

ASBPA Comments in Response To
RIN 0648-XF491
Streamlining Regulatory Processes and Reducing Regulatory Burden

Founded in 1926, the American Shore and Beach Preservation Association (ASBPA) is a nonprofit organization that advocates for healthy coastlines by promoting the integration of science, policies and actions that maintain, protect and enhance the coasts of America. We represent America's coastal "practitioners": coastal managers, municipalities, elected officials, engineers and industry who build, maintain and operate our nation's shores and beaches. Florida Shore and Beach Preservation Association (FSBPA) was organized in 1957 and functions as a league of coastal local governments on beach and coastal issues in the state of Florida. Our members have extensive firsthand experience dealing with NOAA's regulatory processes while working on coastal restoration and resilience projects.

Coastal restoration and resilience projects, particularly those in the Gulf of Mexico and Southeastern United States, are often delayed and incur additional expenses due to backlogs and delays in National Marine Fisheries Service's (NMFS) regulatory and review processes. These extended delays and excessively long consultations are directly related to the federal government's attempt to comply with Section 7(a)(2) of the Endangered Species Act (ESA). For several years, ASBPA has been working with NMFS Protected Resources Division (PRD) staff to identify the underlying causes of these delays and excessively long consultation time periods. We have found three primary causes: a) an underfunded agency; b) a culture of risk aversion that has led to too many individual consultations, and c) overly bureaucratic protocols.

For all coastal restoration and resiliency projects, whether federally cost-shared or non-federally funded, the US Army of Corps of Engineers (USACE) and/or the lead federal agency is required to consult with NMFS on impacts to threatened and endangered species, in order to comply with the ESA Section 7(a)(2). Section 7 (b)(1)(A) of the ESA states that "consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency." The "consultation handbook" states that NMFS has 30 days to respond to a Biological Assessment's (BA) findings, and for formal consultations, NMFS has 135 days to issue a Biological Opinion (BO). However, consultations for coastal restoration and resilience projects regularly ignore these requirements and can take over a year and sometimes up to several years to conclude. This needlessly extends an already lengthy regulatory review process required to obtain permits and authorizations.

In one recent example, multiple local communities collaborated to develop a "batched" BA for several individual projects, at the behest of NMFS, in order to speed consultation. NMFS was provided with a final BA by the lead federal agency on December 18, 2014. The lead federal agency, Bureau of Ocean Energy Management (BOEM), received confirmation from NMFS on July 7, 2015 (200 days later) that the project had just been assigned to a staff biologist. On August 24, the applicant received a correspondence from BOEM stating that NMFS believed they would be able to issue BO in December, 2015. The BO was not issued by NMFS until May 16, 2016, *515 days after the submittal of the BA*. The extensive delays in this process resulted in a 1 year delay in the construction of the project.

This example is not unique. There are several projects within the NMFS Southeast Region that have experienced delays in construction and timeframes of over a year to receive letters of concurrence from NMFS. Through member feedback on individual projects, discussions with subject matter experts within our organization, and through coordination with NMFS staff we have identified several reasons for prolonged consultation with NMFS under Section 7 (a)(2), which include a) an underfunded agency and shortage of staff in some offices; b) a culture of risk aversion that led to too many individual consultations

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“clogging” up the system, and c) decisions being taken away from scientific experts and replaced with bureaucratic Department of Commerce protocol.

Under Funding

Over the past decade, as development has increased along the coast, and as local and state governments have taken more of a lead role in the formulation and implementation of coastal restoration and resilience projects, the number of project requiring consultations by NMFS has increased, but funding for regulatory review has not kept pace. For instance, approximately 50 percent of the national ESA Section 7 consultations are performed by the Southeast Region, while the Southeast region receives approximately 10% of the budget. The increase in the number of threatened and endangered species as well as the establishment of critical habitats for each has also strained the demand on NMFS staff to complete consultations in a timely manner. Agency funding must increase. This has been openly acknowledged by NMFS. In the FY17 budget request, NOAA noted that increased funding for NMFS PRD was “part of a broad NOAA initiative to expand capacity needed to expedite review and permitting of public and private development projects that benefit the Nation’s economy and create new jobs.” Unfortunately, Congress has not seen fit to fund NMFS at the necessary level.

While federal funding should increase, there are models for State Governments to fund specific positions within federal agencies to allow dedicated staff to review projects within that state. There are several models identified that allow State DOT to fund staff within the USACE to conduct 404 assessments. Furthermore, we believe there are models that allow for DOD to fund staff within NMFS PRD to conduct agency specific Section 7 consultations. ASBPA & FSBPA recommend that NMFS request increased funding for PRD, and also proactively lets states and local communities know how they can fund positions at NMFS to expedite Section 7 consultations on coastal protection and resilience projects.

