

2.2 Special Considerations

2.2.1 Exemption from Drafting Recovery Plans

Section 4(f)(1) of the ESA requires NMFS to develop and implement recovery plans for species listed as endangered or threatened, “*unless [the Service] finds such a plan will not promote the conservation of the species.*” (ESA, section 4(f)(1)) There are very few acceptable justifications for an exemption from having a recovery plan, and a determination that an exemption is warranted should be well documented in the administrative record. The determination that a plan will not promote the conservation of the listed species must be approved by the Assistant Administrator for Fisheries (NMFS). Foreign species (species whose historic and current ranges occur entirely under the jurisdiction of other countries) qualify for the exemption.

The following justifications may exempt species from having a recovery plan:

- Delisting is anticipated in the near future because (1) the species is presumed to be extinct or (2) the species is determined to have been listed in error, possibly due to new taxonomic or status information.
- The species’ current and historic ranges occur entirely under the jurisdiction of other countries, i.e., it is a foreign species. Generally, the U.S. has little authority to implement actions needed to recover foreign species, and therefore, a recovery plan would not promote the conservation of these species. While importation into the U.S. and the commercial transportation or sale in foreign commerce of such species by any person subject to U.S. jurisdiction are prohibited unless authorized, the taking of listed species is prohibited only within the U.S., within the territorial seas of the U.S., and on the high seas. The management and recovery of listed foreign species remain the responsibility of the countries in which the species

occur, with the help of available technical and monetary assistance from the U.S. Other circumstances that are not easily foreseen, but in which the species would not benefit from a recovery plan.

In the past, existence of an alternative plan was used to justify an exemption from having a recovery plan, but this guidance considers adoption of an alternative plan a streamlining method of recovery plan preparation (see section 2.3.2.1, Use of Alternative Recovery Plans).

It should be noted that an exemption does not exempt NMFS from preparing for recovery of the species. At a minimum, a recovery outline (section 3.0) should be prepared for every domestic listed species.

2.2.2 Deferring Recovery Planning

There are some circumstances in which it may be necessary to defer the development of a recovery plan via an exemption approved by the Headquarters office. A plan cannot be deferred indefinitely, however, and a recovery outline, however general, should be prepared if at all possible. Circumstances in which a plan may be deferred include the following:

- A need exists to resolve taxonomic questions because new taxonomic information has come to light since listing and the resolution of the taxonomic question is expected to have a substantial bearing on the recovery planning process.
- The best available scientific information indicates that the species may be extinct, and therefore development of a recovery plan is not prudent unless and until the species’ existence/extinction is confirmed. If the species is later discovered to exist, recovery planning should commence promptly. In the meantime, a recovery outline can guide surveys and should include a contingency plan in the case of re-discovery of the species. In this case, the species may be only temporarily exempt from the recovery planning requirement.

2.2.3 Transnational and Transboundary Species

For purposes of this guidance, transnational species are those listed species with geographical ranges both within the U.S. and within one or more international borders. This can be due to migration or because the resident population straddles the border of the U.S. and one or more other countries. For transnational species, it is important to consider appointing one or more recovery team members from the other nation(s). If a representative from the other nation(s) is not appointed to the team, regular communication and cooperation with appropriate agencies in the other nation is important. It is also possible that individuals or representatives of agencies or interest groups from these nations be invited to attend recovery team meetings as observers. For the development of reclassification or delisting criteria, an early decision must be made as to whether individuals of the species that occur outside the U.S. or management actions taken outside the U.S. are necessary in order to achieve the recovery goal (keeping in mind that recovery criteria should be based on the biological needs of the species). If management actions outside the U.S. are necessary, early and continuing international cooperation is very important.

Transboundary species comprise a special case of transnational species. Canada, Mexico and the U.S. are all parties to the Memorandum of Understanding Establishing the Canada/Mexico/United States Trilateral Committee for Wildlife and Ecosystem Conservation and Management (Trilateral Agreement; Appendix D). Article III of the Trilateral Agreement states that the Trilateral Committee will... “develop, implement, review and coordinate specific cooperative conservation projects and programs; and integrate its projects and programs into the conservation priorities of the country in which those projects and programs take place.” The FWS International Affairs Office - Division of International Conservation coordinates the Trilateral meetings, although NMFS is also involved. For NMFS, questions with regard to treatment of transboundary species

can be directed to the Office of Protected Resources. (See the list of phone numbers in the front of this guidance.)

A similar agreement exists between Canada and the United States, entitled the Framework for Cooperation between the U.S. Department of the Interior and Environment Canada in the Protection and Recovery of Wild Species at Risk (Framework; Appendix E). The Framework aims to exchange information and technical expertise, evaluate the status of species, promote increased partnerships between the countries, identify species needing bilateral action, and “promote the development and implementation of joint or multi-national recovery plans for species identified as endangered or threatened.” Starting in 2001, both NMFS and Department of Fisheries and Oceans (DFO) Canada are participating in bilateral Framework meetings hosted by DOI and Environment Canada in order to facilitate bilateral protection and recovery of marine species. The FWS contact for the Framework is the Washington Office of Endangered Species, which should be kept informed of new recovery efforts with Canada to facilitate coordination. NMFS headquarters may be contacted regarding questions on marine species, but NMFS has been working through FWS on Framework issues.

