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16471

MER Policy Letter 01-14

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COMDT (CG-MER)

To : LANTAREA (LANT-3R/5)
PACAREA (PAC-35/5)

Subj: MER POLICY LETTER 01-14; ENDANGERED SPECIES ACT (ESA) SECTION 7 AND
ESSENTIAL FISH HABITAT (EFH) CONSULTATION PROCESS GUIDANCE

Ref: (a) The Endangered Species Act (ESA) of 1973, as amended, 16 U.S.C. §1531 *et seq.*
(b) Interagency Cooperation – Endangered Species Act of 1973, as amended, (50 CFR PART 402)
(c) The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1855(b)
(d) Inter-agency Memorandum of Agreement (MOA) Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act
(e) The Federal Water Pollution Prevention and Control Act (FWPCA), 33 U.S.C. §1321, as amended by the Oil Pollution Act of 1990 (Public Law 101-380)
(f) National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 CFR PART 300)
(g) CG-5RI Area Contingency Planning Process Job Aid (released 05 Dec 2012)
(h) USCG Guidebook to Developing Consensus Ecological Risk Assessments (ERAs):
Environmental Protection in Oil Spill Response Planning

1. PURPOSE. This letter provides updated direction and guidance to District Commanders, Sector Commanders, and their staffs to ensure compliance with key environmental statutes during oil spill contingency planning and response activities. This document is intended to provide guidance for Coast Guard personnel. This letter is not intended to, nor does it impose new regulatory or legal requirements on any party outside the Coast Guard.

2. ACTION.

a. Area Response and Planning Staffs are requested to make this policy letter and references known to CG Federal On-Scene Coordinators (FOSC), RRT Co-Chairs, RRT Coordinators, District Response Advisory Team (DRAT) Supervisors, and their staffs for further dissemination to their Regional Response Teams (RRT) and Area Committees.

b. All MER Policy letters and appropriate references will be posted on CG-MER's portal.

3. DIRECTIVES AFFECTED. None

4. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS. The general policies contained within this policy letter have been thoroughly reviewed by the originating office in conjunction with the Office of Environmental Management, and are categorically excluded (CE) under current USCG CE # 33 from further environmental analysis, in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts, COMDTINST M16475.1 (series). Because this letter implements, without substantive change, the

applicable Commandant Instruction or other federal agency regulations, procedures, manuals, and other guidance documents, Coast Guard CE #33 is appropriate. This directive will not have any of the following: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions; or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policies in this Letter must be individually evaluated for compliance with the National Environmental Policy Act (NEPA), DHS and Coast Guard NEPA policy, and compliance with all other environmental mandates.

5. FORMS/REPORTS. None

6. BACKGROUND.

a. The Endangered Species Act (ESA), reference (a), was signed into law on 28 December 1973, and provides for the conservation of any species listed as endangered or threatened. ESA Section 7(a) (1) directs Federal agencies in consultation with the Secretary of Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for listed species. ESA Section 7(a) (2) directs Federal agencies to insure that any action authorized, funded, or carried by said federal agency is not likely to jeopardize the continued existence of an endangered or threatened species. Reference (b) provides the regulatory framework for management and enforcement of ESA provisions.

b. Reference (c), the Magnuson-Stevens Fishery Conservation and Management Act, is the primary law governing marine fisheries management in United States federal waters. This law was first enacted in 1976, and was amended in 1996 and 2006. The Magnuson-Stevens Act provides for protection of essential fish habitat (EFH) identified in fisheries management plans nationwide. The Act also requires the National Marine Fisheries Service (NMFS) to work with other Federal agencies to conserve and enhance EFHs.

c. Under the provisions of references (a) and (b), the Inter-agency Memorandum of Agreement (MOA) Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the ESA, reference (d), was created as the guiding document for interagency informal, formal and emergency consultation during oil spill planning and response activities. This document provides a process for the USCG and the Environmental Protection Agency (EPA) to collaborate with the U.S. Fish and Wildlife Service (USFWS), NOAA - National Marine Fisheries Service (NMFS), and other trustees (i.e. the "Services") before, during and after a response. The MOA coordinates and aligns USCG and EPA authorities found in references (e) and (f) with ESA Section 7 consultation requirements for the conservation and recovery of threatened and endangered species.

d. During the 1990s, the National Response Team, with support from CG Headquarters Office of Response (G-MOR) actively supported ESA Section 7 consultation initiatives led by RRTs and Area Committees across the country. During this period, dozens of informal and formal consultations were successfully completed, greatly enhancing regional and local oil spill planning and preparedness. Strong partnerships between the USCG, EPA, and the Services were established, and the agencies have continued to foster this cooperation over the past two decades.

e. The Area Contingency Plan (ACP) Planning Process Job Aid, reference (g), was developed to assist FOSCs and Area Committees in developing key sections of ACPs. This comprehensive guidance describes the oil spill contingency planning process and the importance of compliance with environmental statutes during worst case discharge (WCD) planning and development of protection strategies. This tool emphasizes the importance of following the MOA when conducting ESA Section 7 and EFH pre-spill planning consultation activities.

