recommendations on increasing transparency and improving confidence in ESA consultations on fishery management plans.

Terms and Composition

This Working Group will consist of up to 12 members; it will include up to four members each from Council leadership, MAFAC, and NOAA Fisheries. The members should have experience with ESA issues and be willing to serve and participate in Working Group meetings/teleconferences and between meeting work and will be identified by October 19, 2012. The group will be formally organized as a Working Group under MAFAC's Protected Resources Subcommittee. The group's findings and recommendations will be submitted to NOAA Fisheries Assistant Administrator. The Working Group will be constituted for one year, with the possibility of extending that term as deemed necessary by NOAA Fisheries, the Councils, and MAFAC.

Scope and Activities

The Working Group will identify options and best practices for NOAA Fisheries consideration of Endangered Species Act consultations on fishery management actions.

As a first step, the Working Group will be invited to help organize and participate in a webinar to be held on October 24, 2012, to help Working Group members become more familiar with ESA section 7 consultation requirements and current NOAA Fisheries practices. Similar to the panel discussion held at the May CCC meeting, the webinar will present different case studies from which the participants will look for best practices and consider potential areas for improvements in ESA consultations on MSA fishery management actions related to:

- The types of information and analytical methods used in biological opinions.
- How the ESA consultation and MSA fishery management processes are coordinated and carried out.

NOAA Fisheries will identify representative case studies to present during the webinar. Presenters will include NOAA Fisheries and Council staff to ensure various perspectives are provided to the group. The questions to be addressed by the webinar include:

- How were protected species considered during the development of the fishery management actions?
- What information was available on the species and how was it used?
- Would additional data have improved the consultation process?
- How did NOAA Fisheries interact with Councils and other parties throughout the process?
- How did NOAA Fisheries interact with Councils and others in developing reasonable and prudent alternatives and reasonable and prudent measures?
- How did the timing of the ESA consultation process fit with the timing of the RFMC development of fishery management recommendations and completion of the associated NEPA analysis?
- What were the lessons learned from the consultation?

Meetings of the Working Group will be predominantly by teleconference or webinar, but if the opportunity arises, a meeting may be conducted in person.

Roles and Responsibilities

The working group may appoint a chair from among its members. Following the webinar, the Working Group members will determine an appropriate meeting schedule, identify assignments, and develop a work plan. Staff assistance will be provided by NOAA Fisheries Offices of Protected Resources, Sustainable Fisheries, and NOAA General Counsel, as needed, with Protected Resources taking the technical lead. Office of Policy staff will serve as secretariat to the Working Group.

Timing

The Working Group will be constituted for up to one year, with the possibility of extending that term as deemed necessary by MAFAC, NOAA Fisheries, and the Councils. The Working Group is expected to report its progress to NOAA Fisheries and the CCC at MAFAC meetings as they occur over the course of its tenure. A progress report with draft options will be due to NOAA Fisheries within six months after the Working Group is constituted, and the development, completion and submission of options, including recommendations and best practices for NOAA Fisheries consideration will be due within 12 months from creation of the working group.

Funding

No additional NOAA funds for travel, consultants, or contracts will be available for the Working Group; expenses will be supported by the member's home organizations and each member will voluntarily contribute their time.

B. ESA working group members, subgroup members, and primary staff support

Regional Councils
Edwin Ebisui, Western Pacific Council
Jim Lynch, Western Pacific Council alternate
Dan Wolford, Pacific Council
Don McIsaac, Pacific Council alternate
Cora Campbell, North Pacific Council
Chris Oliver, North Pacific Council alternate
Corky Perret, Gulf Council
Kevin Anson, Gulf Council alternate

NOAA Fisheries
Gina Shultz, Office of Protected Resources, Headquarters (until February 22, 2013)
Stan Rogers, Office of Protected Resources, Headquarters (after February 22, 2013
David Bernhart, Office of Protected Resources, Southeast Regional Office
Marian McPherson, Office of Sustainable Fisheries

MAFAC
Julie Morris, New College of Florida and Working Group Chairperson
Columbus H. Brown, U.S. Fish and Wildlife Service, Retired
Paul Clampitt, Owner F/V Augustine
Pamela Yochem, Hubbs-Sea World Research Institute

Resources/Staff to the Working Group
Pamela Lawrence, Office of General Counsel
Heidi Lovett, Office of Policy, NOAA Fisheries

Consultation Subgroup
Jim Lynch
Marian McPherson
Stan Rogers

Data Quality Subgroup
Pamela Yochem
David Bernhart
Stan Rogers
Heidi Lovett

C. Initial areas of agreement for Working Group members

In January working group members responded to a survey indicating areas of agreement and disagreement and high priority topics for discussion related to ESA section 7 consultations and protected resources issues. The areas of highest agreement on the survey were:

- Protected Resources should coordinate with Councils early in the development of FMPs.
- Protected Resources discussions with Councils should begin early, before formal consultation begins.
- We should determine the best timing for Protected Resources to share information about fishery impacts with Council and Sustainable Fisheries and the best timing for Council and Sustainable Fisheries to share information with Protected Resources about special features of the fishery.
- Protected Resources should discuss "Best Available Information" with the Council early in the process to identify data weaknesses and strategies to address these weaknesses.

Areas of majority agreement were:

- Protected Resources should communicate a "Jeopardy Bar" to Councils and SF early in the process with clear guidance on actions that would meet the "no jeopardy" standard.
- Strive for stakeholder understanding of data and analysis methods used in the biological opinion.
- Review NOAA 2005 Draft Operating Guidelines for suggestions on consultations related to fishery management guidelines.
- Clarify the legal and regulatory constraints on communication between Protected Resources and Councils during consultation.
- Consider using consistent data sources and analyses for a Protected Species that occurs across several regions.
- Define standards and levels of "Best Available Data" used in Biological Opinions.

D. Draft Integration Memo

[DATE]

MEMORANDUM

TO: COUNCIL CHAIRS

FROM: NAME, Assistant Administrator
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, either through the Chair or the Executive Director 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. It is expected that NMFS generally will grant a Council's request for involvement in an ESA section 7 process. However, NMFS may deny the request in circumstances that include NMFS' determination that the Council's requested level of involvement would violate federal law or the order of a court in ongoing litigation or existing deadlines do not provide sufficient time for the level of involvement requested.

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.