

## **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) (Agenda Item B.2.a, Attachment 2) 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 Work Plan: A Fishery Management Work Plan (Work 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. If feasible, a draft Work Plan may be prepared for the Council's initial scoping meeting to facilitate Council input on the document. It is prepared only for major fishery management actions; minor fishery management actions do not require the preparation of a Work Plan (see below). For recurring actions (e.g., harvest specifications) a draft Work Plan should be available one Council meeting in advance of the meeting at which the Council takes preliminary action; a completed Work Plan will be available at the meeting at which the Council takes preliminary action. For these recurring actions a standing Work Plan may be prepared. The Work Plan, if appropriate, may also serve as a scoping information document. As appropriate, the Work 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);
- Provides a preliminary assessment of the likely effects of the action on the human environment, indicating the level of NEPA analysis to be undertaken: categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS);
- Specifies Interagency Work Group (IWG - see below) 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 IWG) 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, Administrative Procedures Act (APA), and other applicable laws.

Interagency Work Group: An Interagency Work Group (IWG, equivalent to the Fishery Management Action Team identified in the Operational Guidelines) is formed for each major fishery management action (see below) in order to enable leadership, coordination, and an effective fishery management process. The IWG should include staff representatives of all offices and organizations involved in the development, review, and/or implementation of the action, including Council and NMFS staffs, and Advisory Body members. IWG composition will be determined in consultation between the Council Executive Director and the Regional Administrator (RA) or his designee. All IWGs shall have a team leader responsible for overall project management. Except for recurring actions, a separate IWG is formed for each major fishery management action, and these IWGs dissolve upon completion of each action. For

recurring actions a standing IWG may be constituted. The IWG 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 IWG is to prepare documents (CE checklist, EA or EIS) in support of a CE decision memo, finding of no significant impact (FONSI) or record of decision (ROD) and their work is concluded with the signing of the FONSI or ROD. The IWG is not directly involved in certain agency responsibilities, such as the rulemaking process pursuant to the APA or section 7 consultations pursuant to the Endangered Species Act (ESA).

Major Fishery Management Action and Minor Fishery Management Action: A *major fishery management action* is an action for which a new EA or EIS must be prepared. If an existing or supplemented CE decision 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 fishery management plans (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 RA 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 IWG, 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 its 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.

## **Major versus Minor Fishery Management Actions**

Council Operating Procedures (COP) 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. Minor fishery management actions do not require preparation of a Work Plan or formation of an IWG. 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. The periodic specification of the Pacific mackerel harvest guideline is a second example of a minor fishery management action when the effects do not differ from those evaluated in a previous NEPA document (CE memo) and are not significant. 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). By extension, minor fishery management actions do not affect species listed under the ESA such that consultation pursuant to section 7 of the act is initiated. (In any case, such effects would also signal the need to prepare an EA or EIS.) In both cases Council decision-making normally occurs at one meeting. A third example of a minor fishery management action is the granting of an EFP based on previous evaluation in an umbrella NEPA document such as the EIS that is prepared for the biennial specification of groundfish harvest levels and management measures.

### **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.

## **Procedural Guidelines for Major Fishery Management Actions**

### **Phase 1: Planning and Scoping**

- Staff undertakes preliminary scoping activities, if appropriate. This may include the preparation of a scoping information document (informing the public about the proposed action) and scoping report (summarizing the results of public and interagency scoping).
- For occasional actions a draft Work Plan (including identifying IWG composition) may be prepared.
- For recurring actions a Standing Work Plan may be prepared and standing IWG constituted, which would be modified as necessary at any time before a decision-making cycle begins. A final Standing Work Plan would be completed before the first Council meeting in the particular recurring action cycle. (see COP 9 and 10 for the specifics of these cycles.) A Standing Work Plan should additionally document and provide the rationale for a recurring process (e.g., salmon harvest specifications) to support its ongoing use.
- 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 Work Plan and constituting the IWG.
- At any time before preliminary action (Phase 2 below) the Work Plan and IWG are finalized based on consultations between the Executive Director and the appropriate Regional Administrator.
- Based on preliminary information in the Work Plan, agency NEPA guidance (NAO 216-6), and any other pertinent information, the type of NEPA document to be prepared is determined. Regional GC will have lead responsibility in making this determination.
- Finalization of the Work Plan is a CFP. The RA may provide advice to the Council on the sufficiency of the record of the finalized Work Plan (or Standing Work Plan) before preliminary action begins (Phase 2 below).
- 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 Council on Environmental Quality, “Forty Questions.”)

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

- The IWG 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 essential fish habitat (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. To facilitate this process, the following steps occur:
  - The appropriate Sustainable Fisheries Assistant Regional Administrator (SF ARA) provides a formal recommendation regarding the need for section 7 consultation under ESA by means of a memo to the appropriate RA through the Protected Resources (PR) ARA. If necessary, the SF ARA also requests EFH consultation by means of a memo to the Habitat Conservation (HC) ARA.
  - If necessary, the appropriate PR ARA drafts a section 7 consultation assessment memorandum to the appropriate SF ARA summarizing preliminary conclusions expected to form the basis of any subsequent biological opinion (BiOp). This may be based on a draft biological assessment prepared by the IWG and/or Protected Resources Division (PRD).
  - If necessary, the HC ARA provides an EFH consultation assessment memorandum.
  - These consultation assessment memos are made available to the Council prior to final action (Phase 3 below) in order to facilitate meaningful discussion about the probable effects of a proposed action/alternatives on ESA-listed species and critical habitat, EFH, and to identify mitigation measures.
  - The section 7 consultation assessment memo should provide information on the data and models that will be used a BiOp, if prepared. The Council will have the opportunity to provide comments on these scientific issues, with NMFS response.
- 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 the Environmental Protection Agency (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 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.
- Based on the section 7 consultation assessment memo (Phase 2 above), the SF ARA formally initiates ESA section 7 consultation on the preferred alternative, if necessary.
- 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.
- Based on the section 7 consultation assessment memo, draft BiOp, or other information the Council, through its Executive Director and in consultation with the appropriate RA, will decide whether Council transmittal (Phase 4 below) may occur before finalization of the BiOp. This assessment is based on the likelihood that the preferred alternative will result in a jeopardy determination, requiring further Council action.

