

## **MARK UP**

# **DRAFT Operating Agreement**

Among the

Pacific Fishery Management Council;

NOAA<sup>1</sup> Fisheries West Coast Regional Office;

NOAA Fisheries Northwest Fisheries Science Center;

NOAA Fisheries Southwest Fisheries Science Center;

NOAA Fisheries Office of Law Enforcement, West Coast Division;

NOAA General Counsel, Northwest Section; and

NOAA General Counsel, Southwest Section

DRAFT

Additions in **red**  
Deletions in **purple** strike-out

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<sup>1</sup> "NOAA" is the National Oceanic and Atmospheric Administration. "NOAA Fisheries Service" and the "National Marine Fisheries Service (NMFS)" are synonymous names for the same agency. NMFS is the term used in this document.

## Acronyms and Abbreviations

<b>Agreement</b>	Regional Operating Agreement
<b>COP</b>	Council Operating Procedure
<b>ESA</b>	Endangered Species Act
<b>EO 12866</b>	Executive Order 12866 Regulatory Planning and Review
<b>ESA</b>	Endangered Species Act
<b>FEP</b>	Fishery Ecosystem Plan
<b>FMP</b>	Fishery Management Plan
<b>GC</b>	General Counsel
<b>MMPA</b>	Marine Mammal Protection Act
<b>MSA</b>	Magnuson-Stevens Fishery Conservation and Management Act
<b>NEPA</b>	National Environmental Policy Act
<b>NMFS</b>	National Marine Fisheries Service (also known as NOAA Fisheries)
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>NWFSC</b>	NMFS' Northwest Fisheries Science Center
<b>NOAA GC</b>	NOAA's Office of General Counsel, Northwest and Southwest Sections
<b>OLE</b>	NMFS' Office of Law Enforcement
<b>PFMC</b>	Pacific Fishery Management Council
<b>Pacific Council</b>	Pacific Fishery Management Council
<b>PSMFC</b>	Pacific States Marine Fisheries Commission
<b>RFA</b>	Regulatory Flexibility Act
<b>SAFE</b>	Stock Assessment and Fishery Evaluation
<b>Secretary</b>	Secretary of Commerce
<b>SOPP</b>	Statement of Organization, Practices, and Procedures
<b>SSC</b>	Scientific and Statistical Committee
<b>SWFSC</b>	NMFS' Southwest Fisheries Science Center
<b>WCR</b>	West Coast Region

## Overview

This Operating Agreement (Agreement) confirms the mutual interests of, and describes the working relationship among, the following parties:

- Pacific Fishery Management Council (Pacific Council)
- National Marine Fisheries Service (NMFS) West Coast Regional Office (WCR),
- NMFS Northwest Fisheries Science Center (NWFSC),
- NMFS Southwest Fisheries Science Center (SWFSC),
- NMFS Office of Law Enforcement, West Coast Division (OLE), and
- NOAA's Office of General Counsel, Northwest and Southwest Sections (NOAA GC).

The preparation, review, approval, and implementation of fishery management actions and the implementing rules and regulations under the Magnuson-Stevens **Fishery Conservation and Management Act (MSA)** comprise a complex process in which the Regional Fishery Management Councils and NMFS, acting on behalf of the Secretary of Commerce (Secretary), have distinct, yet sometimes overlapping, roles. In addition to the MSA, a variety of other applicable laws and Executive Orders have analytical and procedural requirements ~~with which NMFS and the Pacific Council must comply~~ **that must be complied with**, including the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (**MMPA**), the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act, the Information Quality Act, Executive Order (EO) 12866, ~~and~~ the Administrative Procedure Act, **inter alia**. To support the mutual and dependent responsibilities of the Pacific Council, the NMFS WCR, NWFSC, SWFSC, OLE, and the NOAA GC, this Agreement specifies responsibilities of each party to be implemented to the fullest extent that anticipated funding and staffing levels allow. Should funding and staffing fall to levels that affect the ability to meet expectations, the Pacific Council and the Federal ~~Parties-signatories to this Agreement~~ shall confer in an effort to adjust expectations and, if necessary, proceed to terminate this agreement (see "Life of Agreement" section below).

