

**Frequency Asked Questions from the
Forest Service and Bureau of Land Management**
“Integrating Recovery Plan Products and Section 7 Consultations in the
NMFS Northwest Region”

National Marine Fisheries Service, Habitat Conservation Division, May 2009

“Integrating Recovery Plan Products and Section 7 Consultations in the NMFS Northwest Region” is a NMFS document intended to guide NMFS staff when conducting section 7 consultations. NMFS shared this document in the autumn of 2008 with U.S. Forest Service (USFS) and the Bureau of Land Management (BLM). NMFS received a number of questions from USFS and BLM staff. The following frequently asked questions and answers were shared as a draft with Forest Service and BLM regional managers in the spring of 2009 and finalized in May, 2009.

1. Q. *How would recovery plan metrics for recovery criteria be used in a BA or BO?*

A. Recovery plans provide biological criteria that describe what “recovery” looks like. These criteria describe the abundance, productivity, spatial structure and diversity of a recovered species in the form of metrics that are useful for evaluating the effects of human actions on populations of listed species. NMFS evaluates project effects and whether any changes in the four characteristics of population viability (abundance, productivity, spatial structure, and diversity) bear on the conservation risk to the species as part of the jeopardy analysis in the biological opinion. In some locations, the metrics can only be discussed in qualitative terms (e.g., productivity reduced) because of a lack of data. In other locations and as our information improves, the predicted change in a metric because of the proposed action can be discussed quantitatively.

2. Q. *How would the consultation process be affected by information within a recovery plan? How would this process change for a watershed identified as critical habitat if a population is important or of lesser importance to a recovery scenario?*

A. Recovery plans provide the context for considering the importance of designated and proposed critical habitat for listed species. NMFS’ critical habitat analysis determines whether a proposed action will destroy or adversely modify critical habitat for ESA-listed species. This determination is made by evaluating the effect of a proposed action on the primary constituent elements (PCEs) which constitute those essential features and then examining any expected changes in the conservation value of the essential features of that critical habitat.

Recovery plans help action agencies design their proposed actions in ways that will support recovery. For example, incorporating recovery actions into an action agency’s proposed actions could aid the action agency in

minimizing adverse effects and avoiding jeopardy or adverse modification of critical habitat. While providing important context, recovery plans do not place any additional burden on NMFS when determining whether an action would jeopardize the continued existence of a listed species or adversely modify critical habitat. Recovery plans will help action agencies identify opportunities to fulfill their 7(a)(1) responsibilities to carry out programs for the conservation of listed species.

3. Q. *At what scale is the role of recovery planning relevant for project effect analysis?*

A. The appropriate scale for ESA section 7 analyses is dependent on the magnitude of affect of that action. The unit that NMFS identified to conservation value is the HUC 5. If the affect of the action at the HUC 6 reduces the conservation value of the HUC 5 then commensurate mitigation could be achieved at the HUC 6 scale.

4. Q. *What is this the “net benefit” concept? For example, if the federal action introduce sediment in a stream channel from one project element, while another project element reduces chronic erosion from a road, will that avoid a jeopardy or an adverse modification determination?*

A. Net benefit must be evaluated on a case-by-case basis. “Net benefit” is most likely to apply if the negative impacts of a project are balanced in time, place, and magnitude. Short-term increases in sediment may or may not balance long-term reductions in sediment, depending on the magnitude of the short-term affect and the status of the population or critical habitat.

5. Q. *If recovery plan actions are not mandatory, does this mean that actions not identified in recovery plans will avoid jeopardy?*

A. Recovery plans do not place an additional regulatory requirement on action agencies. Implementation of actions identified in recovery plans may be useful to action agencies if the impacts of their actions need to be mitigated. Recovery plan actions were identified to address deficiencies in the viability of populations and their habitats. Although other actions may also be appropriate to minimize or mitigate the affect of actions under consultation, recovery plans may provide a ready list of relevant actions. Further, these actions may facilitate collaborative conservation and cost-sharing with other entities implementing those plans.