2.2.4 Species Occurring on Tribal Lands

Although Native American Tribes share the general goal of conserving endangered and threatened species on their lands, Tribal lands are not Federal public lands, and NMFS has special responsibility to address listed species in accordance with the following principles:

- Respect Tribal rights
- Acknowledge the treaty obligations of the United States towards Tribes
- Use the government-to-government relationship in dealing with Tribes
- Protect natural resources that the Federal government holds in trust for Tribes
- Solicit and utilize the expertise of affected Indian Tribes by having tribal representation on recovery teams, as appropriate

- Work cooperatively with affected Tribes to identify and implement recovery

Departmental and Executive policies related to tribes are contained in Appendix F and include the following: Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (Department of the Interior and Department of Commerce 1997); American Indian and Alaska Native Policy of the U.S. Department of Commerce (1995); Executive Order on Consultation and Coordination with Indian Tribal Governments (2000); Executive

Order on Indian Sacred Sites (1996); Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments (1994; 59 FR 10877).

One example of cooperation between Tribes and NMFS is the partnership between the Skagit System Cooperative and the NWFSC Watershed Program to recover threatened chinook salmon in the Skagit River Basin (see Box 2.2)

2.2.5 Integration of MMPA and ESA

All marine mammals are protected under the Marine Mammal Protection Act (MMPA). The

Box 2.2 - Working with Local Tribes to Recover Salmon in the Pacific Northwest

In order to recover threatened chinook salmon populations in the Skagit River Basin, Washington, a partnership was formed between the Skagit System Cooperative and NMFS. The Skagit System Cooperative (SSC) is the fishery management agency for the Swinomish Tribal Community, Upper Skagit Indian Tribe, and Sauk-Suiattle Indian Tribe. The SSC approached the Watershed Program of NMFS Northwest Fisheries Science Center (NWFSC) about working together because they shared common goals. A Memorandum of Understanding (MOU) was developed as a formal vehicle to streamline cooperation.

In particular, the MOU identified the mutual goal of cooperatively developing a life-cycle model that relates the production of juvenile chinook salmon to habitat characteristics in the Skagit River Basin. Both parties share equitably in the collaborative tasks outlined in the MOU: (a) developing the life-cycle model (including necessary research), (b) collecting and analyzing field data necessary to parameterize and update the model, and (c) designing additional model elements that incorporate further biological processes and life-history patterns, as needed. It is the shared project goals and envisioned products that drive this type of relationship.

This partnership works well for several reasons. First, each party has unique expertise necessary to obtain the common goal. The SSC envisioned developing a chinook life cycle model in 1995 and has been conducting habitat and juvenile chinook life history studies in freshwater and estuarine areas of the Skagit since that time. The NWFSC has staff that are specialized in modeling and communicating results to a wide audience. In addition, NWFSC provides a means of collecting data in important unsampled strata i.e., Skagit Bay offshore habitats. By cooperating, the job gets done faster and more thoroughly than it otherwise would. Without NWFSC, a major sampling strata would not be sampled. Without SSC, most of the rest of the data would not be collected. Together, they build a better model. This effort is also successful because it is being conducted as part of the larger Puget Sound recovery planning effort for Pacific salmon.

As tribute to the success of this partnership, within a short time after the MOU was drawn up, the SSC and NWFSC had started multiple field projects, and were well on the way to completion of the life history model. The partnership continues to expand its ideas on joint projects to address threatened populations of juvenile chinook salmon in the Skagit River Basin and beyond.

MMPA specifies that conservation plans should be completed for any species or stock designated as depleted, which includes those that are listed as endangered or threatened under the ESA. The MMPA defines “depleted” as a marine mammal species or stock that is below its optimum sustainable population (OSP) level or that is listed as threatened or endangered under the ESA. The OSP level is the number of animals that will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Thus, in some cases, there is a different threshold for a depleted designation under the MMPA than for a threatened or endangered listing under the ESA.

The MMPA requires that conservation plans be modeled after ESA recovery plans; therefore, all MMPA conservation plans should follow the format of an ESA recovery plan, as described in this guidance. For those marine mammals that are depleted due to their listing under the ESA, a recovery plan can serve the dual purpose of compliance with the requirement for a recovery plan under the ESA and for a conservation plan under the MMPA. For marine mammal stocks that are depleted but listed under the ESA, the guidance for recovery plans remains consistent with requirements for a conservation plan. Senate report 100-592 indicated that managers should include the basic components of a recovery plan as specified in section 4(f)(1)(B) of the ESA, as well as the following:

- (1) an assessment of the status of the species or stock and its essential habitat;
- (2) a description of the nature, magnitude, and causes of any population declines or loss of essential habitat;
- (3) an assessment of existing and possible threats to the species and its habitat;
- (4) a discussion of critical information gaps;
- (5) a description and discussion of research and management that could be undertaken to meet the objectives of the plan; and
- (6) a schedule for implementing the

research and management actions identified in the plan.

