

Concepts for an Operating Agreement between the Pacific Fishery Management Council and NOAA Fisheries

Introduction

The Operational Guidelines for Development and Implementation of Fishery Management Actions (Operational Guidelines) were presented to the Pacific Fishery Management Council (Council) at their November 2005 meeting (Agenda Item B.4.a, Attachment 1). They describe a formalized cooperative relationship between the Councils and NOAA Fisheries (NMFS), which would integrate the many statutory mandates that apply to the development of fishery management actions. The Operational Guidelines are intended to address problems related to unnecessary delays, unpredictable outcomes, and lack of accountability; they do so by outlining standardized practices that integrate the multiple mandates governing fisheries management, thereby improving the quality and efficiency of regulatory decisions. This should increase efficiency in designing and implementing fishery management measures, improve the decision-making process, and raise the likelihood of success in litigation.

The Operational Guidelines are based on the concept of “frontloading,” which requires active participation of key Council and NMFS staff at early stages of fishery management action development—a “no surprises” approach. The goal is to ensure that all significant legal and policy issues will be identified early in the process.

In order to support the objectives of the Regulatory Streamlining Project, the Operational Guidelines advise Fishery Management Councils and NMFS Regional Offices and Fisheries Science Centers to enter into written Regional Operating Agreements (ROAs) that specify responsibilities and steps that will be taken to prepare documentation for fisheries conservation and management decisions. The Pacific Fishery Management Council has had discussions with its partner NMFS Regional Offices (NWR, SWR) to develop an Operating Agreement and will also engage the appropriate Science Centers (NWFSC, SWFSC) in ongoing development; the present document contains concepts and language that could become part of such an agreement. It is envisioned that a single ROA would be developed for all of these parties.

Statement of Purpose

This Operating Agreement describes the roles and responsibilities of the parties and provides general guidance on the procedures they will follow under the fishery management process established by the Magnuson-Stevens Act (MSA). In addition to the MSA, the National Environmental Policy Act (NEPA) provides the principal framework for decision making. The purpose of specifying roles, responsibilities, and procedures is to improve cooperation between the parties; demonstrate shared responsibility for decisions; and facilitate timely, sound, and legally defensible decision making.

Key Concepts

Fishery Management Action Plan: A Fishery Management Action Plan (Action Plan) is a preliminary planning and vetting document prepared soon after the meeting (scoping meeting) at which the Council initially decides to undertake an applicable action. It is prepared only for major fishery management actions; minor fishery management actions do not require the preparation of an Action Plan (see below). For recurring actions (e.g., harvest specifications) a draft Action Plan should be available one Council meeting in advance of the meeting at which the Council takes preliminary action; a completed Action Plan will be available at the meeting at which the Council takes preliminary action. For these recurring actions a standing Action Plan may be prepared. The Action Plan, if appropriate, may also serve as a scoping information document. As appropriate, the Action Plan:

- Describes the proposed action, and purpose and need;
- Describes any available information relevant to the formulation of a range of alternatives (e.g., extant scientific information, types of management measures that may be employed);
- Makes a preliminary assessment of the likely effects of the action on the human environment, providing sufficient information to identify the type of NEPA analysis to be undertaken (CE, EA, EIS);
- Specifies Fishery Management Action Team (FMAT) composition;
- To the extent possible, specifies the data, models, and methodologies to be employed in the analysis;
- Assesses and identifies the staff resources (both internal and external to the FMAT) that will be required for the analyses, including task assignment (at least at the organizational level); and
- Provides a realistic timeline for complying with all applicable laws and for completing and implementing the action, including the identification of Council meetings at which key decision will be made; deadlines for the receipt of data, analyses or other work products crucial to decision making and timely completion of required documentation; and deadlines driven by regulatory requirements stemming from NEPA, APA, and other applicable laws.

If feasible, a draft Action Plan may be prepared for the Council's initial scoping meeting to facilitate Council input on the document.

