

ESA/MSA INTEGRATION AGREEMENT

SOUTH ATLANTIC FISHERY MANAGEMENT COUNCIL
NATIONAL MARINE FISHERIES SERVICE SOUTHEAST
REGIONAL OFFICE

Draft

February 12, 2016



Introduction

In January 2015, the National Marine Fisheries Service (NMFS) released Policy Directive 01-117 titled Integration of Endangered Species Act Section 7 with Magnuson-Stevens Act Processes. This directive implemented recommendations from the Endangered Species Act (ESA) Working Group, which was convened by the Marine Fisheries Advisory Committee (MAFAC) and the Council Coordination Committee (CCC) to make recommendations on how to improve the involvement of regional fishery management councils in the ESA section 7 consultation process. The policy directive applies to ESA section 7 consultations that are conducted on fishery management activities that: (1) are governed by fishery management plans (FMPs) developed by the Council pursuant to the Magnuson–Stevens Fishery Conservation and Management Act (MSA); and (2) may affect endangered or threatened species or designated critical habitat under NMFS’s jurisdiction. The directive also provides guidance on the development of an ESA/MSA Integration Agreement between a fishery management council and a NMFS regional office.

This **draft** ESA/MSA Integration Agreement (Agreement) is between the NMFS Southeast Regional Office (SERO) and the South Atlantic Fishery Management Council (Council). The Agreement outlines procedures for Council involvement in the ESA section 7 formal consultation process, the role of SERO Protected Resources Division staff in the interdisciplinary planning team (IPT) process, and expectations of the SERO Protected Resources Division staff in communicating and informing the Council during Protected Resources Committee meetings.

Contents

Introduction.....	2
Council Involvement in Formal Consultations.....	3
A. Agreement of the procedure.....	3
B. Council Involvement During Consultation.....	4
Role of Protected Resources Staff in the IPT Process and Amendment Development.....	5
A. SERO PR Staff Involvement in IPTs.....	5
Protected Resources Staff Involvement at Committee/Council meetings.....	6
A. Continue Existing Agreement to Update Council on PR-related Issues at each Council Meeting ...	6
B. SERO PR Point of Contact.....	6

Council Involvement in Formal Consultations

A. Agreement of the procedure

As soon as a need for a formal consultation is (re)initiated, the SERO Sustainable Fisheries Division (SFD) will notify the Council by the next Council meeting. The Council will be notified whether the need to (re)initiate is due to a potential Council action (i.e., selection of a preferred alternative in an amendment to a fishery management plan (FMP)) or due to external factors, including but not limited to, changes in species listing or critical habitat, new scientific information on a listed species or interactions with the fishery, or exceedance of the incidental take statement. At the meeting in which the Council is notified that formal consultation needs to be (re)initiated, the Council will discuss, either during the Protected Resources Committee, the appropriate FMP Committee, and/or the full Council session, with input from SERO and NOAA General Counsel, the level of involvement (I, II, or III described below) requested for the consultation. Once consultation has been initiated, SERO Protected Resources Division (PRD) and SFD, and the Council will tentatively agree on work products to be developed (i.e. draft reasonable and prudent alternatives/reasonable and prudent measures (RPAs/RPMs) and draft biological opinion) and a timeline for delivery of those work products. It is acknowledged that timing may need to be adjusted during the process, and that SERO PRD will notify the Council as soon as possible when there are any changes to the timeline.

Comment [JL1]: I understand Council/staff's concern that they are sometimes out of the loop, but SERO really is sufficient for tasking and will allow the best person to brief the Council. If you really want this though, it can be left as is.

1) Involvement I

- The Council receives status updates on the consultation at each Council meeting during Protected Resources Committee or during Full Council session (status quo).
- Delays in completion of the Biological Opinion are not expected to result from PRDs preparation and delivery of these updates. These updates will be used to assess consultation progress and to make adjustments to relevant tentative timeline agreements as necessary.

2) Involvement II

- The Council receives status updates on the consultation at each Council meeting during Protected Resources Committee or during Full Council session (same as Involvement I).
- SERO PR may request information from the Council on fishing practices, landings, and other information about the fishery, which will utilize the knowledge and expertise of Council members and may result in delays of the Biological Opinion depending on the level of analysis requested.
- Agreement on expected timeline and delivery of draft RPAs/RPMs.
- The Council will review draft RPAs/RPMs and provide input.
- Review of RPAs/RPMs by the Council could delay the delivery of the Biological Opinion by at least three months (time between the Council meetings).