6. Q. *How will the integration document be used in context with informal consultations (Introduction)?*

A. While the NMFS document on integrating recovery plans in section 7 actions focuses on the jeopardy/adverse modification analyses, it provides useful

information for informal consultations (NLAA) as well. The focus of the informal consultation is the determination of effect, and the consequent evaluation of the need to proceed to formal consultation. To be able to understand the effects of the action on the species and critical habitat, information presented in recovery plans, TRT documents, status reviews, etc., can provide substantial data and information supporting or informing the analysis. Further, incorporating recovery actions into an action agency's proposed actions could aid the action agency in minimizing adverse effects and avoid formal consultation. Also see our answer to Question 12 below.

7. *How does NMFS interpret the words "reasonably" and "appreciably" as used in the definition of "jeopardize the continued existence of" a listed species (Section 2, Relationship between Recovery and Section 7)?*

A. "Reasonably" and "appreciably" have never been defined by rule or articulated more precisely in the courts. However, these terms are regularly interpreted in practice, and those interpretations have occurred in consultations with USFS and BLM. That practical history is demonstrated in the qualitative and quantitative assessment of the effects of a proposed action, such that exacerbating risk to long term conservation prospects of a listed species is likely to meet the jeopardy standard. It is less clear when the primary effects are to habitat (e.g. suspended sediment). In the past we have relied on the best professional judgment of NMFS experts exercised within the framework of NMFS NWR policies like the Habitat Approach (NMFS 1999) but with recovery plans, we are able to do a better job of evaluating what is reasonable and what is appreciable. Regardless, the evaluation would examine the temporal and spatial scale of the effect, and put it in context of the environmental baseline and status of the species to determine whether the effect will change the viability criteria in a manner that would reduce appreciably the likelihood of both survival and recovery.

8. *If there are no recovery plan products that are meaningful at the action area scale, do the action agencies need to go through a lot of discussion indicating that action area site-specific information or recovery measures may not exist or is not relevant (Section 3, Recovery Planning Products)?*

A. A lot of discussion on this topic in a biological assessment is not necessary. However, the action agency should address whether there is relevant information available at a larger scale. Further, the recovery plans or TRT documents will have information on populations and viability criteria and limiting factor analyses that will be important to the analysis of effect, and the action agency should discuss whether the proposed action is consistent with recovery plan measures (even if the measures are at a larger scale).

9. *Q. Will land management agency actions that result in adverse affects to listed species, but do not result in jeopardy or adverse modification to critical habitat, and have*

no beneficial effect or support recovery plan measures be granted incidental take and be legally allowed to proceed (Sections 4 and 5, Preconsultation Considerations and BA Development and Consultation Initiation)?

- A. Nothing in the integration document changes or suggests a change to the consultation process described in ESA section 7 or the regulations that implement that section. Under the scenario described above, the proposed action will likely be exempted from any taking under section 7(o)(2) of the ESA provided that the taking is incidental to carrying out an otherwise lawful activity conducted by the Federal agency or applicant (50 CFR 402.02), and provided that any taking meets the terms and conditions of a written incidental take statement. However, under 7(a)(1) agencies need to appreciably contribute to species recovery, and NMFS may request the inclusion of beneficial activities to offset adverse effects to listed species.

10. *How does recovery plan information inform an effect determination made by an action agency in a biological assessment (Section 5, BA Development and Consultation Initiation)?*

- A. The information requested helps NMFS fulfill its duty under ESA section 7 to help action agencies ensure their actions do not jeopardize listed species or adversely modify or destroy critical habitat. When action agencies consider relevant recovery plan information, the action agency is certain 1) to be aware of adverse effects of the proposed action on listed species or critical habitat that would be important to avoid or minimize, and 2) to be aware of potential elements of mitigation that could be added to the proposed action to help avoid long term detriment to species' to species' recovery potential. The inclusion of recovery plan information in a biological assessment can facilitate and further streamline NMFS' preparation of it biological opinion.

11. *How will land management agencies determine the importance of the action area to species viability (bullet 2, Section 5, BA Development and Consultation Initiation)?*

- A. First, some recovery plans provide more detailed and smaller-scale information than others. When the information is available in recovery plans or other documents, NMFS asks that action agencies discuss the importance of the action area to affected populations and species viability. The action area may include valuable and rare spawning habitat, or may provide unique off-channel rearing habitat. This information should be presented, when the information is available, to put the predicted effect of the action in context with the status of the species and the environmental baseline.

