Department of Commerce · National Oceanic & Atmospheric Administration · National Marine Fisheries Service

NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 02-110-12
December 15, 2005

Protected Resources Management

Delegation of Authority for Section 7 Consultations Under the ESA

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SUMMARY OF REVISIONS:

This directive modifies the Delegations of Authority from the Assistant Administrator for Fisheries in the NOAA Organizational Handbook regarding conduct of Section 7 consultations under the ESA. This directive does not change delegations for other sections of the ESA.

The conduct of formal and informal consultations, the issuance of biological opinions and letters of concurrence and any other responsibilities under Section 7 of the ESA is delegated to the Director, Office of Protected Resources, and the Regional Administrators and where appropriate, may be re-delegated to their designee(s), as set forth in this directive.

Signed Donna Wieting 3/10/15
Donna Wieting Date
Director, Office of Protected Resources

1.0 Introduction. NOAA's National Marine Fisheries Service (NMFS) reviewed the delegations of authority for conducting consultation pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. This delegation supersedes all prior delegations regarding Section 7 of the ESA.

2.0 Objective. To provide for the effective and efficient agency implementation of Section 7 of the ESA by revising the delegation of authority for the conduct of ESA Section 7 consultations to Regional Administrators and to the Director, Office of Protected Resources, and where appropriate, their designee(s).

3.0 Authorities and Responsibilities. This directive modifies the Delegations of Authority from the Assistant Administrator for Fisheries in the NOAA Organizational Handbook regarding conduct of Section 7 consultations under the ESA. This directive does not change delegations for other sections of the ESA.

The conduct of formal and informal consultations, the issuance of biological opinions and letters of concurrence and any other responsibilities under Section 7 of the ESA is delegated to Regional Administrators and where appropriate, may be re-delegated to their designee(s), as set forth in this directive, for actions that may affect ESA-listed species or their designated critical habitat in the geographic area for which the Regional Administrator has primary responsibility, including actions taken by the national offices of NMFS.

The conduct of formal and informal consultations and issuance of biological opinions and letters of concurrence and any other responsibilities under Section 7 of the ESA is delegated to the Director, Office of Protected Resources and where appropriate, may be re-delegated to their designee(s), as set forth in this directive, for Section 7 consultations not conducted by a Regional Administrator and as follows.

3.1. The Director, Office of Protected Resources (Office Director) is delegated authority for any consultation on an action determined to have national significance by the Assistant Administrator for Fisheries, in consultation with the Office Director and with appropriate Regional Administrators. Determinations regarding the responsible office for a particular consultation should be formally documented and disseminated to appropriate Regional Offices and the Office Director.

3.2. The Office Director is delegated authority for any consultation on an action where the activities cross regional boundaries and, in consultation with the appropriate Regional Administrators, the action is determined to be national in scope. When an action under consultation crosses regional boundaries but remains regional in scope, the Regional Administrators will, by mutual agreement, determine which Region will have authority to conduct the consultation. Determinations regarding the responsible office for a particular consultation should be formally documented and disseminated to appropriate Regional Offices and the Office Director.

3.3 The Office Director is delegated authority for consultations on the issuance of permits and regulations by the Office of Protected Resources, NMFS. Upon mutual agreement between the Office of Protected Resources and a Region(s), the completion of a Section 7 consultation for a permit or regulation can be done by either office.

4.0 Re-Delegation of Section 7 Responsibilities

In carrying out the duties and responsibilities of their positions, the Regional Administrators and Office Director may delegate their authority to perform Section 7 functions to any one or more designee subject to the conditions specified herein. Any future re-delegations must be established through Quality Assurance Plans (QAP) as described in section 5.0 and approved by the Assistant Administrator for Fisheries and the Section Chief, General Counsel, Fisheries and Protected Resources Section (formerly known as "General Counsel for Fisheries").[1]
The Regional Administrator or Office Director is required to prescribe, as noted in Section 5.0, which Section 7 functions (including signature authority for consultation documents) will be retained by him/her and those that may be delegated to his/her designee(s).

In considering which Section 7 functions may be re-delegated, the Regional Administrator or Office Director shall be guided by the following:

- Jeopardy and/or adverse modification biological opinions are delegated at the level of the Regional Administrator, Deputy Regional Administrator, Office Director or Deputy Office Director
- No jeopardy and/or no adverse modification biological opinions are delegated at the level of Assistant Regional Administrator, or Division Chief[2]
- Letters of concurrence are delegated no further than the level of Regional branch chief, or Deputy Division Chief

Regional Administrators or the Office Director may specify additional criteria that further defines the delegation levels specified above. Such criteria could include, but are not limited to: action agency, type of action, which species are affected by the proposed action, and whether or not the subject action is covered in a general counsel waiver.

If a no-jeopardy biological opinion or letter of concurrence is deemed to be controversial, the designee with signature authority must notify, in writing, the Regional Administrator or Office Director prior to finalizing the action. The notification procedures shall be included in each Quality Assurance Plan as specified in Section 5.0.