Too Many Consultations

While increased funding and staffing is necessary, it is by no means sufficient to improve NMFS permitting issuance times. A risk averse mentality within both the USACE and NMFS based on litigation brought about by environmental groups, has led to an increased number of consultation requests when, for many projects, no such consultation is needed. NMFS should improve training of PRD staff and USACE Civil Works regulatory staff in each of the USACE District offices to better define and apply protocols that identify when consultation is or is not necessary. This training program should occur on a biennial basis due to staff turnover and attrition.

Programmatic Biological Opinions (BOs) developed by NMFS and USACE General Permits have been used to reduce the number of consultations required by covering substantially similar projects. This has been effective in reducing the time required for NMFS to issue a determination. However, when a new species is listed and new critical habitat is established, these Programmatic BOs have been rendered obsolete because individual consultations are now necessary for the newly listed species. ASBPA & FSBPA recommend that the Programmatic BOs be updated regularly with newly listed threatened and endangered species. Updating Programmatic BOs should be made a priority by both NMFS and USACE.

NMFS should also encourage applicants to batch (combine similar projects) where possible to reduce the total number of consultation. While this often happens already, NMFS regional staff should proactively identify where projects can be batched and encourage applicants to do so.

Overly Bureaucratic Process

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NMFS determinations and letters of issuance are reviewed by multiple legal staff within the Department of Commerce. These multiple reviews often result in delays of a timely issuance NMFS determinations. Since the NMFS PRD and Habitat Conservation Division's (HCD's) consultations are performed by qualified biological staff and reviewed by qualified biological supervisors, a single review by experienced legal staff should be sufficient. Reviews by multiple legal staff that are not familiar with the scientific aspects of the NMFS documents does not provide a superior review, just a slower process. Instead, we suggest dedicating a senior legal staff reviewer with extensive experience in technical consultations to review the consultation, rather than staff that are balancing the NMFS consultations with other items, cases, and documents from the Department of Commerce at-large.

As a comparison, the U.S. Fish and Wildlife Service (Department of Interior), which must also must comply with the ESA, including Section 7 consultations, has legal staff within their section and do not rely on legal staff from the Department of Interior at-large. ASBPA & FSBPA recommend that NMFS have legal staff dedicated to consultation efforts, who can work more closely with NMFS biological staff and provide more timely reviews.

Sometimes early informal coordination can also stave off later bureaucratic delays. The regulatory review process for coastal projects sometimes begins with an inter-agency scoping or pre-application meeting depending on the project. This meeting allows federal and state agencies to understand and comment on the scope of the project. The meeting also allows the project sponsor and consultants to learn which issues should be most detailed in their permit application. This collaboration reduces later bureaucratic steps and additional reviews because the applicant is better able to address NMFS's concerns during the initial application. ASBPA & FSBPA encourages NMFS Protected Resources Division (PRD) personnel to attend pre-application meetings just as USACE, USFWS and NMFS HCD often do. (However, we do not recommend making these pre-application meetings a required bureaucratic step, just that PRD attend when requested by the applicant.)

Conclusion

ASBPA & FSBPA appreciate the opportunity to comment on the NOAA's efforts to streamline regulatory processes. We believe consultation processes can be improved while maintaining important environmental and community protections and full compliance with the ESA. As an organization of coastal managers, practitioners, municipalities, and elected officials, we have experienced the problems caused by extended delays and excessively long consultations by NMFS to coastal restoration and resilience projects. We also know the joy and economic benefits of having sea turtles nest on a beach and coral reefs upon which we dive. We encourage NOAA to assess its consultation protocol and procedures without undermining protections to endangered species. We believe this can be done by addressing three fundamental areas:

- a) Increase funding to NMFS Protected Resources Division.
- b) Reduce the number of individual consultations. Better training and protocols at NMFS and USACE will help clarify which determinations can be made without formal or informal consultation with NMFS. Additionally, timely updates of Programmatic Biological Opinions can reduce the number of consultations.
- c) Reduce bureaucratic delays. NMFS scientistd should engage in early scoping meetings; and Department of Commerce should improve the protocol for legal review by having legal staff within NFMS rather than relying on legal staff from the Department of Commerce at-large.

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We hope you will consider these recommendations and we look forward to working with NMFS to ensure permitting timeframes for coastal restoration and resilience projects are expedited while maintaining the highest scientific rigor.