

NMFS Report: Reinitiation of Consultation on the Impacts of the Pacific Fishery Management Council salmon fisheries on Southern Resident killer whales and their Critical Habitat

Background

On April 12, 2019, NMFS reinitiated consultation¹ to consider the effects of Pacific Fishery Management Council (Council) managed ocean salmon fisheries under the Pacific Coast Salmon Fishery Management Plan (FMP) on the Southern Resident killer whales (SRKW). The Council then formed the ad-hoc SRKW workgroup (Workgroup) to assist NMFS in reassessing the effects of Council-area ocean salmon fisheries on the Chinook salmon prey base of SRKW, and depending on the results, develop and recommend to NMFS an approach that could include proposed conservation measure(s) or management tool(s) to limit PFMC salmon fishery impacts to prey availability for SRKW relative to implementing the FMP.

We reiterate our concern about the severely depressed status of the SRKW population. We are particularly concerned about high risk conditions in years with critically low Chinook salmon abundance throughout the whales' geographic range because of the potential effects of additional prey reductions from fisheries on the whales' energetics, health, reproduction, and survival during these high risk conditions. Fishery management that considers and responds to high risk conditions for the whales will be important to our evaluation of the Endangered Species Act (ESA) jeopardy standard. Although Chinook salmon abundance South of Falcon (SOF) may not be consistently important to SRKW as demonstrated for North of Falcon (NOF), SRKWs require healthy Chinook salmon stocks throughout their geographic range and consideration of both NOF and SOF responses to high risk conditions will also be part of our evaluation of how the fishery may affect SRKW survival and recovery.

While the workgroup was in progress, NMFS assessed the Council's 2020 fisheries with respect to their potential effects on SRKW. In our 2020 biological opinion², we considered whether the pre-season Chinook salmon abundance in the action area³ was above the levels observed in particularly low Chinook salmon abundance years when there is a higher risk of negative effects to whale health. In light of the fisheries' expected reduction and taking into account the most recent data on abundance and whale health, we anticipated that even with the 2020 fisheries, the abundance of Chinook salmon will be well above any low abundance threshold. NMFS determined that the Council-managed ocean salmon fisheries in 2020 were not likely to

¹ Memo from R. Wulff to C. Yates, April 12, 2019 (Agenda Item G.2, Attachment 1, June 2019)

² NMFS. 2020. Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Conference Opinion. Consultation on Implementation of the Pacific Fishery Management Council Salmon Fishery Management Plan in 2020 for Southern Resident Killer Whales and their Current and Proposed Critical Habitat. April 29, 2020. NMFS Consultation No.: WCRO-2019-04040.149p.

³The action area encompasses the waters of the U.S. Pacific Coast Region EEZ, which are directly affected by the action, and the coastal waters of the states of Washington, Oregon, and California, and inland waters of Washington (Salish Sea) which are indirectly affected by the action (i.e., potential reduction in available prey that would have moved into these waters if it had not been caught by the PFMC ocean salmon fisheries).

appreciably reduce the likelihood of both survival and recovery of SRKW or destroy or adversely modify their designated and proposed critical habitat.

The Workgroup's Risk Assessment was finalized in June 2020⁴ and alternative draft recommendations have been provided to the Council⁵ for its consideration. We appreciate all the hard work and dedication of the Workgroup, and the collaboration with the Council and its advisory bodies. NMFS anticipates the Council will adopt a range of alternatives for further analysis and consideration at the September meeting based on the Workgroup's recommendations, and will adopt a final preferred alternative in November to forward to NMFS for our consideration. The Council's adopted alternative could involve an amendment to the FMP and/or a regulatory amendment, or continued management of the fishery under the current salmon FMP. The objective of this report is to provide information on our ESA section 7 consultation process and how we will conduct our assessment under ESA section 7 of the implementation of the Council's final alternative. This includes a description of a few of the standards that apply in an ESA section 7 analysis, as particularly relevant to the analysis of the effects of the salmon fisheries on SRKW and their critical habitat.