12. *Q. If the land management agency proposes an action that results in a NLAA determination (not meaningfully measurable or detectable, or it cannot be meaningfully evaluated, or is discountable), and it has no beneficial relationship with recovery, does the BA need to address recovery plan information. For example, some timber sales may*

have the potential to affect recovery plan limiting factors and the environmental baseline, but if their effects do not change the environmental baseline, then they are maintaining the baseline, but not necessarily improving it. Is there a need to address recovery plan measures, limiting factors, or other recovery plan criteria in a NLAA BA (Section 5, BA Development and Consultation Initiation)?

- A. By demonstrating that the action agency considered recovery plan information in the biological assessment, it helps substantiate the NLAA conclusion. In the example provided, the action agency should discuss if the action is affecting recovery plan limiting factors and the environmental baseline. Then, explain why from the action agency's perspective the proposed action is NLAA. Is it a question of scale? Or the type of habitat affected?

13. Q. *Why is it necessary for action agency staff to reproduce information in a BA that is already available to NMFS (Section 5, BA Development and Consultation Initiation)?*

- A. ESA section 7 creates an affirmative duty in action agencies to ensure their actions do not jeopardize listed species or adversely modify or destroy their designated critical habitat. It is helpful for action agency staff to include recovery plan information in biological assessments. First, assembling this information ensures the action agency is informed about the full potential impact of their action. Second, the BA is a public record, and because NMFS is just one of many diverse stakeholders in the development of a recovery plan, it is important that the action agency can demonstrate to multiple parties that it did its homework. While not all of the information in a recovery plan is relevant to the proposed action, when an action agency reviews and includes information from the recovery plan in a BA, it helps the action agency uphold its duties to avoid jeopardy and adverse modification by understanding the proposed action in the context of the ecosystem and species recovery, and to define the temporal and spatial scales of the effects of the action. In the BA, the action agency should demonstrate only that they considered the relevant recovery plan information in their analysis, not just reproduce the recovery plan information. It is important for the action agency to document their logic path to the effect conclusion.

14. Q. *NMFS implies that it is possible to streamline BO's by focusing the analysis on those factors that are most relevant to the species and actions being discussed. Is it possible to do the same thing when preparing the BA (Section 6, Preparing a Biological Opinion)?*

- A. Absolutely. NMFS recommends having a discussion at the Level 1 meeting to discuss what are the relevant factors prior to eliminating factors that are deemed irrelevant by the action agency. In other words, make sure there is consensus concerning what are the irrelevant factors that can be deleted.

15. Q. *How will NMFS obtain the information necessary to evaluate VSP parameters, MPGs, range-wide limiting factors affecting PCEs, etc., to move from a take analysis at the action area scale to a jeopardy analysis (Section 6, Preparing a Biological Opinion)?*

A. NMFS must use the best available information. It is NMFS' job to conduct the jeopardy analysis and we do not expect the action agency to conduct this analysis. The biological assessment should provide an analysis of effects and effects determination only. To conduct the jeopardy analysis, NMFS relies on information presented in the biological assessment as well as information in recovery plans, peer-reviewed literature and white papers, geoview, other Federal, state, and tribal fish biologists and filed data, information obtained from our science centers, plus many other sources. When specific information is not available, NMFS makes a decision using the best scientific information that is available.

16. Q. *Who is ultimately responsible for maintaining the environmental baseline (Section 6, Preparing a Biological Opinion)?*

A. From the explanation of the question, the action agency is asking who is responsible for maintaining the most recent information on the status of the environmental baseline. NMFS agrees that ultimately NMFS is responsible for the information in the baseline section of the biological opinion; however, the action agencies often have site-specific or reach-specific information that is not readily available to NMFS. It is NMFS' expectation that the land management agencies present data or information that builds on the knowledge base for the watershed or subbasin, when they have access to such information.

17. Q. *How does environmental baseline functional condition factor into a jeopardy determination for a population important to recovery (Section 6, Preparing a Biological Opinion)?*

A. The effects of the proposed action on the status of the environmental baseline and the status of the species are very important considerations in the jeopardy analysis. Jeopardy determinations are not made at the population scale. They are made based on the aggregation of the status of the species, the condition of the environmental baseline, the effects of the action (including those of interrelated and interdependent actions), and cumulative effects. As mentioned in our answer to question 7, NMFS jeopardy analysis typically consists of a sequential, hierarchical assessment of the effects of the action, nested in the context framed by the condition of the environmental baseline and the rangewide status of the species, in addition to cumulative effects. The effects of the proposed action relate specifically to the condition of the environmental baseline because the baseline is described at the action area scale. Thus effects of an action that impair the functional processes present in

an action area or that prevent the eventual improvement of existing habitat in that action area, probably bear more strongly on the conservation risk borne by the species.