Comment [JL2]: I am struggling still with this one a bit just because SERO PR may do this as needed regardless of the involvement level assigned; also these data would much more likely be sought from SERO SF and its data branch and/or SEFSC. If this is something that the Council thinks is important to put here, perhaps we are missing the point? Is the point that in certain situations the Council anticipates wanting to provide specific information to NMFS?

3) Involvement III

- The Council receives status updates on the consultation at each Council meeting during Protected Resources Committee or during Full Council session (same as Involvement I).
- SERO PRD may request information from the Council for effects analysis which may result in delays of the Biological Opinion depending on the level of analysis requested (same as Involvement II).

- Agreement on expected timeline and delivery of draft RPAs/RPMs (same as Involvement II).
- The Council will review draft RPAs/RPMs and provide input (same as Involvement II).
- Review of RPAs/RPMs could delay the delivery of the Biological Opinion by up to three months (time between the Council meetings).
- Agreement on expected timeline and delivery of a draft biological opinion.
- The Council and Scientific and Statistical Committee (SSC) will review a draft biological opinion and provide input. The SSC meets twice per year (although the SSC can meet through webinar outside of their regular schedule) to review science related to management issues. The SSC review could result in a significant additional delay of the biological opinion due to the SSC meeting schedules. Additional delays may also occur because of the time needed for: (1) the Council and SSC to review the biological opinion and provide recommendations, (2) SERO to respond to any recommendations, and/or (3) revision to the analyses in the biological opinion.

B. Council Involvement During Consultation

1) Status updates [All levels]

The Council receives status updates on the consultation at each Council meeting during Protected Resources Committee or during Full Council session. The updates should include but are not limited to: current progress of analysis and biological opinion; expected timeline; and possible issues that will need to be addressed.

2) Information from the Council for Effects Analysis [Levels II and III]

Following initiation of a consultation, and while SERO SFD is compiling data and information for use in the analysis, SERO may request information from the Council about fishing practices, landings, and other information about the fishery, which will utilize the knowledge and expertise of Council members. SERO can present the request to the Council prior to an upcoming Protected Resources Committee, appropriate FMP Committee, or Full Council Session, or contact staff outside of a Council meeting. Sufficient time is necessary for Council members and Council staff to review the request and gather the information to be provided. Additional information may be provided by Council members and Council staff to SERO PRD following the Council meeting.

3) Council Review of Draft RPAs/RPMs [Levels II and III]

The Council and SERO will agree on a timeline for delivery of the draft RPAs/RPMs for Council review. When available, SERO PRD will present draft RPAs or RPMs under consideration during Protected Resources Committee, appropriate FMP Committee, and/or Full Council session and allow input from Council members. The draft RPAs/RPMs should be provided for the Council meeting briefing book to allow time for Council members to review and prepare for the meeting. The briefing book deadline is generally three weeks prior to the Council meeting. If draft RPAs/RPMs undergo multiple revisions, the draft RPAs/RPMs can be presented at subsequent Council meetings.

The Council or Council staff may also request that Council staff be provided draft RPAs/RPMs for internal review outside of Council meetings.

Comment [MS3]: Chip, what exactly does this mean?

Comment [JL4]: Given the Council is not an applicant, when we share information and drafts with the Council during the public process we are sharing with all public; including this language in the policy seems like a bad idea; needs more GC consideration at a minimum.

Monica: I share Jenny's concern. I could possibly see an exchange of this kind of information (maybe) during the IPT process, but I don't think that needs to be formalized in this agreement.

4) Council/SSC Review of Draft Biological Opinion [Level III]

The Council and SERO will agree on a tentative timeline for delivery of the draft biological opinion for SSC and Council review. The agreed upon timeline should ensure the document and any supporting materials are provided at least two weeks prior to an SSC or Council meeting to enable adequate time for review. When available and cleared by NOAA GC, SERO PRD will provide a draft biological opinion for review by the Council and/or the SSC. The Council may convene a special meeting of the SSC (in-person or webinar) to review the draft biological opinion, or the SSC may review the draft biological opinion at a regularly scheduled SSC meeting. At the subsequent Council meeting following SSC review, the Council will review the SSC recommendations and also provide comments and input to SERO PRD. In addition to discussion at the Council meeting, the Council recommendations will be provided to SERO PRD in a **report drafted during the meeting**. SERO will provide responses to all Council recommendations in a memorandum to the Council. The memorandum will be provided at the subsequent Council meeting; however, if workload precludes the development of the memorandum, ~~a conference call between SERO PR, SERO SFD, and SAFMC staff will be scheduled to discuss the comments.~~