This direction for conservation plans comports with the requirements of a recovery plan. The assessment of status, trends, habitat needs, causes of decline, threats, and critical information gaps can be included in the Background section of the plan. Research and management actions can be included in the Recovery Action Narrative section of the plan. The schedule for implementation of the plan can be covered in the Implementation Schedule of the recovery plan. Since the goal of OSP under the MMPA may be “higher” than that of delisting under the ESA, a recovery plan would include goals and criteria for delisting under the ESA and may also include goals, criteria and actions for attaining OSP.

Take reduction plans, which are developed pursuant to section 118 of the MMPA to address incidental mortality and serious injury of “strategic”³ marine mammals affected by commercial fishing operations, should be incorporated into recovery/conservation plans when completed. More information on take reduction plans can be found at 50 CFR part 229, which provides general guidance for implementing section 118 of the MMPA.

It should be noted that an enhancement permit under the MMPA can only be issued if the taking or importation is consistent with an MMPA conservation plan or an ESA recovery plan. Thus, recovery plans for marine mammals should address issues such as rescue, rehabilitation, captive breeding etc., for which requests for enhancement permits can be anticipated.

³ The term “strategic stock” means a marine mammal stock (1) for which the level of direct human-caused mortality exceeds the potential biological removal level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the ESA within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA, or is designated as depleted under the MMPA.

2.3 Organizing the Recovery Planning Effort

Recovery planning requires NMFS to organize a process addressing both inside-NMFS and outside-NMFS involvement. For the simplest planning efforts, it may be sufficient to approach organizational issues in an ad hoc fashion. For more complex efforts, however, these organizational issues should be explicitly addressed in order to identify clearly expectations, responsibilities, and lines of communication. It is also important to put together a timeline for completion of key steps, which includes (and may help set) the frequency of public meetings and plan reviews, and time limits for each. The majority of these considerations will be addressed in the Recovery Outline (section 3.0).

The inside-NMFS logistics include such issues as the following:

- Who will be NMFS' lead region/recovery biologist for the species?
- What type and level of coordination needs to occur among recovery, consultation, and permitting biologists, etc.?
- What other program or agency personnel (e.g., Refuges, Fisheries, Contaminants, Law Enforcement, National Ocean Service, Marine Sanctuaries, etc.) should have involvement in recovery planning and implementation?
- Who will write, edit, or review the plan?
- Who will facilitate meetings (should an outside facilitator be brought in)?
- Who will maintain administrative files, including data and comments provided by experts and stakeholders?
- How can communication and coordination best be facilitated among the Field, Regional, and Headquarters Offices, and other agencies, including foreign agencies, when appropriate?
- Who will be the NMFS contact person for stakeholder inquiries?
- Who will need to review the plan before it can be approved and how much time can be devoted to review?

Involving experts and stakeholders outside NMFS in the planning process has become increasingly important. Whether it be through informal contacts, information-sharing sessions, task forces, a recovery team, or other means, the relationships, roles, and responsibilities among planning parties again should be explicit. Some of the outside-NMFS organizational considerations include the following:

- Does the species or ecosystem occur on Tribal lands/waters or cross international borders?
- Who will be integrally involved in plan preparation, and who will provide peer reviews?
- What stakeholders will be involved at which stages in the effort and how?
- What are the most appropriate methods for contacting/involving stakeholders?
- Do you need to plan time for public meetings?
- What is the most appropriate length of time for public comment periods?
- Should a facilitator be used in running stakeholder meetings?

The outcome of all these considerations should be a proposed organizational structure and timeline that can be used to assign or negotiate roles and responsibilities with all those involved in the planning effort, and to plan for their completion. For more information on recovery teams, see section 2.3.3, Appointing a Recovery Team, and 4.2, Managing a Recovery Team.

Box 2.3 - The Recovery Planning Process for Pacific salmon

NMFS has developed a unique strategy for recovery planning for Pacific salmon and steelhead in the four states of Washington, Oregon, California, and Idaho. Eight recovery planning areas, or domains, have been identified throughout the West Coast that encompass all 26 listed ESUs of Pacific salmon and steelhead. A Recovery Science Review Panel (RSRP) has been appointed, comprised of scientists with national and international reputations. The RSRP is chartered to ensure that recovery plans use consistent and well accepted ecological and evolutionary principles and to oversee peer review of all recovery plans.

NMFS has appointed Technical Recovery Teams (TRTs) comprised of scientists to delineate populations, develop de-listing criteria, and to analyze factors that limit species survival. NMFS will work with state, tribal and local interests to craft a recovery plan development process specific to each domain that refines the TRT de-listing criteria into recovery goals, develops specific actions to achieve recovery goals, and estimates the time and cost for recovery. This process will build upon the many existing state and local conservation and recovery efforts already underway. The structure and timing of efforts will depend to an extent on what processes are underway in a given area.

In some cases it may be appropriate for NMFS to establish a Recovery Team by adding individuals to the TRT who possess a wider range of expertise (such as policy, economic analysis, land use planning, etc.) or represent ongoing planning efforts. In other cases it may be appropriate to appoint a separate policy-oriented Recovery Team and have the TRT serve as science advisors to that team. In still other cases, it may be that stakeholder lead efforts have matured to a point where it is unnecessary to appoint a Recovery Team for development of the recovery plan. In such cases, the TRT could serve as science advisors to the stakeholder effort and that effort can submit a recovery plan as an "Alternative Recovery Plan" for adoption by NMFS.