## Roles and Responsibilities

### **Pacific Council**

The Pacific Council is responsible under the MSA for the preparation of Fishery Management Plans (FMPs), FMP amendments, **Fishery Ecosystem Plan(s) (FEP)**, Stock Assessment and Fishery Evaluation (SAFE) documents, **Catch Share Program Reviews**, and other related actions for species under its authority that require conservation and management. The Pacific Council develops, analyzes the likely impacts of, and recommends management measures to NMFS that are the product of an open and transparent public process engaging all interested in the fishery and consistent with all applicable laws and regulations. The Pacific Council is responsible for documenting its fishery management process and providing the justification and rationale for its recommendations. Typically, Pacific Council staff are the lead drafters of required analyses to support these recommendations (e.g., NEPA, MSA, **Executive Order 12866**, **RFA**, etc.) (see "Inter-staff Workload and Communication Protocols" section below). Pacific Council **staff are responsible for ensuring Council** members ~~must be~~ **are** informed of the potential impacts of the actions they are recommending by ensuring all documentation and analysis necessary to support fishery management actions are available prior to final action on Pacific Council recommendations.

### ***An Open, Public, Transparent Decision-Making Process***

The Pacific Council is responsible for conducting a properly noticed, open process in an accessible public forum that encourages public input throughout all developmental stages and at the time of final decision-making, in accordance with the Pacific Council's Statement of Organization, Practices, and Procedures (SOPP) and Council Operating Procedure (COP) 1. This ~~is to include~~ **includes** the preparation of advance briefing ~~books~~ **materials** with notice of decision-making specifics scheduled for each ~~particular~~ Pacific Council meeting, together with informational material and public comment received in advance of publication deadlines. Pacific Council staff shall work with NMFS parties to ensure to the extent practicable that informational material produced by NMFS can be included in the advance briefing book. The Pacific Council is responsible for distribution of information about Pacific Council decisions to the public in a timely manner.

### ***Pacific Council Advisory Bodies***

The Pacific Council is responsible for appointing members to Advisory Bodies and conducting their meetings in accordance with COPs 2, 3, 4, 5, 6, 7, 8, and the SOPP document, including a Scientific and Statistical Committee (SSC), Management **and Technical** Teams, and Advisory Subpanels for each of the Pacific Council ~~FMPs~~ **FMP and FEP**, a Habitat Committee, an Enforcement Consultants Committee, a ~~Groundfish Allocation Committee~~, a Budget Committee, a Legislative Committee, and other permanent **and** ad hoc committees ~~(Figure 1)~~. The Pacific Council staff is responsible for facilitating input of scientific, technical, and policy analysis and

advice from these Advisory Bodies to Pacific Council Members and the public in the form of written statements ~~presented at Pacific Council meetings~~ and documents presented at Pacific Council meetings. Pacific Council Staff is also responsible for ensuring Council priorities and directions are addressed by the Advisory Bodies. Management and Technical Teams will generally be responsible for drafting analytical/decision documents used in routine management actions such as annual/biennial harvest specifications and management measures. Teams may also be asked to draft or contribute to similar documents for FMP amendments and regulatory amendments.

### ***Maintenance of Meeting ~~Preparation of an Administrative~~ Record***

As noted above, the Pacific Council is responsible for documenting its fishery management process and providing the justification and rationale for its recommendations. The full meeting record of each Pacific Council meeting is maintained at the Pacific Council office, and consists of the following:

