

Considerations Relevant to the Process of Reinitiating Formal Section 7 Consultation on the Groundfish Fisheries of the North Pacific for Species Listed under the Endangered Species Act

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Background

At the June 2005 Council meeting, the Council discussed the possibility of reinitiating formal section 7 consultation under the Endangered Species Act (ESA) on listed species (e.g., Steller sea lions, whales, turtles, salmon). The federal fishery in Alaska currently operates under the Biological Opinions from a series of formal Section 7 consultations and associated incidental take statements:

- November 2000 Biological Opinion on the Fishery Management Plans and associated regulations for the groundfish fishery in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.
- October 2001 Biological Opinion on the federally managed pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska and parallel fisheries for pollock, Pacific cod, and Atka mackerel as authorized by the State of Alaska within 3 nm of shore.
- June 2003 Supplement to the October 2001 Biological Opinion on the pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.

The Council has previously been advised that programmatic consultations (and their resulting biological opinions) should be re-evaluated about every five years. The November 2000 Biological Opinion (FMP BiOp) on the Fishery Management Plans for the BSAI and GOA is now approaching 5 years old, although subsequent opinions have evaluated new information and thus kept the FMP BiOp current. The goal of this paper is to highlight the pertinent issues in order to assist the Council in determining whether reinitiation of consultation on the FMP BiOp is necessary or desirable.

In recent meetings, the public has testified before the Council to request the reconsideration of the current Steller sea lion (sea lion) protection measures. Some believe the FMP BiOp is out of date and no longer applicable to the current condition of the federal fisheries. In addition, some have voiced an opinion that new information on sea lions and fishery interactions has dated the analyses and conclusion in the FMP BiOp. For example, changes in how fisheries are prosecuted and changes in our understanding of certain groundfish stocks have occurred since 2000, plus changes have been made to some fisheries through informal consultation.

Numerous proposals have been made to the Council to amend the sea lion conservation measures considered in the October 2001 Biological Opinion (2001 BiOp). These include a request by the

St. George Traditional Council to review and reconsider protection measures around St. George Island including the haulout at Dalnoi Point. Other suggestions for changes include a proposal by the Alaska Board of Fisheries to open nearshore areas (state waters; 0-3 nm from shore) in Steller sea lion critical habitat to a state water pollock fishery in certain waters of the Central and Western GOA and in the Aleutian Islands. NMFS has determined that some of these types of changes would likely require formal consultation. To facilitate such changes, the Council may wish to consider the entire suite of changes it would like to make in the BSAI and GOA fisheries, then determine whether it would like to recommend proceeding with a new consultation (with appropriate consideration of current information on the biology of Steller sea lions and their critical habitat).

The Formal Section 7 Consultation Process Under The ESA

Under provisions of section 7(a)(2)¹ of the ESA, a federal agency that authorizes an activity that may impact a listed species must consult with NMFS (or the U.S. Fish & Wildlife Service) to ensure that its actions will not jeopardize the continued existence of that listed species nor destroy or adversely modify its designated critical habitat. In the case of federal groundfish fisheries, the Sustainable Fisheries Division of NMFS (OSF) represents the action agency, and consults with the Protected Resources Division (PRD) with determinations made by the Regional Administrator of NMFS for the Alaska Region. In this case (FMP BiOp), the “proposed action” under consideration is authorizing the Fishery Management Plans for the groundfish fisheries of the GOA and the BSAI and their implementing regulations. The Council’s role here would be to define the proposed action and recommend that the consultation process be reinitiated.

Once a consultation has already been prepared on an action (e.g., the FMP BiOp, or the 2001 BiOp), certain conclusions about impacts to listed species and critical habitat and other determinations under the ESA have already been reached. When reinitiating such consultations, the process is somewhat different than if no consultation had ever been conducted. For example, it has already been determined that certain federal groundfish fisheries adversely affect Steller sea lions and salmon (as articulated in the respective Biological Opinions) which is why an incidental take permit is provided to allow that take which would otherwise be unlawful under section 9² of the ESA. In contrast, the FMP BiOp concluded that the federal groundfish fisheries were not likely to have adverse impacts on other listed species such as whales and turtles.

Reinitiation of formal consultation must occur if (50 CFR ' 402.16):

¹SEC. 7.

(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.-

(2) 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 (hereinafter in this section referred to as an “agency action”) 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 by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

²SEC. 9.

(a) GENERAL.-

(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to-

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

- (a) the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) a new species is listed or critical habitat designated that may be affected by the identified action.

Thus, the Council may request reinitiation of formal consultation based on any of these four criteria; in the case currently being contemplated by the Council, the issues are primarily proposed new actions giving rise to effects not previously considered.