The key to this planning is to build existing efforts and develop new efforts where needed, and do so in a manner that involves NMFS sufficiently to ensure that recovery plans are consistent with the ESA and this guidance..

2.3.1 Coordination

In order to heed the direction in the 1994 Interagency Policy on Recovery Plan Participation and Implementation of the ESA (FWS and NMFS 1994c) that recovery plans be completed in a timely way, e.g., within two and a half years of listing, the planning process must run as smoothly as possible. This indicates a clear need for effective leadership and for accountability in terms of plan production and quality. As in any type of project, this outcome is best achieved by identifying someone as the Recovery Plan Coordinator. The Recovery Plan Coordinator should be designated prior to beginning any recovery plan, and this individual's role should be clearly conveyed to

everyone involved in the planning process. The Recovery Plan Coordinator's standard role is to be the key person involved in all aspects of the planning process to the degree necessary to keep recovery plan development on course.

In some cases, the Recovery Plan Coordinator will be the biologist who listed the species; this individual will then go on to prepare the recovery outline and write the recovery plan; in other cases, the Recovery Plan Coordinator will not be directly involved in preparing planning documents but will work closely with plan authors and contributors. For complex, high-profile species, a full-time species coordinator may be designated, as has been done for the white abalone. For species with recovery teams, the Recovery Plan Coordinator will typically be the Recovery Team Liaison (and,

in some cases, the Team Leader). Some situations may require a small group of coordinators rather than a single person; in these cases, individual roles and responsibilities should be clearly spelled out before embarking on the planning project. It is important to note that the Recovery Plan Coordinator for a specific plan may or may not be the person designated in the field or regional office as the Recovery Coordinator (at the regional level, this role may involve administrative and review functions rather than coordination of specific projects, but each office is different). In any event, the key consideration is that someone be assigned to take responsibility for seeing the recovery plan through both the production and review phases to a timely completion.

Note that it is important, in terms of accountability, for the Recovery Plan Coordinator to be a NMFS employee, even if the plan is being contracted out or is in any other way being produced out of house. In cases where primary responsibility for producing and implementing a recovery plan has been delegated to a state agency or other organization, it may be appropriate to have the NMFS Recovery Plan Coordinator work hand-in-hand with a co-coordinator from that agency or organization. In all cases it is critical to have a key NMFS person responsible for ensuring that the process does not stall, that communication among all involved parties is open and constructive, and that planning products meet NMFS standards. These requirements clearly demand organizational skills, an ability to work well with others, a willingness to take responsibility for outcomes, and a conviction that the recovery plan will serve the best interests of the species.

2.3.2 Plan Preparation

Recovery plans can be written by any of several different entities, depending on the situation. In fact, all or part of a recovery plan may have been written by a different entity and adopted by NMFS. It should be borne in mind that, whoever writes the plan, the ESA recovery plan is a NMFS document and NMFS is ultimately responsible for its content. The following are

considerations in determining who should write a recovery plan.

2.3.2.1 Use of Alternative Recovery Plans

In some cases, an alternative plan, already existing or about to be completed, serves the purpose of a recovery plan. An alternative plan is usually written by another agency or organization, but must be the functional equivalent of a NMFS recovery plan. In the past, existence of an alternative plan was used to justify an exemption from having a recovery plan, but this guidance considers adoption of an alternative plan a streamlining method of recovery plan preparation. Alternative plans must have the elements of a recovery plan required by the ESA (site-specific management actions necessary to achieve the plan's goal; objective, measurable criteria for meeting that goal; and estimates of the time and cost required to carry out those measures) as well as those required by policy directives and this guidance. Alternative plans that do not meet these requirements may be adopted as recovery plans once appropriate changes are made to ensure that they meet the requirements. In some cases, these changes are most appropriately made in the plan itself; in others they may be made in the form of an addendum. Alternative plans must undergo public review and comment.

2.3.2.2 Use of NMFS Biologists to Write Recovery Plans

In some cases it may be deemed efficient to have an individual or a small group of individuals within NMFS, often experts on the species, write a recovery plan. NMFS biologists are frequently used when a species has a small range or exists largely on publicly owned or managed land and waters and the number of potential stakeholders is small, making coordination less complex. A NMFS biologist may also write a recovery plan when the biologist is one of few experts on the species.

In the case of publicly owned lands, such as state parks, conservation areas, national marine sanctuaries or national wildlife refuges, the mission of the management area may coincide

with the recovery of the species. This may also be the case with privately owned lands, such as trusts and preserves. In these cases, complexity and conflict are likely to be low, and it is possible for NMFS biologists to write effective recovery plans, particularly for species with a small range.

It is tempting to assign NMFS biologists to write recovery plans for the sake of efficiency, even if it is not the most appropriate means of completing a plan for that species. However, too many recovery plans are not used because they do not have the buy-in of those needed to carry out recovery actions. It is important to ensure that the long-term benefits of recovery implementation are not sacrificed for a quick completion of a recovery plan. In any case, it is essential that authors of recovery plans coordinate with all stakeholders.

2.3.2.3 Use of Contractors to Write Recovery

Box 2.3.2.4 Decision Point: Recovery Team or Not??