1. The meeting notice and proposed agenda.
2. The approved ~~minutes~~ meeting records. The ~~minutes~~ meeting records summarize actual meeting proceedings, noting the time each agenda item was addressed ~~and~~, identifying relevant key documents, and transcripts of all motions. The agenda item summaries consist of a narrative on noteworthy elements of the gavel-to-gavel components of the Pacific Council meeting and summarize pertinent Pacific Council discussion for each Pacific Council Guidance, Discussion, or Action item, including detailed descriptions of rationale leading to a decision and discussions between an initial motion and the final vote.
3. Audio recordings of the gavel-to-gavel components of the Pacific Council meeting. Recordings include testimony, presentations, ~~and~~ discussions, and motions occurring at the meeting. ~~Recordings~~ Council meetings and are labeled by agenda number and time to facilitate electronic review of a particular agenda item. Links to the audio recordings are included in the meeting record. Advisory Body meetings are not recorded. Records of Advisory Body comments and recommendations are maintained through their written and oral reports to the Pacific Council.
4. All documents produced for consideration at the Pacific Council meeting, including (1) pre-meeting advance briefing ~~book~~ materials; (2) pre-meeting supplemental briefing ~~book~~ documents materials; (3) supplemental ~~documents~~ materials produced or received at the meeting, validated by a label assigned by the Pacific Council Secretariat and distributed to Pacific Council Members; (4) written public comments submitted to the electronic public comment portal or received at the Pacific Council meeting ~~in accordance with~~

~~agenda labeling requirements~~; and (5) electronic material or handout materials used in presentations to Pacific Council Members during the open session.

~~1. The Pacific Council Decision Summary Document. This document is distributed immediately after the meeting and contains very brief descriptions of Pacific Council decisions.~~

5. Draft or final analytical documents, such as ~~Environmental Impact Statements~~ those required by MSA, NEPA, EO 12866, RFA, inter alia or ~~Environmental Assessments as appropriate~~ those that inform ESA or MMPA consultations.

~~2. Pacific Council News. There are between two and four editions of the Pacific Council News produced each year. The Spring Edition covers March and April Pacific Council meetings; the Summer Edition covers the June Pacific Council meeting; the Fall Edition covers the September meeting; and the Winter Edition covers the November Pacific Council meeting. In some years the Summer Edition may be combined with the Spring Edition, and/or the Fall Edition Combined with the Winter Edition.~~

6. FMP, FMP Amendment, and Regulatory Amendment Transmittal letter and related documents, including documentation of deeming under MSA section 303(c) and consultations under MSA section 304(b)(3).

### ***Inter-staff Workload Planning and Communication Protocols***

~~It is recognized that~~ The workload for Pacific Council fishery management actions is a shared responsibility between the Pacific Council staff and the Federal parties to this Agreement. Prior to each Council meeting, leadership from Council staff and from the WCR will coordinate on action timing and respective workloads. It is important for the parties to provide the Council with an assessment of workload capacity to achieve the objectives identified in paragraph 1 of the Roles and Responsibilities above.

During the meeting agenda and workload planning portion of each Pacific Council meeting, the parties shall strive to define the primary party responsible for major MSA, NEPA, ESA, EO 12866, RFA, and other analytical documents the Pacific Council will rely on for decision-making and the Secretarial approval process.

For new actions, Pacific Council staff are the default leads for development of analyses to support the action. In addition to providing staff support on Council Management or Technical Teams, Project Teams, or Ad Hoc Workgroups, WCR leadership may provide WCR staff capacity for leading analytical development for certain actions consistent with NMFS priorities. Leadership from Council staff and from the WCR will also take into account the status of the analyses when scheduling final action, with the mutual goal of sufficiently complete analyses prior to Council final action.

The Pacific Council is responsible for convening conference calls with the Federal parties to the Agreement after each Pacific Council meeting to discuss workload follow-ups and ~~next~~ **subsequent** Pacific Council meeting preparations. ~~Informal inter-staff "project teams" composed of representatives of the parties to this Agreement can be created to plan and execute the~~ **In addition, the senior leadership of the Pacific Council, WCR, NWFSC, and SWFSC will all meet periodically to discuss workload planning.**