5.0 Process Requirements

5.1. *Quality Assurance Review.* By September 10, 2015, each Regional Administrator and the Office Director shall develop and implement a new QAP, consistent with the Improvement Plan for Section 7 Consultations under the ESA (NMFS Instruction 02-110-13; December 15, 2005; renewed July 2014) , for all consultations undertaken in their Region or in the Office of Protected Resources.

Each QAP shall establish procedures and protocols for review and clearance of consultation documents and must be consistent with this Directive. Each QAP must also describe any re-delegation from the Regional Administrator or Office Director as authorized in Section 4.0 and

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[1] *See* NOAA Transmittal #61, Section III (February 28, 2006).

[2] In addition to the Assistant Regional Administrator and the Division Chief, NMFS' West Coast Region, has an another level of manager, Office Supervisors, who are delegated authority to sign no-jeopardy biological opinions that have a NOAA GC waiver.

identify which Section 7 responsibilities have been delegated from the Regional Administrator and Office Director to their designee(s).

The QAPs and any future QAP modifications will be sent to the Assistant Administrator for Fisheries and the Section Chief. The Assistant Administrator for Fisheries and the Section Chief must approve any QAP or QAP modification that redelegates signature authority of biological opinions or letters of concurrence, prior to the redelegation taking effect. Any instance of deviation from the QAP shall be documented in the records of the Region or the Office of Protected Resources.

5.2. *Legal Review.* Absent a written waiver from the Office of the NOAA General Counsel (NOAA GC), all section 7(a)(2) determinations must receive review and approval for legal sufficiency by the appropriate suboffice of NOAA GC. A determination is legally sufficient if:

1. There is a credible basis to conclude the determination is within the agency's authority and consistent with constraints imposed by statutes or regulations;
2. There is a credible basis to conclude the agency has complied with all applicable procedural requirements; and
3. The agency has articulated a rational explanation for the decision in the letter of concurrence or biological opinion.

For actions delegated to a Regional Administrator, the appropriate suboffice of NOAA GC is the Regional Section. For all other actions, the appropriate office is General Counsel, Fisheries and Protected Resources Section.

The appropriate Regional Section Chief, the Fisheries and Protected Resource Section Chief, or their Deputy Section Chief may waive review of individual consultation actions or of categories of consultation actions. Any such waiver must be in writing and based on a finding that all five of the following criteria are met:

1. The action is substantially similar to actions that have previously been the subject of consultations that received NOAA GC review;
2. The consultation does not raise any legal issues that have not been reviewed by NOAA GC in similar consultations;
3. The action is not associated in any way with known existing litigation against NMFS, the action agency, or the applicant;
4. The action and consultation are not controversial such that litigation over the consultation is not reasonably foreseeable nor are there any known congressional interests in the particular action or consultation; and
5. The listed species for which the consultation is conducted have been the subject of recent biological opinions that received previous NOAA GC review.

5.3. *National Section 7 Coordinator.* The Director, Office of Protected Resources, will appoint a National Section 7 Coordinator to serve in an advisory capacity to the Director on Section 7 issues and develop, review, and disseminate information, advice, policy, and guidance on Section 7 issues. The National Section 7 Coordinator shall be responsible for developing and implementing national training programs.

5.4. *Regional Section 7 Coordinator*. Each Regional Administrator will appoint a Regional Section 7 Coordinator to serve in an advisory capacity to the Regional Administrator and other Regional Office leadership on Section 7 issues, and advise Regional staff responsible for conducting Section 7 consultations on policy, procedures, and guidelines on the conduct of Section 7 consultations. The Regional Section 7 Coordinator will work with the National Section 7 Coordinator and the regional suboffice of NOAA GC to help ensure adequate training for Regional staff conducting Section 7 consultations. Upon request, the Regional Section 7 Coordinator will review highly controversial, precedent-setting, or novel biological opinions and any other consultations the Regional Administrator or Assistant Regional Administrator for Protected Resources deems appropriate to ensure ESA standards and procedures are applied consistently.

5.5. *Tracking and Reporting Consultations.* Each Regional Administrator and the Director, Office of Protected Resources, shall ensure that tracking data and information for consultations conducted by their staff is entered into the Public Consultation Tracking System (PCTS) on a timely basis. The Director, Office of Protected Resources, shall transmit a report from PCTS on the second Friday of each month to the Deputy Assistant Administrator for Regulatory Programs, documenting the number and types of consultation actions (informal, formal, no jeopardy, and jeopardy) completed during the preceding month. The PCTS report will serve as certification that each consultation complies with the process and policy outlined in this delegation memo.

5.6 *Maintaining records.* Each Regional Administrator and the Office Director is responsible for ensuring that a complete record of documents relevant to each consultation decision is maintained.

/s/ December 13, 2005

William T. Hogarth, PhD Date
Assistant Administrator for NOAA Fisheries

/s/ February 27, 2015

Eileen Sobeck Date
Assistant Administrator for NOAA Fisheries