Consider factors such as:

- the species' range (wide-ranging or endemic),
- whether there are controversial issues involved, and
- the scope of the plan (single species, multi-species, ecosystem focus)

Recovery teams are often appropriate for more wide-ranging species, more controversial issues, and larger-scope plans.

Plans

In some circumstances, it may be more expedient to hire a contractor to write a recovery plan, particularly if agency staff are not available. Contractors hired to write recovery plans may be affiliated with state conservation agencies, universities, museums, aquaria, private conservation organizations or private contracting businesses with relevant expertise. These

individuals are considered independent scientists or specialists and are chosen for their expertise. When writing the plan, they do not represent the group with which they are otherwise affiliated. A draft plan does not necessarily reflect the views or positions of NMFS or any other involved agency. The plan a contractor submits may be accepted in full or in part by the Regional or Assistant Administrator, but the agency is under no obligation to do so. Contractors are usually hired through a contractual agreement. As in the case of agency biologists writing plans, it is imperative that individuals who are contracted to write a recovery plan coordinate with stakeholders, including private landowners, land managers, users of the areas in which the species occurs, and other interested parties. In cases where it is determined not appropriate for a contractor to coordinate with the stakeholders, NMFS must carry out these activities appropriately, and the contract should clarify the roles of the contractor and NMFS with respect to these activities.

2.3.2.4 Use of Recovery Teams to Write Recovery Plans

Recovery teams are often used to write recovery plans, especially when numerous parties have expertise or interest in the species for which the plan is being written. Recovery teams can bring together the diversity of expertise most appropriate to understanding a particular species' endangerment and for devising an effective recovery program. Recovery teams may also provide stakeholders and jurisdictions (including State, Tribal, and local governments) the opportunity to participate in the planning and implementation of actions necessary to recover and sustain the listed species; ensure that a diversity of options for the recovery strategy are considered; and help to develop plans that are practical and feasible and that minimize socioeconomic impacts (although they must lead to recovery of the species within a reasonable timeframe).

The decision on whether or not to appoint a recovery team depends on the specific circumstances of the species. Generally, teams are appropriate where there is greater public interest

(i.e., more and diverse stakeholders, controversial issues) and/or a wider species' range. Decisions on whether to have a recovery team and, if so, potential roles of team members in plan development and implementation may be addressed in the Recovery Outline (see section 3.0, The Recovery Outline, and Box 2.3.2.4).

Recovery teams have numerous advantages in that they do the following:

- obtain diverse opinions and ensure dialogue regarding important recovery issues;
- increase the depth of expertise (biological and otherwise) contributing to plan development;
- provide a mechanism for multiple agencies and stakeholders to interact;
- address and resolve controversial issues early in the process;
- impart greater credibility to decisions made by NMFS regarding the species' recovery program;
- develop advocates for the recovery program; and
- facilitate the implementation of recovery actions.

Disadvantages of recovery teams may include the following:

- a tendency for unwieldy and nonproductive meetings, especially if the team is large or includes persons who view their special interests as more important than the recovery of the species (see section 2.3.3.2, Recovery Team Composition);
- the investment of considerable energy and resources;
- difficulties bridging knowledge gaps among scientists, agency representatives, and other stakeholders;
- more complications in recovery plan development due to diverse viewpoints and sheer number of opinions;
- difficulty managing the dissemination of information (for example, members may inadvertently share incomplete or

inaccurate information with the public or media); and

- potential for misunderstandings if all team recommendations are not accepted by NMFS.

Guidance concerning the appointment and management of recovery teams is provided in sections 2.3.3, Appointing a recovery team, and 4.2, Managing a Recovery Team.

2.3.2.5 Use of Informal Meetings and Groups

Whether NMFS biologists, contractors or recovery teams are writing the recovery plan, informal meetings and groups can be useful to share information, accomplish planning tasks, explore multiple points of view, and generate interest in the planning endeavor (see Box 2.3.2.5). Several options are provided below:

- Work with experts and interested parties on a one-to-one basis. Many times, this is the most productive way for the Recovery Plan Coordinator and/or for the plan author to proceed.
- Begin the recovery planning process with a "kick-off" meeting or workshop in which experts and other key contributors can get acquainted, share information and ideas, express opinions, and help establish a baseline understanding of the species with respect to recovery needs and opportunities.
- Use informal meetings to invigorate the process at various points during plan development. These meetings (including conference calls, video conferencing, or any other mode of group discussion) can be task- or topic-oriented; they can help keep the planning process moving forward; and they can be more or less inclusive of individuals with various expertise and interested parties. Examples include PVA workshops, meetings to discuss research findings, single-issue discussions, meetings with state agencies to discuss cooperative efforts, and meetings to review draft documents.

- Set up informal planning groups, task forces, topical committees, or communication networks to address specific planning issues or to obtain various types of input.

It should also be recognized that these informal approaches require a significant degree of initiative and coordination, which should be anticipated when developing schedules and budgets and setting out milestones. Informal meetings and groups hold the potential for being much more fluid, inclusive, and focused than recovery teams, but they are not necessarily less time consuming. Good communication is all-important, and follow-up is vital, i.e., meeting notes should be shared and entered into the administrative record, and participants should be apprized of their continuing roles in the planning process. Also, if the plan is being prepared by a contractor or other independent party, this individual should be involved in or kept informed of all substantive discussions.