Fishery Management Action Team: A Fishery Management Action Team (FMAT) is a group formed specific to a major fishery management action in order to enable leadership, coordination, and an effective fishery management process. The FMAT should include staff representatives of all offices and organizations involved in the development, review, and/or implementation of the action, including Council and NOAA Fisheries staffs, and Advisory Body members. FMAT composition will be determined in consultation between the Council Executive Director and the Regional Administrator or his designee. All FMATs shall have a team leader responsible for overall project management. Except for recurring actions, a separate FMAT is formed for each major fishery management action, and these FMATs dissolve upon completion of each action. For recurring actions a standing FMAT may be constituted. The

FMAT is responsible for preparing, or coordinating the preparation of, all documentation necessary to support Council decision making. This documentation will constitute a part of the sufficient administrative record, based on applicable law. Generally, the role of the FMAT is to prepare documents (EA or EIS) in support of a FONSI or ROD and their work is concluded with the signing of the FONSI or ROD. The FMAT is not directly involved in certain agency responsibilities, such as the rulemaking process pursuant to the APA or section 7 consultations pursuant to the ESA.

Major Fishery Management Action: A major fishery management action is an action for which a new environmental assessment or environmental impact statement must be prepared. If an existing or supplemented CE memo, FONSI, or ROD is applicable to the action, it is normally not considered a major fishery management action. Examples of major fishery management actions include FMPs and FMP amendments; regulatory amendments; and periodic specification of quotas, harvest guidelines, and/or management measures resulting in environmental effects not adequately considered in a previous or supplemented CE memo, FONSI, or ROD applicable to the management framework under which those quotas, harvest guidelines, and/or management measures were implemented. *Minor fishery management actions* include the periodic establishment of a quota or harvest guideline or a change in existing management measures (e.g., “inseason” actions) with effects which have been adequately considered in an existing or supplemented CE memo, FONSI, or ROD for the management framework under which the new action is being taken. The review and granting of an exempted fishing permit (EFP) may be considered a major fishery management action if the environmental effects of the permit have not been adequately considered in a previous or supplemented CE memo, FONSI, or ROD.

Advice on Programmatic and Legal Sufficiency: Critical Feedback Points (CFPs) are steps in the decision-making process at which critical decisions are made that could ultimately affect approvability of the action. The number of CFPs applicable to an action varies depending on the MSA and NEPA requirements that apply to that action. At these CFPs, the Regional Administrator or his designee may advise the Council, in writing or orally during a closed session of the Council, on the sufficiency of the administrative record supporting the action. Based on this advice the Council may provide guidance to the FMAT, if applicable. Advice on programmatic and legal sufficiency is nonbinding and shall not prejudice Council decision-making.

The Decision Memorandum: At the conclusion of the Council’s decision making process, after the Council has transmitted their recommendation to the RA, the RA issues a *Decision Memorandum* to initiate Secretarial Review and describe how the analyses as presented were reasonably considered by the Council to support their final decision in accordance with the procedures and requirements in the Operational Guidelines.

Procedural Guidelines for Different Fishery Management Actions

Council Operating Procedures describe both management and activity cycles (e.g., periodic harvest specifications) (COP 9, COP 10) and plan amendment cycles (which although not specified, could also apply to regulatory amendment cycles) (COP 11). These COPs generally describe procedures, timelines, and roles and responsibilities identified in the Council’s FMPs.

A Regional Operating Agreement is not intended to supersede or conflict with the processes described in the COPs or FMPs.

Minor Fishery Management Actions

Certain Council actions may be described as minor fishery management actions, using the criteria outlined above. An inseason action is one example of a minor fishery management action. Inseason actions adjust previously established management measures to prevent a harvest guideline or quota from being exceeded or to meet other objectives specified in the management framework. These actions are consistent with the current harvest specification and management framework, and are not expected to result in impacts different in context or intensity from those disclosed in a previous finding (ROD or FONSI). The periodic specification of the Pacific mackerel harvest guideline is another example of a minor fishery management action because the effects do not differ from those evaluated in a previous NEPA document and are not significant. As a result, these types of actions may be subject to a Categorical Exclusion. In both cases Council decision making normally occurs at one meeting. Similarly, any exempted fishing permit (EFP) review and approval that falls under the umbrella of a specifications process for which the relevant NEPA document evaluates the effects of any EFPs authorized as part of the specifications process (e.g., groundfish EFPs) would be considered a minor fishery management action. As discussed above, minor fishery management actions do not require preparation of an Action Plan or formation of a FMAT.