~~The~~ procedural and technical steps necessary for the Pacific Council decision-making and ~~regulatory NMFS rulemaking processes, and to collaborate on~~ **necessitate** the **development of** supporting documents for Pacific Council actions, including MSA ~~documents~~ **documentation** (e.g., FMP, FMP amendment), **Fishery Impact Statement, National Standard consistency, Rebuilding Plans, etc.**), NEPA documentation (e.g., Environmental Assessment, Environmental Impact Statement), information necessary for WCR to conduct **or evaluate consistency with** ESA Section 7 consultations **or determine consistency with MMPA coverage**, and documentation demonstrating consistency with all other relevant applicable laws and Executive Orders. ~~In addition, the senior leadership of the Pacific Council, WCR, NWFSC, and SWFSC will meet periodically to discuss workload planning~~ **Development of these documents or information to inform these documents requires coordination among the parties to this agreement and can be accomplished through the Management and Technical Teams, through informal inter-staff "Project Teams", or through Council appointed Ad Hoc Workgroups/committees. Management, Technical, and Project Teams are working groups and members are expected to contribute to the preparation of analyses and documents under development.**

**Pacific Council staff and NMFS WCR staff will collaboratively develop project planning tools (e.g., action plans, schedules etc.) to document clear roles and responsibilities, identify action collaborators including any necessary specialized expertise and typical collaborators such as NEPA coordinators and NOAA GC, identify timelines and project milestones such as review periods, and identify oversight responsibility as necessary. At their core, these tools will recognize the necessity of close coordination between Pacific Council staff and WCR staff for efficient action development and subsequent rulemaking and implementation; and coordination should begin as soon as practicable when the Council begins consideration of a new action.**

Pacific Council staff will be responsible for reviewing proposed implementing regulations **developed by NMFS staff** for Pacific Council-developed actions, and for making a recommendation to the Executive Director (and if appropriate, the Pacific Council) that regulations are deemed consistent with Pacific Council intent before transmitting the deeming decision and associated materials to NMFS. **Pacific Council staff are also responsible for updating the FMP once an amendment has been approved and making it publicly available in a timely manner.**



## ***NMFS***

NMFS reviews the Pacific Council's fishery management recommendations for consistency with all statutory and regulatory requirements and Executive Orders. NMFS approves, disapproves, or partially approves the Pacific Council's recommendations. ~~If a measure is disapproved, NMFS is responsible for providing~~ **NMFS will coordinate with Pacific Council staff on an appropriate date for the transmittal of recommended Council FMP amendments and supporting documents (regulations deemed consistent with Council action, proposed FMP language, NEPA documents, etc.). Consistent with the MSA, if a measure is disapproved, NMFS will provide** the rationale and justification for the disapproval. If measures are approved, NMFS is responsible for implementing, administering, and enforcing the management programs. ~~In accordance with MSA §302(f)(3) and (4),~~

**Within available workload capacity,** NMFS is responsible for participating in the development of Pacific Council actions through attendance at Pacific Council meetings, meetings of established Advisory Bodies, ~~specialized workgroups, project teams and Ad Hoc Workgroups,~~ **Project Teams,** workshops, and other informal collaboration, such as post-Pacific Council meeting conference calls, to coordinate follow-up actions.

## ***NMFS HQ***

~~NMFS Headquarters is responsible for:~~

- ~~Deciding whether to concur with the Regional Administrator's decision regarding approval/disapproval/partial approval of Pacific Council recommended actions;~~
- ~~Deciding whether to approve final rule implementing regulations;~~
  - ~~Determining that an appropriate NEPA document has been completed for the action;~~
- ~~Resolving with NOAA GC any issues elevated to Headquarters, including issues related to determinations of legal sufficiency; and~~
- ~~Providing guidance on FMP approval processes and underlying regulatory requirements.~~

## ***WCR***

WCR will assist the Pacific Council in the development of fishery management actions, by:

- ~~Attending Pacific Council meetings with representation in the Regional Administrator's Pacific Council Member seat, and with sufficient support~~ **Supporting and assisting Pacific Council staff to assist with in development of analytical documents and analysis, reviewing drafts of analytical documents, and providing information** necessary for Pacific Council decision-making.
- Ensuring **WCR** staff representation on appointed seats for Advisory Bodies listed in the Pacific Council COPs, or participation in Advisory Bodies as necessary if not a member of the Advisory Body, to provide information ~~and analysis~~ on biological, technical, policy, administrative, and legal requirements and issues, as appropriate. In the absence of direct OLE staff input on a Pacific Council action, it will be the responsibility of the



WCR to coordinate with OLE and ensure appropriate input occurs on Pacific Council actions.