Bear in mind that recovery teams and informal planning meetings or groups are not mutually exclusive. Recovery team members may join larger recovery meetings when desired; recovery

teams can work alongside task forces; team members can be consulted as individual experts, etc. For any given planning project, the variety of expertise and richness of experience should be tapped in the most effective way possible and with a clear purpose in mind.

Although these less formal avenues for working with plan contributors and with other planning partners are more dynamic than a standing advisory body (like a recovery team - see section 2.3.3) and can provide a means of nurturing strong working relationships, they cannot function like a Federal Advisory Committee. According to the Federal Advisory Committee Act (FACA), NMFS cannot ask for and cannot accept consensus recommendations; NMFS cannot convene regularly scheduled meetings with the same group of invited participants; and none of these groups or individuals can be given decision making authority without going through very specific procedures. It is important to understand the provisions of FACA before any of the above options are used. Within this legal constraint, however, the informal approach can be an effective way of garnering individual viewpoints and new information while avoiding some of the pitfalls associated with recovery teams, e.g., conflicts of interest, size limitations, difficulties in gaining consensus, and the time constraints of team members.

Box 2.3.2.5 - Use of informal planning by a Service Biologist: Endangered Wood Stork Recovery Planning

To write the recovery plan for the wide-ranging, cross-regional endangered wood stork (*Mycteria americana*), the FWS lead biologist prepared an outline of the issues (including controversial) that needed to be addressed, held a meeting with all persons who knew anything about the species needs, and developed a draft plan from what was said at the meeting. The draft plan was distributed for review and comment to everyone who attended the meeting, in addition to anyone else who he thought would be affected and would have input. The draft and very successful approved plan were written in-house.

As an example of the concerns about violating FACA, in 1994, the 11th Circuit Court of Appeals upheld a District Court holding that the combined findings of several scientists, initially requested individually by the FWS to assess the current status of the Alabama sturgeon, constituted a scientific advisory panel without following FACA procedures, and there had been a violation of FACA (*Alabama-Tombigbee Rivers Coalition v. Dept. of Interior*, 26 F.3d 1103 (11th Cir. 1994)). Because of this violation, the court upheld an injunction preventing the FWS from publishing, employing, and relying on the panel's report, either directly or indirectly, to determine whether to list the Alabama sturgeon. This decision was made, not because the science was invalid, but because it was developed and introduced into the process without following FACA procedures.

2.3.3 Appointing a Recovery Team

2.3.3.1 Statutory and Policy Basis

According to section 4(f)(2) of the ESA, NMFS, “in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons.” Section 4(f)(2) also exempts appointed recovery teams from the requirements of the Federal Advisory Committee Act (FACA; see Section 1.2). Most appointed groups whose purposes are to develop or implement recovery plans qualify as recovery teams and thus are exempt from FACA constraints.

Although appointed recovery teams are specifically exempt from FACA provisions, outside of the recovery team setting one must carefully consider the provisions of FACA when seeking *advice* or *recommendations* from more than one individual at a time in the development and implementation of recovery plans.

2.3.3.2 Recovery Team Composition

The composition of a recovery team is crucial to its effectiveness. Team membership and team size are two key considerations in ensuring a functional recovery team.

Identification and Selection of Team Members – Recovery teams usually consist of a Team Leader, a Team Liaison, and a manageable number of team members (see Team Size below). Although diversity of membership is encouraged, recovery team membership should be based on relevant expertise, not affiliation, and all members of the recovery team must be committed to the recovery of the species in a timely manner. Team members should be selected for their knowledge of (1) the species, closely related species, ecosystem, or relevant disciplines, e.g., local planning, ecology, genetics; (2) the threats contributing to the status of the species, e.g., resource extraction operations, forestry, hydrology; or (3) various elements of recovery plan design or implementation, e.g., land-use planning or knowledge of alternatives to reduce socioeconomic effects of implementation. Teams

are to be composed of recognized experts in their fields and are encouraged to explore all avenues to achieve recovery. Membership should include people with experience in managing species and in restoring and managing habitats. Additional considerations when selecting team members include (1) the ability to work together in team situations and (2) the ability to make time available to fulfill the needs of the recovery planning time frames.

Team Leaders and Team Liaisons – Although the Team Leader and the Team Liaison may be the same person, the Team Liaison is always a NMFS employee while, in many cases, the Team Leader is not a NMFS employee. The individuals in these positions work closely together to handle logistics of meetings, communication among members and between members and the agency, and ensure that the team stays on schedule. Both must have good organizational and leadership skill and have the ability to maintain a productive atmosphere for the recovery team. The Team Leader particularly is generally chosen because s/he is well respected and is considered fair and unbiased. The latter is especially important for species’ plans that will involve contentious issues.