7. DISCUSSION.

a. Due to recent litigation cases alleging that the USCG and EPA violated key provisions of Section 7 of the ESA while instituting new spill response plans, there has been significant interest at the national and regional levels to ensure our agencies conduct appropriate consultation efforts required by this key environmental statute. These court cases have further emphasized the need to reinvigorate the Coast Guard's attention to the consultation processes outlined in the MOA.

b. Under the ESA, it is the responsibility of the Federal agency taking an action (e.g., USCG directing oil spill contingency planning and response efforts) to consider and address any potential impacts to listed species and critical habitats. Similarly, whenever Federal agencies authorize, fund, or carry out actions (e.g. oil spill contingency planning and response) that may adversely impact an EFH, they must consult with NMFS regarding the impact of their activities on EFH. Although the ESA and Magnuson-Stevens are different laws, the consultation processes required by EFH are very similar to those required by ESA Section 7; RRTs and Area Committees are encouraged to use the ESA Section 7 consultation process outlined in reference (d) as the mechanism to conduct EFH consultations. To streamline the consultation process, RRTs and Area Committees should coordinate with NMFS officials to conduct joint EFH and ESA Section 7 consultations in conjunction with each other whenever possible.

c. Securing consistent participation and involvement from key players, including EPA, NOAA, Department of Interior (DOI), USFWS, NMFS, and State On-Scene Coordinators (SOSC) is arguably the most important step in pre-spill, emergency, and post response consultation efforts. The importance of the Coast Guard's role, in cooperation with RRTs and Area Committees, in initiating, planning, coordinating, overseeing, and documenting consultation processes from start to finish cannot be overemphasized. Interagency cooperation and commitment is essential for successful consultations, which can identify and mitigate impacts to listed species and critical habitat, directly inform development of ACP response strategies, and minimize or obviate the need to conduct subsequent ESA Section 7 consultations.

8. GUIDANCE.

a. Importance of the MOA. It is paramount that RRTs and Area Committees follow the processes outlined in reference (d) in determining the appropriate scope and extent of consultation needed based on the impacts of oil spill response activities on listed species and critical habitat. These planning bodies are also highly encouraged to make use of information and procedures found in reference (g) to guide and assist their consultation efforts.

b. Roles and Responsibilities. FOSCs, Coast Guard RRT Co-Chairs and coordinators, DRATs, and their staffs all have key roles in supporting regional and local area level planning, including community engagement and environmental compliance. These District and Sector key personnel must work together as a cohesive team to ensure successful coordination and completion of consultations.

(1) FOSCs. The consultation processes described in the MOA are intended to be initiated and managed at the Area Committee level. FOSCs should ensure their staffs, especially members involved in leading and coordinating Area Committee activities (e.g. meetings, workshops, etc.), are familiar with the consultation requirements described in the MOA, and have the resources needed to facilitate Area Committee consultations with the Services. Furthermore, FOSCs should ensure that all necessary ESA Section 7 and EFH consultations are conducted during ACP updates, which are required (at a minimum) every three years, or when the Area Committee completes major plan updates to response strategies or other critical sections. If ACP updates are anticipated to be complex the FOSCs should work with the Services to prioritize threatened and

endangered species during the emergent, informal and/or formal prioritization consultation process.

(2) RRT Co-Chairs. It is important that environmental compliance support activities of District and Sector MER resources be closely coordinated under the leadership and oversight of the Coast Guard RRT Co-Chair to ensure that all necessary consultations are completed and updated as necessary for each of the Regional and Area Contingency Plans for which they are responsible. RRT Co-Chairs are the CG regional subject matter experts for oil spill environmental compliance, and they should ensure FOSCs and Area Committees understand the consultation processes and requirements described in the MOA. Furthermore, RRT Co-Chairs can assist FOSCs in securing participation from key regional and local agency representatives and trustees, especially representatives from the Services. For consultations intended to determine potential impacts of certain non-mechanical response options (e.g. dispersants), which are governed by RRT policy and applicable across an entire region, RRT Co-Chairs are in the best position to lead, coordinate, and manage these consultations in cooperation with their respective RRTs and Area Committees.

(3) RRT Coordinators. In partnership with RRT Co-Chairs, RRT Coordinators also play an important role in managing these activities at the regional level, monitoring the status of Area Committee consultation activities across their respective District AOR, planning and coordinating RRT meetings and activities, and assisting RRT Co-Chairs in securing regional and local stakeholder participation.

(4) DRAT Supervisors. In development of ACP response strategies, DRAT Supervisors provide expertise on oil spill response equipment and tactics that can greatly inform consultation activities. In particular, these District members can participate in Area Committee meetings and workshops and make recommendations on best practices that are most likely to prevent or minimize impacts to listed species and/or critical habitat. Furthermore, DRAT Supervisors can advise local stakeholders on what equipment is the most appropriate for different operating environments, taking into account the types of oil, environmental sensitivities, and seasonal considerations for potential impacts to listed species.