If a request for reinitiation of consultation is made for the FMP BiOp based on, for example, changes to the action, then the following information must be provided to NMFS, usually in the form of a “biological assessment”, in order to begin the official process of consultation³:

- A description of the action to be considered
- A description of the specific area that may be affected by the action
- A description of any listed species or critical habitat that may be affected by the action
- A description of the manner in which the action may affect any listed species or critical habitat and an analysis of cumulative effects
- Relevant reports, including any EISs, EAs, or biological assessments
- Any other relevant information on the action, the affected species, or critical habitat

The consulting agency (PRD) then determines if the package is complete, and notifies the action agency (OSF) that this information is sufficient to begin consultation. From the date that formal consultation is initiated, NMFS is allowed 90 days for the consultation and another 45 days to prepare and submit a biological opinion. This 135-day time period can be extended by mutual agreement. For a reinitiation of the FMP BiOp and reconsideration by the Council of the proposed action, the statutory time period likely will not be sufficient given the potential complexity of the process. Therefore, OSF would need to work out a schedule with PRD to complete the consultation and biological opinion.

For changes to the regulations or the FMPs, the Council will need to prepare an appropriate NEPA document (i.e., EA or EIS), which will describe the likely impacts to the environment. The EA or EIS can be prepared concurrently with the consultation process, and should include all of the required elements of a biological assessment. The consultation should be concluded before the final EA or EIS is issued. An integral part of this process and timeline is the presentation of a draft biological opinion to the Council for review and comment.

The outcome of the consultation will be a biological opinion that will state the opinion of the consulting agency as to whether or not the proposed action is likely to jeopardize the continued existence of any listed species such as Steller sea lions or result in the destruction or adverse modification of critical habitat. If the action is determined to jeopardize any listed species or

³ 50 CFR 402.12 and 402.14

adversely modify critical habitat, one or more reasonable and prudent alternatives (RPAs) would be provided by NMFS. The RPAs modify the proposed action such that jeopardy and adverse modification are then avoided.

For listed species likely to be taken incidental to the action, an incidental take statement (ITS) may be provided as long as that take does not jeopardize the species. The take authorized in an ITS is take that is incidental to the action and non-intentional. The ITS exempts the action agency (and those persons operating within the proposed activity; e.g. fishermen) from provisions in section 9 of the ESA that prohibit the take of a listed species. An ITS typically provides for the take of a species as either the amount or the extent of take. The groundfish fisheries currently operate under two incidental take statements. The ITS in the FMP BiOp covers fisheries other than pollock, Pacific cod, and Atka mackerel, while the Biological Opinion prepared in 2001 provides coverage for those three fisheries.⁴ Incidental take of salmon is provided for in the FMP BiOp.

FMP or Project Level Consultation

If the Council intends to consider substantial alterations to the current Steller sea lion conservation measures, it would be advisable for OSF to request reinitiation of consultation on the FMP BiOp. Given the time that has passed since the FMP BiOp was published and the perceived need to revisit the analyses made in that document, it would be appropriate to reconsider an FMP level consultation as opposed to a consultation on the three fisheries that were subject to the 2001 BiOp. This FMP level consultation likely would also address the impacts and analyses contained in the 2001 BiOp and its Supplement. This ultimately would allow for the issuance of a single Biological Opinion governing all of the groundfish fisheries authorized under the FMPs and their implementing regulations. NMFS prefers this approach to a more limited consultation on the 2001 BiOp.

Action Before the Council

Determine if the Council wishes to recommend reinitiation of section 7 consultation. Factors the Council may wish to consider include the applicability of the four “triggers” at 50 CFR 402.16 (see previous page of this memo), level of public support, time and staff resources, and other Council priorities.

Determine the Proposed Action

The first major task is for the Council to develop or define the proposed action. Determining the proposed action is an important step as it establishes the nature of the consultation and the bounds within which the consultation will occur. The Council should determine how this

⁴ The FMP level BiOp and the 2001 BiOp ITSs allows direct incidental take of Steller sea lions of 30 and 15 animals per year for all BSAI and GOA groundfish fisheries, respectively, and some unspecified level of sub-lethal harm; the ITS provides exemption from the prohibitions of ESA Section 9 as long as NMFS complies with specified Reasonable and Prudent Measures and associated Terms and Conditions contained in the ITS.

process will occur. Note that consultation is not initiated until the proposed action is developed. The current BiOps remain in force until the new opinion is completed and published.

Developing the proposed action could be done through a Council committee, such as the Steller Sea Lion Mitigation Committee (SSLMC), or it might be accomplished through a process involving the entire Council. Public participation should be an important consideration in the development of a new proposed action, if that is the desired approach. The Council could choose to recommend a consultation only on the action as is currently implemented, that is, the current FMPs and regulations, as amended since the FMP BiOp. The Council may choose a more broad reconsideration of all conservation measures that might be developed through a committee process as well as new scientific information on SSLs and their interactions with fishing activities. Other mechanics of the process should also be considered, such as whether the Council or its committee would issue a call for proposals, and what might be the bounds of, or justification required in, such proposals.

The initial process of developing the proposed action could take some time. Numerous Council meetings may be needed to develop the action. The Council could set a schedule for this step, or start the process and then determine a schedule at a subsequent meeting. After these steps are completed, the Council can review the proposals and determine what elements it wants to include. A starting point could be the action evaluated in the FMP BiOp, as modified in the 2001 BiOp and in subsequent amendments to the FMPs and regulations. The Council could then add or subtract elements that the Council feels are appropriate.