- ~~Ensuring active staff participation in specialized work groups, project teams, or workshops leading to Pacific Council decision making, as well as on informal communication and collaboration efforts.~~
- Identifying a lead staff person in the Sustainable Fisheries Division to assist with coordinating other WCR/NOAA divisions, offices, and experts as needed **through formal project planning**, including **Permit and Monitoring staff**, Area Offices, the Protected Resources Division, OLE, NOAA GC, and NEPA and ESA experts. **Lead staff person will attend all project team meetings.**
- **Based on agency priorities, taking the lead in the construction of documents necessary to support Council decision making, including meeting the analytical mandates of the MSA, NEPA, RFA, and EO 12866, and providing these documents as appropriate in the advance briefing materials to Pacific Council meetings in which Pacific Council decision-making is scheduled.**
- Identifying and responding to Pacific Council and WCR staff resource needs, requirements, and/or limitations associated with the development, review, approval, and/or implementation of an action.
- **Determining if NEPA applies and if so, determining the appropriate level of NEPA analysis for Council actions.**
- Coordinating any interactions as appropriate between the Pacific Council and NMFS Headquarters and the various offices within NMFS Headquarters (e.g., Office of Sustainable Fisheries, Office of Science and Technology).
- Coordinating the review of Pacific Council actions and documentation within NWFSC, OLE, SWFSC, WCR, and NOAA GC as necessary.
- Providing advice, guidance, and information on fishery management policy issues and requirements as appropriate, including considerations of administrative costs and complexity, enforceability, timing of the development and implementation of an action, potential obstacles to the approvability of an action in advance of the Secretarial review phase, and regulatory simplification (i.e., how to keep measures and regulations as simple and clear as possible).
- **In coordination with Pacific Council staff, WCR NEPA coordinators, and NOAA GC, providing feedback to the Council as to the sufficiency of analytical documents pursuant to the mandates of MSA, NEPA, E.O. 12866, RFA and inter alia, prior to Council final action.**
- ~~Drafting proposed and final rules to implement approved measures, with the accompanying~~ regulatory language, consistent with the Pacific Council's action and intent; providing ~~such rules and~~ regulations to Pacific Council staff in a timely manner to allow for the Pacific Council's regulatory deeming process.

- Drafting proposed and final rules to implement approved measures **and deemed regulations.**
- Ensuring that all applicable laws and Executive Orders are addressed (e.g., Paperwork Reduction Act, Information Quality Act) and integrated into Coordinating with Pacific Council staff concerning the Pacific Council process as appropriate.
- Identifying the type **timing for formal transmittal** of NEPA analysis expected to be undertaken to support the Pacific Council actions **and associated documentation for FMP amendments and other major actions of** decision-making process (i.e., Categorical Exclusion, Environmental Assessment, or Environmental Impact Statement) after conferring with the Pacific Council staff.
- Taking the lead in the construction of NEPA documents in response to limited Pacific Council resources, and providing these documents in the advance briefing book to Pacific Council meetings in which Pacific Council decision making is scheduled.
- Conducting **any necessary consultations and permitting (i.e., Essential Fish Habitat consultations, and ESA)**, in a manner integrated with the Pacific Council process as appropriate.
- Conducting consultations under the ESA, in a manner integrated with the Pacific Council process as appropriate.
- Assisting Pacific Council staff in developing analyses that will aid NMFS with its economic analysis of regulations (e.g., RFA and EO 12866). In most instances, Pacific Council staff are to develop preliminary analyses for Pacific Council decision making that can be finalized by NMFS as part of the rulemaking process.
- Responding **Drafting responses** to public comments received during rulemaking **and the NEPA process**, in consultation with Pacific Council staff as appropriate.
- Implementing and administering approved **fisheries programs** and **program fishery** changes; working closely with OLE and NOAA GC to enforce regulations and defend approved **Pacific Council recommendations FMP amendments and promulgated regulations** in litigation.
- ~~Monitoring, projecting, and documenting fishing activity and catches, providing such information to~~ **In consultation with** the appropriate Pacific Council Advisory Body, **and its advisory bodies**, taking appropriate in-season and/or post-season actions **to modify fishery activity** relative to annual catch limits and seasonal catch quotas.
- In consultation with, or as a result of, Pacific Council recommendations or discussion, develop and implement emergency actions, interim actions, and Secretarial FMPs/amendments that respond to new information or management/statutory requirements as appropriate.
- ~~Notification to~~ **Consulting with** Pacific Council staff **or concerning** the ~~timing for formal transmittal of Pacific Council~~ **action and associated with regard to MSA Section (304)(b)(3), including** documentation ~~for FMP amendments and rationale of changes to proposed regulations.~~