18. Q. *How does one determine the “relevant habitat factors” (Section 6, Preparing a Biological Opinion)?*

A. Relevant habitat factors are habitat components that are limiting to the species, and/or have the potential to be affected by the proposed action. For example, if the proposed action is to replace a screen on a water diversion, NMFS would not put significant effort into describing the effects of forest thinning on the status of the environmental baseline/species. NMFS evaluates the relevant habitat factors on a case by case basis that takes into account the probability, magnitude and significance of the expected effects as well as the action’s litigation risk.

19. Q. *At what scale will the proposed action be evaluated in terms of the effect on limiting factors relative to recovery of the population (Section 6, Preparing a biological opinion – effects of the proposed action)?*

A. The analysis looks at whether there is an effect at the scale of the population(s) within the action area, and then the analysis is extended to evaluate whether that effect extends to the range of the species. The first step (limiting factors, direct effects) is usually done at the watershed scale.

20. Q. *Are the new terms “exacerbate, alleviate, or have no effect” defined and what context will be applied (Section 6, Preparing a biological opinion – effects of the proposed action)?*

A. These terms have not been defined, and are merely intended to explain to NMFS staff how they should analyze the proposed action in the context of the limiting factors described in a recovery plan. It is merely asking the staff to make a qualitative judgment on whether the effects are positive, negative or neutral.

21. Q. *How will the effects of the proposed action on species viability be determined (Section 6, Preparing a biological opinion – effects of the proposed action)?*

A. NMFS staff have been conducting mostly qualitative assessments of the relationship of effects on individual fish in the action area to each of the relevant characteristics of viable salmonid populations. Knowing these factors at the species and population scales from the recovery plans and listing documents, NMFS biologists look at the likely level of project effect, and determine if any of the VSP characteristics will be influenced by changes in the action area. As yet, there is no single population model that NMFS staff can exclusively rely upon when evaluating the effects of the proposed action

on species viability. NMFS staff use a well-supported risk assessment approach, relying on the logical extension of effects at the scale of the action area to effects at the scale of the species. Crucial is the application of a thorough understanding of the status of the species and environmental baseline, the full range of effects of the proposed action, relevant ecological theory, and best professional opinion.

22. Q. *How can the recovery plans be used to determine if actions are reasonably certain to occur (Section 6, Preparing a biological opinion – effects of the proposed action)?*

A. NMFS agrees that just because a management action is mentioned in a recovery plan that does not mean it is reasonably certain to occur. NMFS staff relies on specific information to determine reasonable certainty; this may include funding, permits, or required as part of a comprehensive plan or similar document. When NMFS staff evaluate cumulative effects, they look at more generic information, such as human population growth trends, or zoning information to determine if non-Federal actions are reasonably anticipated in the action area.

23. Q. *How does a CHART rating for a watershed's conservation value for critical habitat factor into a destruction/adverse modification determination (Section 6, Integration and Synthesis/Conclusions)?*

A. This integration document focuses on providing concise guidance to NMFS staff on the integration of the recovery plan products into section 7 consultations. It is not intended to provide a complete list of all information available to NMFS during the consultation. That said, the CHART information can be used to develop information on the current status of critical habitat relative to recovery, and the importance of the critical habitat to achieving species recovery (delisting) criteria. In addition, conservation rankings help NMFS staff understand the relative importance of certain geographies to species recovery potential, and why those landscapes are important. The CHART ratings inform the overall risk assessment by sorting the importance of certain watersheds to conservation.

24. Q. *Is it possible to arrive at a jeopardy determination when the population present in the action area has not been identified as essential in a recovery scenario (Section 6, Integration and Synthesis/Conclusions)?*

A. Theoretically, it would be possible but less likely than for essential populations. The questions NMFS needs to answer is what is the extent of the loss of viability of the population in the action area, and what would be the effect in the reductions in the viability of the exposed populations on the viability of the species. It is also possible that new information alters the relative importance of the population in the action area relative to recovery

scenarios. Table 1 state that when the affected population or habitat is less important to achieving recovery goals, then there is a lower risk of reaching a jeopardy or adverse modification of critical habitat conclusion.