The Council could consider some or all of the elements that have been brought to the Council and discussed in recent years by industry, communities, the State, or the Council:

- Earlier start of the EBS pollock “A” season
- Change in P. cod fishing dates in the EBS
- Dalnoi Point SSL trawl closures on St. George Island
- Nearshore pollock fishery opportunities in AI region for the Aleut Corp
- BOF proposals for State pollock (parallel) fisheries in the central and western GOA and AI

An important issue that will need to be worked out early in the process is the role of the State of Alaska. One approach is for the Council to request cooperation of the State such that the State-managed parallel groundfish fisheries will be part of the proposed action. All other State fisheries, including State groundfish fisheries that are not parallel fisheries, could be addressed in the cumulative effects section of the biological opinion. However, the State could request that other State fisheries such as the Pacific cod, herring, and salmon fisheries also be included in the consultation. A compelling rationale could be made for this approach, although it would complicate the consultation. The benefits include section 9 coverage for the State as well as a more comprehensive approach to Steller sea lion conservation and recovery and fisheries management in Alaska.

As the Council considers the approach and develops its proposed action, it should be aware that the action must avoid jeopardy and adverse modification. The larger the deviation from the

current measures, the more likely that jeopardy issues could develop during the consultation phase. The NMFS PRD would participate in this process and would provide guidance to the Council or its committee on measures that will likely not be feasible under the jeopardy and adverse modification standards.

Since the FMP BiOp, new information has become available related to the causes of the current decline and its possible relationship to commercial fisheries. The most notable change is to the perspective on which areas around a rookery or haulout are most important. An expanded discussion of these factors can be found in the 2001 BiOp's 2003 Supplement in section IV(B). In general NMFS' guidelines for conservation are the following:

Closure areas:

- 0-3 nm closed 100%
- 3-10 nm closed 75%
- 10-20 nm closed 50%
- Critical habitat overall, including foraging areas closed 50%

Temporal dispersion:

- Seasonal (first half/second half) apportionment of catch at 50/50

Catch limitations (localized depletion):

- Critical habitat catch limits (or other) for those fisheries known to be concentrated in space and/or time

NMFS' hierarchy of concern (from most to lesser) by gear type has been trawl, fixed gears (pot and hook-&-line), and then jig gear (see 2001 BiOp's 2003 Supplement section IV(B)). NMFS also views juveniles and adult females as the most important component of the population when considering changes to conservation measures.

This process would likely involve the use of trade offs in order to maintain a sufficient level of conservation while providing for fishing opportunities in some areas and times that would not otherwise be available. It is not likely that the BUMP analysis tool⁵ will be used again, although the SSLMC started development of such a tool for review by the SSC, but stopped work at the Council's request. NMFS would participate in the process of evaluating proposed changes, but there is no trade-off analysis procedure currently available for use by the Council.

The Alternatives for Consideration

The no action alternative would represent the status quo, i.e., the current FMPs and implementing regulations. This includes those changes made since the FMP BiOp.

⁵ The BUMP analysis tool was a qualitative model used during the work by the Council's RPA Committee to evaluate the degree to which alternative fishery management measures would impact the Steller sea lion population trajectory. See DeMaster (2001) unpublished white paper.

The Council then may recommend several alternatives, including eventually its preferred alternative, or the proposed action, which would consist of the above action with changes as proposed by the Council. In order to comply with the requirements of NEPA and other laws, the Council may need to consider several alternatives.

Council Involvement in the Consultation

While the consultation would be officially between Sustainable Fisheries and Protected Resources Divisions, the Council would be integrated into the process. The Council could use its SSLMC to work out the details in the proposed alternatives. In this case, NMFS PRD and OSF staff would participate in that committee's activities.

Other Issues to Consider

SSL Recovery Plan

NMFS intends to complete the revised Steller Sea Lion Recovery Plan before finalizing the next biological opinion. The recovery plan will provide a context for recovery such that decisions about jeopardy and adverse modification can be made with the knowledge of the recovery criteria and the recovery strategy. The draft plan is expected to be available for review by early 2006. The recovery plan will be helpful to the Council regarding necessary actions to facilitate recovery of sea lions and the most important threats limiting recovery.

Redesignation of sea lions under the ESA

The Steller sea lion recovery plan will identify delisting and downlisting criteria regarding the endangered and threatened status of the western and eastern populations of Steller sea lions. A status review may be recommended in the recovery plan. This process of finalizing the recovery plan and initiating a status review will take some time, and could occur at the same time as the consultation process.

Conservation of Steller sea lions

It is important to consider that during the consultation, not only will changes to the current action be considered, but also those actions that would be necessary to avoid jeopardy and adverse modification. Since the last consultation, there have been many changes to fish stocks, new research publications and findings, and changes to the action such as the TAC setting process, etc. Also there are new data on the structure and the dynamics of the Steller sea lion population, and the Recovery Plan will provide additional insights into important measures for future SSL management. Combined, this information could lead to new approaches to groundfish fishery management in the Alaskan EEZ. All of these issues would be integral to the process of reinitiating consultation on the FMP BiOp.