#### **Phase 4: Secretarial Review**

- 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. The Council may request formal notification of a transmittal date consistent with timely promulgation of the Decision Memorandum to initiate Secretarial review. This facilitates implementation consistent with the statutory timelines described at MSA §204(a) and (b) for Secretarial review of FMPs, plan amendments, and proposed regulations. The appropriate RA will make the Decision Memorandum available to the Council.
- Council transmittal is a CFP and the appropriate RA may provide advice to the Council on the sufficiency of the record, including requests for any additional information that may be required for Secretarial review.
- Elements of steps 9–16 in draft OG model process are completed, which may include the following elements:
  - Preparation of Decision Memorandum package, Council transmittal
  - Preparation of proposed rule package; review by Regional General Counsel (GC)
  - Transmit Issues Advisory to HQ
  - Preparation of FEIS with response to comments; file with EPA
  - Preparation of final rule package; review by Regional GC
  - Preparation of FONSI/ROD
  - Finalization of BiOp
  - RA decision to (dis)approve FMP/ final rule; Assistant Administrator (AA) concurrence
  - Notification of the Council of RA decision on FMP/FMP amendment, revision of FMP accordingly, publication of (revised) FMP.

- RA decision on final rule; 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 RA 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 ESA.

#### Responsibilities

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

- The Council may review a draft Work Plan and provide direction to the Executive Director and the appropriate RA, or his designee, so that they may finalize the Work 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 IWG composition.
- The Executive Director and the appropriate RA, or his designee, with direction from the Council, are responsible for completing a Work Plan for a major fishery management action.
- The Executive Director, with advice from the Council, will assign staff and provide staff support to IWGs.
- The Executive Director, with advice from the Council and consent from the supervisory agency, may assign advisory body members to an IWG.
- Council staff assigned to an IWG will coordinate logistics for IWG meetings, and, with NMFS staff on the IWG, prepare all documentation resulting from IWG meetings (e.g., meeting summaries, Work Plans, etc.).

- Council staff with lead responsibility will inform IWGs 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 RA 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 IWG.

**NOAA Fisheries Regional Offices (NWR, SWR), Fisheries Science Centers (NWFSC, SWFSC), and NOAA Regional General Counsel (NWR, SWR)**

Regional Offices, Regional GC, and Science Centers will identify their roles and responsibilities in the process. Generally, Regional Offices, Regional GC, and NMFS Headquarters (HQ) are primarily responsible for activities after Council final action and transmittal of the decision, and in certain other statutory determinations (e.g., BiOp, ROD, Initial Regulatory Flexibility Analysis/Final Regulatory Flexibility Analysis [IRFA/FRFA]). The procedural guidelines described above indicate the following responsibilities:

- Provision of staff to IWGs, including legal advice/review (GC). Science Center staff may serve on IWGs in their capacity as Plan Team members.
- Provision of data, models, and scientific advice in support of NEPA analysis (Science Centers)
- GC advice/determination on type of NEPA analysis.
- Preparation of Consultation Assessment memorandums (PRD, HCD)
- Preparation of Biological Opinion (PRD)
- Provides draft regulations to the Council for review (optional).
- Provision of advice on the sufficiency of the record for decision-making (RAs).
- Promulgation of the Decision Memorandum (RAs)
- Other process-related activities associated with Secretarial review and rulemaking.

**Accession to an Operating Agreement**

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

## List of Acronyms

AA	Assistant Administrator (NMFS)
BiOp	Biological Opinion
CE	Categorical Exclusion
CFP	Critical Feedback Point
COP	Council Operating Procedure
DEIS	Draft EIS
EA	Environmental Assessment
EFH	Essential Fish Habitat
EFP	Exempted Fishing Permit
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FMP	Fishery Management Plan
FONSI	Finding of No Significant Impact
GC	NOAA General Counsel
HC ARA	Habitat Conservation Assistant Regional Administrator (NMFS)
HCD	Habitat Conservation Division
HQ	NMFS Headquarters Office
IRFA/FRFA	Initial Regulatory Flexibility Analysis/Final Regulatory Flexibility Analysis
IWG	Interagency Work Group
MSA	Magnuson-Stevens Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service, NOAA Fisheries
NWFSC	Northwest Fisheries Science Center (NMFS)
NWR	Northwest Region (NMFS)
OGs	Operational Guidelines
PR ARA	Protected Resources Assistant Regional Administrator (NMFS)
PRD	Protected Resources Division (NMFS)
RA	Regional Administrator (NMFS)
ROA	Regional Operating Agreement
ROD	Record of Decision
SF ARA	Sustainable Fisheries Assistant Regional Administrator (NMFS)
SWFSC	Southwest Fisheries Science Center (NMFS)
SWR	Southwest Region (NMFS)