(5) NOAA SSCs are valuable technical advisors that can be requested to provide advice on consultations during response and/or facilitate key discussions with the Services during RRT or Area Committee Workshops and other activities related to ESA and EFH regulatory compliance. SSCs are well versed in ESA Section 7 and EFH regulatory requirements, and they often serve as advocates for RRT and Area Committee activities. Generally located in or near CG District offices, they are ideally positioned to help coordinate participation and involvement in consultations from their respective regional NOAA NMFS colleagues.

c. Pre-spill planning. The pre-spill planning process is shown as a flow chart in Appendix A of reference (d). Area Committees are required to engage the Services in informal consultation when developing or making significant revisions to ACP response strategies. The pre-spill planning process should be pursued with the goal of minimizing the impacts listed species or critical habitat. If necessary, it may be practical for the Services to review similar ACPs simultaneously provided they have similar response strategies, similar environmental issues and/or draw upon common best management practices. As such, RRT co-chairs should seek opportunities for the Services to perform concurrent review of multiple ACPs during pre-spill planning.

FOSCs are encouraged to complete pre-spill planning using informal consultation by taking appropriate action based on service consultation, such as adjusting planned response tactics, adopting management practices, or planning for specific consultations during an incident, as appropriate, so that planned response actions are not likely to adversely affect listed species. However, if informal consultation results in a determination by the Services that proposed response actions may result in adverse impacts to listed species or critical habitat, the CG (coastal) or EPA (inland) is required to

initiate formal consultation. Formal consultation often significantly extends the timeline to complete the pre-spill planning process, and may require substantial funding for the purposes of completing a biological evaluation (BE). The scope and extent of formal consultation is dependent upon the amount of existing biological data from the Services or from past BEs. Although the formal consultation process must result in a biological opinion by the Services, the amount of environmental and project/action documentation that must be completed may vary in order to reach a determination from the Services.

d. Emergency consultation. The emergency consultation process is shown as a flow chart in Appendix A of reference (d). This process is required for oil spill response activities which may affect listed species and/or critical habitat. Emergency consultation should be conducted during the spill event and the FOSC should work with the NOAA SSC and the “Services” to update required best management practices (BMPs) to limit the interference with ongoing cleanup.

e. Post-response. The post-response consultation process is shown as a flow chart in Appendix A of reference (d). If listed species or critical habitat have been adversely affected by oil spill response activities, a formal consultation is required. In some cases, if a Natural Resource Damage Assessment (NRDA) is initiated, some of the information collected related to impacts to listed species or critical habitat during the NRDA may inform post-response consultation efforts. Please note, NRDA and post-response ESA consultation are separate activities, with their own intended purpose.

f. Ecological Risk Assessments (ERA). RRTs and Area Committees should strongly consider use of ERA Workshops as a tool to support FOSCs in development or re-evaluation of response strategies across one or more Captain of the Port (COTP) Zones. The ERA provides an organized, facilitated process that allows regional and local stakeholders to present the best available scientific data to determine what response options are most likely to minimize the environmental consequences and maximize recovery potential in a particular area. These workshops provide a more complete understanding of interests and equities among federal, state, and local officials, and they serve as an ideal forum to improve consensus and decision making among RRT and Area Committees. ERAs also place special emphasis on use of chemical dispersants, and they can directly inform dispersant pre-authorization decision-making at the RRT level. Furthermore, ERAs can help determine if a full Biological Evaluation is needed based on impacts to listed species or critical habitat as a result of dispersant application and other response options. The USCG ERA Guidebook, reference (h), provides a detailed overview of ERA principles, concepts, and process.

g. Funding and technical support for pre-spill planning consultations. In many cases, especially when formal consultation is required, funding and technical support may be necessary to support ERA Workshop planning and execution, completion of BEs, or other activities necessary for pre-spill planning consultations. In these situations, Coast Guard RRT co-chairs and FOSCs should strive to support the majority of this work with available District and/or Sector Command operating funds and regional or local interagency sponsors. Only under extraordinary circumstances, and if all potential unit and interagency funding sources have been exhausted, should units pursue funding requests through their appropriate District, Area, and HQ chain of command.

h. Historical documentation. RRT Co-Chairs and RRT Coordinators are asked to forward electronic copies of ESA and EFH historical documentation (i.e., consultation request letters, no effect response letters, concurrence letters, non-concurrence letters, biological assessments, biological opinions, and biological evaluations) by 3 January 2014 to the ACP Program Manager, Mr. Kevin Sligh. Coast Guard ESA and EFH historical documentation, best practices and lessons learned will be stored by the program on the CG-MER-1 Portal website located at <https://cgportal2.uscg.mil/units/cgmer/mer1/SitePages/Home.aspx>.

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9. QUESTIONS. All CG-MER Policy Letters, as well as other guidance documents are posted to the CG-MER portal. Questions or comments regarding this guidance can be directed to the USCG Headquarters Office of Marine Environmental Response Policy, Policy Development Division (MER-1). Points of Contact: CDR Ed Bock (Division Chief), (202) 372-2234, Edward.L.Bock@uscg.mil; LCDR Drew Casey, Drew.M.Casey@uscg.mil, (202) 372-2675 or Mr. Kevin Sligh, (202) 372-2250, Kevin.M.Sligh@uscg.mil.

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