

**Marine Fisheries Advisory Committee
Endangered Species Act Working Group
Terms of Reference
September 20, 2012**

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 9 members; it will include up to three 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 10, 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.