Generally, the responsibilities of the *Team Leader* include the following:

- Works with the Team Liaison to plan recovery team meetings
- Chairs and facilitates recovery team meetings (although a professional facilitator may be brought in for specific meetings in which a subject is going to attract a large number of people or is particularly contentious, or all meetings, if necessary)
- Takes a lead on overseeing recovery plan development
- Works with the team to identify and recommend priorities for recovery implementation

Generally, the responsibilities of the *Team Liaison* include the following:

- Provides guidance to the team regarding their role and function

- Ensures that the Regional Administrator's requests and recommendations are addressed
- Serves as the conduit through which recommendations, team minutes, and other communications to and from the Regional Administrator are transmitted
- Keeps the Regional Office and Headquarters informed of team opinions and positions on critical issues, and recovery planning progress
- Represents, elicits participation of, and informs experts in other NMFS programs (e.g., Habitat Conservation, Sustainable Fisheries), as appropriate

Team Size – Team size should balance the need to include diverse expertise and experience with the need to optimize manageability. In addition to the previously mentioned advantages of including a variety of expertise on teams, it has been suggested that diverse teams, particularly those with at least one non-federal member, may result in plans that are more likely to be implemented and effective (Clark et al. 2002). However, both Clark et al. (2002) and Gerber and Schultz (2002) also note that larger teams do not correlate with better plans or improved status trends for listed species. Management literature regarding team size indicates that teams may consist of two to 25 members (Hiller 1998) although the size generally suggested for optimal functioning is five to eight (Baguley 2002, Harrington-Mackin 1994). More specifically, Baguley (2002) states that the ideal size for a well-functioning team is five to seven members and that no more than ten members should be appointed to the team if full participation and involvement is being sought, albeit larger teams allow a wider range and diversity of skills and abilities.

Harrington-Mackin (1994) sets the ideal team size for accomplishing multiple, complex tasks at five to eight members. She defines small teams as having six to 12 members and large teams as having 15-25 members. She cautions that larger teams are generally more appropriate when they are tasked with a simpler assignment or when the team is to be subdivided into specialized functions; in any case, members of large teams must recognize that they will not have equal participation in all issues (Harrington-Mackin

1994). These team size sideboards are found throughout business management literature.

There are a variety of options for restructuring the "traditional" recovery team format for cases where the number of potential contributors significantly exceeds the optimal functional team size. Options include developing: workgroups, scientific/technical and implementation subgroups, advisory recovery networks, core-teams, and technical consultants/technical advisors (see Appendix G). Experts or contributors who are primarily involved through these alternate mechanisms usually address specific species or habitat issues, rather than large sections of the recovery plan.

2.3.3.3 Appointing a Recovery Team

Recovery team members are appointed by the lead Assistant Administrator (with the exception of NMFS Pacific salmon teams, which are appointed by the Regional Administrator) with the approval of the prospective team member's employer. An appointment letter describing the terms of their appointment is sent to new members (See Appendix H for a sample appointment letter). These terms and other issues regarding team procedures may be clarified through a Terms of Reference, which is often distributed and agreed upon by all members at the first meeting.

The appointment letter does the following:

- Identifies the purposes of the team (whether to write/revise a plan, guide recovery implementation etc.)
- Explains that team members serve in an advisory capacity to the Assistant or Regional Administrator and are providing their recommendations and advice in response to their requests
- Indicates the anticipated duration of the team
- Clarifies that team members may be removed or replaced as the focus of the recovery team changes or if an individual fails to serve in a contributory and constructive way

- Clarifies that recovery teams may be terminated or restructured when their purpose has been served
- Notes, as appropriate, whether team members are responsible for their own travel expenses.

2.3.3.4 Terms of Reference

A Terms of Reference, which describes the team operating rules, is not mandatory but can be a very useful document. Generally, the Team Leader and Team Liaison or Recovery Coordinator draw up a Terms of Reference in advance of the first recovery team meeting. The team then discusses it and proposes changes, if any. Once finalized, the Terms of Reference should be agreed to by all team members and the Regional Administrator (see Appendix I for a sample Terms of Reference). The specific contents of the Terms of Reference should be tailored to each situation and can be finalized in consultation with the team. This document serves as an agreement between each member of the recovery team and NMFS.

The Terms of Reference does the following:

- Clarifies the purposes of the team and expected products
- Details the responsibilities of NMFS with respect to the team
- Details the roles of team members, the Team Leader, and the Team Liaison/Recovery Coordinator
- Describes the operating rules of the team, e.g., whether decisions will be made by consensus (preferable), majority votes, 3/4 majority votes; what percentage of members form a quorum; if members can have proxies or must be present, etc.
- Addresses the formation and duties of sub-committees, workgroups, and other groups
- Emphasizes the confidentiality of drafts and internal documents

2.3.4 Developing a Production Schedule

Box 2.3.3.3 - One Way to Construct a Recovery Team

To ensure that potential recovery team members understood their role in developing the South Florida Multi-Species Recovery Plan, the FWS lead office in Vero Beach, Florida used the following process prior to appointment of recovery team members: 1) The Introduction (which described the expertise needs and the outline of the plan's scientific basis) of the draft plan was prepared by the Field Office. 2) Agency heads, local governments, state partners and other stakeholders were contacted by a letter which described the scope of the plan and the approach that would be used to develop the plan, and attached a copy of the Introduction. Recipients were asked to provide their recommendations for recovery team members based on the information provided. 3) Potential members then received the recovery team appointment letter.