Role of Protected Resources Division Staff on the IPT

A. SERO PR Staff Involvement in IPTs

Currently, SERO PRD staff are included on IPTs that are assembled for each FMP amendment. Direct involvement of PRD staff in IPT calls and writing responsibilities for amendments depends on the level of potential effects of the Council actions on protected species. For some Council actions, PRD staff involvement will be minimal. When Council FMP amendment alternatives and decisions could affect protected species, PRD staff will continue to be actively involved with the IPT, including but not limited to:

- Provide input on the potential impact of FMP amendment alternatives on protected resources in early stages of development¹ of the alternatives, specifically if an alternative will trigger a formal consultation and projected delay in timing due to formal consultation;
- Evaluate likely timeframe needed to complete the biological effects for the protected resources section of an FMP amendment.
- **The PRD staff on the IPT should be prepared to comment on the potential FMP amendment alternatives in relation to their effects on listed species under the ESA² when alternatives are reviewed by the IPT. If an alternative is likely to cause substantial**

¹ “Early stage” will depend on the expected timeline and prioritization of the amendment for the Council, but in general the early stage would mean the first and second IPT meetings after the Council has directed staff to start work on amendment.

² This does not constitute a formal decision but used to provide guidance to the IPT and Council.

Comment [MS5]: I deleted this because this cuts against the public process requirements of Council business. How about instead:

“however, if workload precludes the development of a memorandum, SERO will respond orally to the Council recommendations at the meeting.”

OR

“however, if workload precludes the development and presentation of a memorandum at the subsequent Council meeting, SERO will respond to the Council recommendations at the next Council meeting.”

adverse effects, the IPT will notify the Council at the subsequent meeting. The Council will determine if work should continue on that alternative.

- PRD staff may be assigned to analysis and writing assignments for an FMP amendment document. The IPT leads will provide expected timelines and deadlines for writing assignments. In most cases, analysis and writing assignments are due within three to four months of an IPT conference call. If PRD staff assigned to an analysis and writing assignment cannot meet a deadline, the IPT leads must be notified as soon as possible. If PRD staff are unable to complete analysis and writing assignments, other IPT members will be assigned to complete the sections in order to meet timeline expectations for an FMP amendment.
- PRD staff may provide input on ways that effects on protected species could be minimized.
- Provide memorandum to SFD and Council if an amendment/action is not likely to cause jeopardy to ESA listed species or impact marine mammals.

Comment [JL6]: Appropriate to frame in terms of expected extent/severity of effects not specifically in relationship to the jeopardy standard and gets at the intent. Inappropriate for PR staff to be prejudging and communicating on whether an action is jeopardy or not at that stage in development.

Comment [JL7]: The only way we can legally conclude that an action is not likely to jeopardize an ESA listed species is via a biological opinion. This does not fit as a role for the PRD staff on the IPT.

Protected Resources Division Staff Involvement at Committee/Council meetings

A. Continue Existing Agreement to Update Council on PR-related Issues at each Council Meeting

Currently, SERO PRD staff provides a briefing book document for each Council meeting with the status of all ESA and MMPA-related actions that may affect South Atlantic fisheries management and/or require action by the Council. Briefings may include, but are not limited to, updates on Section 7 consultations, proposed regulations, recovery plans, status reviews, and take reduction team/plan developments. SERO PRD staff will continue to provide presentations on one or more of these actions at the request of SERO PRD or the Council, depending on the level of detail needed to keep the Council informed.

B. SERO PRD and Council Staff Point of Contact

The SAFMC staff supports the Council's Protected Resources Committee, and SERO PRD will have a designated point of contact. The designated Council staff point of contact for each Council committee is listed on the SAFMC website (www.safmc.net under the Committee Link) and should be contacted for emerging protected resources issues.

Signing this agreement indicates acknowledgement of the preceding language. However, NMFS retains the discretion to conduct any individual ESA Section 7 consultation differently from the process spelled out in this agreement.

Southeast Regional Office
Regional Administrator
Dr. Roy Crabtree

South Atlantic Fishery Management Council
Executive Director
Gregg Waugh