NMFS Consultation Process on PFM Salmon Fisheries

The West Coast Region's Protected Resources Division will use the final decision of the Council in November as part of the proposed action to be analyzed in a new biological opinion. That opinion will consult on the operation of the west coast salmon fisheries in the EEZ conducted under the Council's Salmon FMP, either as currently constituted or including Council-recommended management measures, depending on the action taken by the Council. If the Council is unable to reach a final decision by the conclusion of its November 2020 meeting, NMFS will consult on the operation of the west coast salmon fisheries in the EEZ conducted under the Council's Salmon FMP as currently constituted. NMFS is committed to finalize that biological opinion prior to promulgation of the 2021 salmon management measures, expected to be by May 14, 2021.

Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined...to be critical....

In other words, it is the obligation of the federal action agency (NMFS Sustainable Fisheries Division in this case) to insure that its action (implementing the FMP for the ocean salmon fisheries within the Pacific U.S. EEZ) is not likely to jeopardize the listed species (SRKW).

⁴ Pacific Fishery Management Council Salmon Fishery Management Plan Impacts to Southern Resident Killer Whales. Risk Assessment. May 2020. Agenda Item E.2.a. SRKW Workgroup Report 1. June 2020.

⁵ Agenda Item H.3.a, SRKW Workgroup Report 1, September 2020

NMFS' obligation as the consulting Service is to provide assistance to the action agency in making this determination by providing its biological opinion.

The term jeopardize the continued existence is defined in regulation as:

...to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. (50 CFR 402.02)

The analytical process used to make this finding is described in regulation as:

(g)(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. (50 CFR 402.14(g))

Section 7(a)(2) further states:

In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Under this standard, the courts have opined that the agency must not “disregard available scientific evidence that is in some way better than the evidence it relies on.” [San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 995 \(9th Cir. 2014\)](#) (alterations adopted and citation omitted). “On the other hand, where the information is not readily available, we cannot insist on perfection.” [San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 602 \(9th Cir. 2014\)](#). As a result, the standard does not “require an agency to conduct new tests or make decisions on data that does not yet exist.” [Locke, 776 F.3d at 995](#). The analysis in a biological opinion must also meet the requirements of the Administrative Procedures Act, in the sense that it must have a rational basis, and must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” At all stages of analysis, the Services must rely on the best available scientific and commercial data available; the concept behind the phrase “benefit of the doubt to the species” can be used to fill in information and/or data gaps, as long as the Services provide a rational basis for relying on the concept and documents that clearly support the analysis.

NMFS uses a weight-of-evidence approach, particularly in the absence of a quantitative tool, to consider all of the information available in assessing the effects of actions. NMFS will rely heavily on the Workgroup's Risk Assessment and will consider any analysis of alternative measures for the fishery presented to the Council in November, and will continue to use a variety of metrics or indicators with varying degrees of confidence (or weight) in order to formulate our ESA section 7 biological opinion.

“Effects of the action” are defined for ESA section 7 purposes as consequences to listed species or critical habitat that are caused by the proposed action; which means they would not occur but for the proposed action and are reasonably certain to occur. 50 CFR 402.02. In practical terms, this means that a proposed action where a qualifying event triggers additional action, it must be clear as to what additional action will actually be taken, and the extent of that action, in order for NMFS to effectively analyze the effects of the additional actions.

Conclusion

We particularly appreciate the efforts of the Workgroup to develop recommendations with the assistance of tribal participation. Many actions are being taken to improve conditions and conserve and recover SRKW, particularly to address the three main threats to the whales: prey limitation, vessel traffic and noise, and chemical contaminants. NMFS remains committed to working through the Council process, and with states, tribes and our other partners to take actions to improve conditions for the whales, and we recognize that prey availability is only one element that has contributed to the current SRKW condition and fisheries are only one source of potential risk. NMFS will continue to also consider actions, such as habitat and hatchery actions supported through the Pacific Salmon Treaty, and how they contribute to overall Chinook salmon prey available to the whales.

The NMFS West Coast Region looks forward to working with the Council to develop ocean salmon fisheries consistent with the conservation and management objectives of the Salmon FMP, the Magnuson-Stevens Fishery Management and Conservation Act, and the ESA.