As stated in section 1.5.1, Timeframes, recovery outlines should be completed within 60 days of listing and approved within 90 days of listing, and a draft recovery plan developed within 1.5 years of listing and a final within 2.5 years of listing. A schedule for accomplishing various planning actions and a method for monitoring progress should be developed. This schedule should include important meetings (including public meetings), turnaround times for internal and peer reviews, and other milestones.

2.3.5 Setting Up the Administrative Record

The administrative record is the paper trail that shows the basis upon which the agency has made its decisions, and the procedures that the agency followed. The administrative record for a recovery plan consists of all documents and materials considered by the decision-makers in making decisions concerning the development and implementation of the recovery plan, including those that reflect positions contrary to the final outcome. Examples of documents that should be

included in the administrative record include the following:

- Relevant portions of policies, guidelines, directives, manuals, books, etc.
- Technical information, sampling results, survey information or other studies, reports, or scientific articles relating to the species covered in the plan
- External correspondence relating to the plan, including communications from other agencies and the public, and responses to those communications (E-mails from those outside the agency should be printed on paper and included in the administrative record)
- Notes or minutes of meetings with stakeholders, invitations and outreach material
- Transcripts of public hearings and other meeting notes
- Telephone conversation records, unless they are personal notes (see below)
- Petitions or other legal documents received from adversarial groups
- Draft versions of the plan that were circulated outside the agency
- *Federal Register* or other notices or formal documents relating to the plan
- Decision documents

Personal notes written and controlled by individual staff members solely for their own use are not included in the administrative record. NMFS has issued Guidelines for Agency Administrative Records. These are available at <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/30-123-01.pdf>.

An administrative record should be established early in the process of recovery planning and maintained throughout. A good administrative record documenting the processes and decisions involved in developing and implementing a recovery plan is extremely important; if a recovery plan is challenged in court, the administrative record will serve as the basis for court review. Two laws are particularly relevant to the establishment and maintenance of an administrative record – the Administrative

Procedure Act of 1946 (APA) and the Freedom of Information Act of 1966 (FOIA).

Administrative Procedure Act

The APA sets standards for judicial review of agency actions and public involvement in a rule-making process. The APA allows a private party to challenge the legal sufficiency of any final “agency action” (under which a final recovery plan or the decision that a recovery plan would not promote conservation of the species can be challenged) or bring a lawsuit for an “agency action unlawfully withheld or unreasonably delayed” (under which the failure to complete a recovery plan in a timely manner can be challenged). When reviewing the adequacy of a final recovery plan or decision not to prepare a plan, a court should uphold the plan or decision unless it is “arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with the law.” In conducting its examination, the court will consider whether the agency acted within the scope of its legal authority, whether the agency adequately explained its decision, whether the agency based its decision on facts in the record, and whether the agency considered the relevant factors. The successful defense of a final recovery plan or decision not to prepare a plan thus largely depends upon the adequacy of the agency’s administrative record.

The APA also requires the publication in the *Federal Register* of rules and a period for public comment. Although a recovery plan does not come under the public notice and comment requirements of the APA, the ESA itself requires public notice and the opportunity for comment. The adequacy of the public comment process would be reviewed under APA standards. The administrative record should document NMFS’ public comment process and that the agency considered the comments received. Thus, a Notice of Availability (NOA) of the draft plan must be published in the *Federal Register*, and interested parties and the public must be given an opportunity to comment.

Freedom of Information Act

FOIA states that any person has the right to request access to federal agency records. Federal agencies are required to disclose records upon receiving a written request for them, except for those records that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court. Records include all books, papers, maps, charts, plans, architectural drawings and microfilm; all machine-readable material such as electronic mail, magnetic tape, disks, drums, and punched cards; all audiovisual material such as still pictures, sound and video recordings; and all other documentary materials (including handwritten notes), regardless of physical form or characteristics, made by or received by NMFS pursuant to Federal laws or in connections with the transaction of public business and preserved or appropriate for preservation by the Service as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities, or because of the informational value of the record (44 U.S.C. 2211).

The nine exemptions of FOIA follow:

1. Matters of national defense or foreign policy
2. Internal personnel rules and practices
3. Information specifically prohibited from disclosure by other statutes
4. Trade secrets, commercial or financial information (confidential business information)
5. Privileged interagency or intra-agency documents
6. Personal information affecting an individual's privacy
7. Records compiled for law enforcement purposes
8. Records of financial institutions
9. Geological and geophysical information, including maps, concerning wells

However, if a portion of a record falls within one of the exempted categories it does not mean that it is automatically excluded from release (note that an entire record would rarely fall within an exemption). If an exemption is to be invoked to deny access to information, a justification for withholding the information must be provided --

a mere assertion that an exemption applies is insufficient.

It should be noted that any information that has already been released in some way to the public can no longer qualify for an exemption. Generally, once a document has been released to a non-agency party, it loses its exempted status and cannot be withheld as a privileged document in litigation. Although this issue is not necessarily limited to FOIA, FOIA is a common form of release. This serves as a reminder to be cognizant of what gets shared with stakeholders and others outside the recovery team. However, NMFS should be able to release agency documents to recovery team members without waiving their ability to withhold the documents under FOIA, as long as team members do not distribute the documents. Consider whether confidentiality should be one of the ground rules for the recovery team. Such documents should be labeled as confidential and team members should understand that such documents should not be shared outside the recovery team process.