### ***NWFSC and SWFSC***

The NWFSC and SWFSC staff will: attend Pacific Council meetings as necessary; provide for staff representation on appointed seats for Advisory Bodies listed in the Pacific Council COPs, or participation in Advisory Bodies as necessary if not a member of the Advisory Body; and provide scientific information and analysis relative to the development of fishery management actions. The NWFSC and SWFSC staff will also contribute to and review Pacific Council-developed documents supporting fishery management actions, and provide advice, data, modeling (e.g., ecosystem impacts models, stock assessments, cost-earnings modeling) and analyses ~~that promote the use of the best available scientific information as requested~~. NWFSC and SWFSC will provide support for stock assessments and STAR Panels, **to the extent possible**, as scheduled through the Pacific Council process. **Finally, the NWFSC and SWFSC will coordinate with the Pacific Council, WCR, and advisory bodies within the regional best scientific information available framework, including timely best scientific information available determinations prior to the Pacific Council's final adoption.**

### ***NOAA General Counsel, Northwest and Southwest Sections***

NOAA GC advises the Pacific Council and NMFS throughout the process of developing documentation, making and reviewing decisions, and provides legal advice to the WCR Regional Administrator confirming legal sufficiency of documentation and processes. **As described in 50 CFR section 600.235, a NOAA General Counsel attorney is the designated official for purposes of making determinations regarding recusal as described in that section, and consistent with regional procedures.** NOAA GC staff will attend Pacific Council meetings, will make every effort to participate in Pacific Council Advisory Bodies to which they have ~~agreed to be~~ **been** appointed, and will participate in meetings of other Advisory Bodies as needed, **subject to availability**. NOAA GC provides legal support to the Pacific Council, the SSC, and other Advisory Bodies of the Pacific Council, in coordination with NMFS. It is expected that a representative from NOAA GC will be involved, as necessary, **and subject to availability**, so that legal issues are addressed early in the process of developing potential actions. In the event of a legal challenge to a Pacific Council action that has been approved by NMFS on behalf of the Secretary of Commerce, NOAA GC is responsible for assisting the Department of Justice in defending such management actions and will consult with the Pacific Council and its staff in the process, as appropriate.

### ***OLE, West Coast Division***

OLE staff will provide active staff representation and participation in support of Pacific Council meetings and Advisory Body meetings as appointed, to provide enforcement-related advice to the Pacific Council, its various Advisory Bodies, and other entities, as appropriate. If an OLE staff person is not on an Advisory Body, OLE will coordinate with the WCR **or NOAA GC Enforcement Section** to ensure the WCR can provide appropriate input on Pacific Council actions. OLE will **coordinate with other members of the Council's Enforcement Consultants to**

ensure that any potential enforcement-related issues that may be associated with an action are identified as early as possible and addressed to the extent practicable.

### **Life of Agreement**

This Agreement will become effective when signed by all parties and will remain in effect unless and until it is terminated by one or more parties, or it is superseded by another agreement. Any party may terminate this Agreement by providing 90 days written notice to the remaining parties. This Agreement may be expanded to include other aspects of the development and implementation of management actions and may be amended at any time upon written agreement among all parties.

### **Statement of Commitment**

By signing below, I agree, on behalf of the organization I represent, to fulfill the roles and responsibilities outlined herein, and to support the efforts of the other parties.

### **Signatures**

DRAFT