Major Fishery Management Actions

Major fishery management actions fall into two broad categories: the periodic establishment of harvest specifications, quotas, and/or management measures, which are *recurrent actions* that proceed according to a set schedule described in the relevant FMP, and development of FMPs, FMP amendments, or regulatory amendments, which are *occasional actions*. The Operational Guidelines outline a “model process” for the development and implementation of fishery management actions, which is intended to cover all possible contingencies. Consistent with the COPs and focusing principally on the Council decision making process, the Operational Guidelines’ model process may be collapsed into four phases: (1) *Planning and Scoping*; (2) *Identification of the Range of Alternatives and Document Development*; (3) *Council Final Action*; and (4) *Secretarial Review and Recommendations*. The specifics of the process will differ depending on the type of action (recurrent or occasional action, existing procedures identified in FMPs and COPs, etc.). Also, the timing of decision making can be affected by various factors, such as the complexity of the issues to be addressed, so that more Council meetings than identified below are needed. The elements of these phases as they relate to Council decision making are outlined below.

Phase 1: Planning and Scoping

- Staff undertake preliminary scoping activities, if appropriate.
- For occasional actions a draft Action Plan (including identifying FMAT composition) may be prepared.
- For recurring actions a standing Action Plan may be prepared and standing FMAT constituted, which would be modified as necessary at any time before a decision making

cycle begins. A final Action Plan will be completed before the first Council meeting in the particular recurring action cycle. (see COP 9 and 10 for the specifics of these cycles.)

- For occasional actions, at the first meeting (scoping meeting) the Council formally identifies the issues to be addressed, determines if additional scoping meetings will be scheduled, establishes a schedule for decision making and documentation, and identifies staff and advisory bodies that will be prepare the necessary analyses (see COP 11). All of these decisions provide information for finalizing the Action Plan and constituting the FMAT.
- At any time before preliminary action (Phase 2 below) the Action Plan and FMAT are finalized based on consultations between the Executive Director and the appropriate Regional Administrator.
- Based on preliminary information in the Action Plan, agency guidance (NAO 216-6), and any other pertinent information the type of NEPA document to be prepared is determined.
- Finalization of the Action Plan is a CFP. The Regional Administrator may provide advice on the sufficiency of the record either at this point or at the Council meeting at which the elements of the Action Plan (or standing Action Plan) are identified.
- If an EIS is to be prepared a Notice of Intent is published in the Federal Register.
- Scoping done before NOI publication cannot substitute for the normal scoping process after publication; therefore, additional scoping (which may constitute subsequent advisory body meetings, Council meetings, or other public forums) must occur. (See EPA, “Forty Questions.”)

Phase 2: Identification of the Range of Alternatives and Document Development

- The FMAT prepares a preliminary draft analysis, which includes a preliminary range of alternatives and supporting analyses, if available. For occasional actions, at the (minimum) second meeting the Council identifies the range of alternatives to be fully analyzed and may make a preliminary decision on a preferred alternative. The Council’s decision on a range of alternatives may require several meetings, depending on the complexity of the issues. For some recurring actions (e.g., groundfish harvest specifications) COP 9 specifies more than one meeting at which the range of alternatives is developed.
- Adoption of the range of alternatives/preliminary preferred alternative is a CFP and the RA may provide advice on sufficiency of the record at the Council meeting(s) (closed session) where adoption is scheduled.
- Frontloading for EFH or ESA consultation should occur during development of the range of alternatives and before Council final action (see below), if necessary. Selection of a preliminary preferred alternative at this stage would facilitate this type of frontloading. The purpose of this frontloading is to identify any elements of the alternatives that could conflict with findings that will be made under those authorities.
- Public review of the range of alternatives occurs. Depending on the specifics of the process this may be in the form of an advisory body report, draft EA, preliminary DEIS or DEIS. In some cases the DEIS may be filed with EPA at this point (e.g., to meet an externally imposed deadline such as the start of a fishing season or a court-ordered schedule), triggering the required 45-day minimum public comment period. However, in order to better inform the public it is preferable to file the DEIS after the Council takes final action to identify their preferred alternative (Phase 3 below).