25. Q. *Who defines which populations or habitats are more important than others, and how is it done (Section 6, Integration and Synthesis/Conclusions)?*

A. This is generally done through a stakeholder process called Technical Recovery Teams (TRT) that are comprised of scientists from the Northwest Fisheries Science Center and other tribal, Federal, state and local representatives. With input from the NWFSC and other scientists, the TRTs provide the basis for the biological viability criteria. NMFS also applies additional biological and policy considerations to recovery criteria. In some cases, the NMFS consultation biologists determine the relative importance of populations, in coordination with their Branch Chiefs and other experts.

26. Q. *How are the terms “exacerbate” and “(substantially) exacerbate” defined (Section 6, Integration and Synthesis/Conclusions)?*

A. These terms have not been defined by rule; therefore NMFS recommends relying on the dictionary definitions. “Exacerbate” is defined as intensify or make worse, and “substantially” is defined as considerably. The term “substantially” is the more subjective term, but generally if you are able to measure it or quantify it, it is substantial.

27. Q. *How will recovery plan strategies and actions be used to develop Conservation Recommendations and Reasonable and Prudent Alternatives (Section 6 Conservation Recommendations and Reasonable and Prudent Alternatives)?*

A. The action agencies and NMFS can use the relevant recovery documents and other relevant reports and information to develop the Conservation Recommendations by referring action agencies to specific actions that can be undertaken according to the duties established in ESA section 7(a)(1). These sources can also inform the development of Reasonable and Prudent Alternatives (RPAs) to proposed actions for consultations that result in jeopardy and/or adverse modification determinations. Recovery plan strategies and actions are lists of activities the action agency can undertake to support recovery of listed species; these strategies and actions have been developed by stakeholders (including scientists), peer reviewed, and vetted by the public.

28. Q. *How will recovery plan strategies and actions be used to develop terms and conditions to minimize incidental take (Section 6, Incidental Take)?*

A. Terms and conditions are incorporated into incidental take statements for the specific purpose of minimizing the anticipated amount or extent of take

caused by a proposed action. These tend to be prescriptive or best management approaches to addressing activities specific to the underlying proposed action. In contrast, recovery plan strategies and actions whole actions in and of themselves, generally addressing large-scale habitat issues in the relevant reach r watershed, and thus are expressed at a different scale than terms and conditions. Terms and conditions are intended to minimize take of individuals of a species whereas recovery plan strategies and actions are designed to support recovery of a species. However, for actions that have effects in an action area addressed by a specific recovery plan action, the funding of the action to ensure it is reasonably certain to occur would make a suitable consideration for minimizing the effects of the action under consultation. Furthermore, if a recovery plan states that certain actions or in-water activities should be avoided or modified at certain times of the year or in certain locations or types of habitat, this information can be used to develop terms and conditions. Another way to look at it is that terms and conditions are modifications or adjustments to the proposed action, whereas recovery plan actions are activities that are usually independent of the proposed action.

29. Q. *What is the relationship between consultations for critical habitat and recovery plan information?*

A. Recovery plan information can equally inform a critical habitat analysis as it does a jeopardy analysis. An analysis of effects to critical habitat is part of the adverse modification analysis, and Table 1 addresses both the risk to species (jeopardy) and to critical habitat (adverse modification). If the affected critical habitat is important to achieving recovery goals, then there is a high risk of reaching an adverse modification to critical habitat conclusion.

30. Q. *Why is there an intermediate risk to "More Important Populations" in Table 1 if a proposed action has little or no effect to limiting factors in a recovery plan?*

A. Quite simply, the more important the population, the greater the risk as a threshold matter. Any loss of viability of an important population has a greater potential to affect the viability of the species those populations comprise. There would be greater extinction risk if an important population is affected.

31. Q. *How will the relationship of the action to the research, monitoring and evaluation plan for the affected species be used in Section 7 consultations (Section 5, BA development and consultation initiation)?*

A. The research, monitoring and evaluation plan may have information available that can inform either the status of the species within the action area or rangewide, and/or may provide data on the vulnerability of the population to various perturbations (response to stressors). The research, monitoring and

evaluation plan may also have information about the different stressors for the population.