Phase 3: Council Final Action

- For occasional actions the Council chooses a final preferred alternative at a (minimum) third meeting. For FMP amendments involving specific changes to the FMP text, draft amendatory language may be presented for review and adoption by the Council. Development of amendatory language may also trail adoption of a preferred alternative, to be reviewed at subsequent Council meetings. For regulatory amendments or regulations pursuant to an FMP amendment NMFS may, but is not required to, provide draft regulatory language for Council review and comment at the third or subsequent meeting.
- For recurring actions, the meeting at which the Council takes final action varies according to the cycle described in the relevant FMP and COP 9 and 10. Otherwise, the objective of establishing a sufficient administrative record to support final action applies.
- Adoption of a preferred alternative is a CFP and the RA may provide advice on sufficiency of the record at the Council meeting (closed session) where adoption is scheduled.
- *The Sustainable Fisheries ARA initiates ESA section 7 consultation on the preferred alternative, if necessary. [What is the trigger to initiate section 7 consultation?]. The PRD decision-maker provides a Consultation Assessment from PRD to the Sustainable Fisheries ARA.*
- *Identify response to jeopardy determination, such as a Council revote on the preferred alternative.*
- The NEPA document is finalized. If an EA, the final document is made available to the public (e.g., through distribution and/or posting on Council/NMFS website(s)). If not done so already (see above) a DEIS is filed with EPA, triggering the minimum 45-day public comment period.
- The Council decision is transmitted to NMFS. The transmittal date is scheduled in order to ensure consistency between applicable statutory timelines under MSA, NEPA, APA, etc.
- CFP: RA sends Decision Memorandum letter to Council.

Phase 4: Secretarial Review

- Complete decision package
 - CFP: RA sends Advisory Statement letter to Council
- Begin MSA Secretarial review
- Publish NOA, proposed rule; File FEIS
- RA decision to (dis)approve FMP/ final rule; AA concurrence
- RA decision on final rule to implement FMP; AA concurrence
- Publication of final rule

Roles and Responsibilities of the Parties

The Council

Role

The Council engages in a public process to develop specific, substantive fishery management recommendations, which, as appropriate, are approved by NMFS and may entail the implementation of Federal regulations by NMFS. Because the Regional Administrator has a seat on the Council, he—or his designee—participates directly in Council decision making. Generally, the Council takes lead responsibility in the development of FMPs and FMP amendments, and the identification of quotas, harvest guidelines, and management measures, which may be periodically re-specified. The Council is not directly involved in the Federal rulemaking process, although NMFS may provide the Council the opportunity to review draft regulations in advance of the publication of a proposed rule. The Council is not directly involved in section 7 consultations pursuant to the Endangered Species Act. However, when Council final action is inconsistent with the results of a consultation, NMFS will return the proposed action to the Council for reconsideration. As part of this process, NMFS will respond to Council comments on the data, models, or other scientific issues underlying the results of the consultation. In order to avoid conflicts between Council action (e.g., selection of a preferred alternative) and the findings of Biological Opinion developed during the consultation process, NMFS will provide guidance prior to or at the time of Council final action in order to reduce the likelihood of such conflicts.

Responsibilities

In addition to its overall decision making role, the Council and their staff have specific responsibilities:

- The Council may review a draft Action Plan developed for a major fishery management action and will provide direction to the Executive Director and the appropriate Regional Administrator, or his designee, so that they may finalize the Action Plan before the Council takes preliminary action (e.g., approval for public review of a preliminary range of alternatives).
- The Council may provide direction to the Executive Director on FMAT composition.
- The Executive Director and the appropriate Regional Administrator, or his designee, with direction from the Council, are responsible for completing an Action Plan for a major fishery management action.
- The Executive Director, with advice from the Council, will assign staff and provide staff support to FMATs.
- The Executive Director, with advice from the Council and consent from the supervisory agency, may assign advisory body members to a FMAT.

- Council staff assigned to a FMAT will coordinate logistics for FMAT meetings, and, with NMFS staff on the FMAT, prepare all documentation resulting from FMAT meetings (e.g., meeting summaries, Action Plans, etc.).
- Council staff with lead responsibility will inform FMATs or others providing documentation in support of Council decision making of deadlines for the receipt of material at the Council office in advance of the meeting at which the decision is to be taken. The Executive Director has the discretion to reschedule an action item to a later Council meeting if, in his judgment, the necessary documentation is not received in a timely fashion.
- In closed session the Council receives advice from the Regional Administrator or his designee on the legal and procedural sufficiency of the administrative record. Based on this advice, the Council, through the Executive Director, may give appropriate direction to the FMAT.

NOAA Fisheries Regional Offices (NWR, SWR)

Role and responsibilities to be determined.

NOAA Fisheries Science Centers (NWFSC, SWFSC)

Role and responsibilities to be determined.

Accession to an Operating Agreement

Upon finalization of the ROA, it would be signed by the Council Chair or Executive Director, Regional Administrators, and Science Center Directors.