

TITLE:

Endangered Species Act Section 7: National Response Team (NRET) National Environmental Compliance Subcommittee (NEC) updates on Pre-Spill Planning Consultations and Emergency Consultation Guidance.

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ABSTRACT

In 2001 the United States Coast Guard (USCG) and the Environmental Protection Agency (EPA) (collectively referred to as Action Agencies) along with the Department of the Interior's (DOI) United States Fish and Wildlife Service (USFWS), and the Department of Commerce (DOC) National Marine Fisheries Service (NMFS) (collectively referred to as the Services) signed the 2001 Inter-agency Memorandum of Agreement (MOA)¹. The purpose of this 2001 MOA was to “identify and incorporate plans and procedures to protect listed species and designated critical habitat during spill planning and response activities” (USCG, EPA, USFWS, and NMFS, 2001). The procedures outlined in the 2001 MOA are based on the need to meet legal requirements set forth in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (Title 40 of the U.S. Code of Federal Regulations, Part 300 [40 CFR § 300]), the Clean Water Act of 1972, and the Endangered Species Act (ESA) of 1973 [16 U.S.C. 1531 *et seq.*]. The 2001 MOA established procedures to improve the conservation of listed species and the oil spill planning and response procedures delineated in the NCP. Streamlining this process is required by section 7(a)(1) of the ESA. (USCG, 2018).

The MOA also coordinates the consultation requirements specified in the ESA regulations, 50 C.F.R. § 402, with pollution response responsibilities outlined in the NCP. It addresses three areas of oil spill response: 1) pre-spill planning activities; 2) spill response event activities; and 3) post-spill activities. (USCG, 2018). Though this document outlined procedures for how the Action Agencies and the Services were to comply with ESA Section 7, there still existed ambiguities and lack of national level guidance on how agencies were to comply with ESA Section 7. More specifically, these concerns pertained to pre-spill, emergency, and post-response operations. To alleviate the demand in the field for further ESA Section 7 guidance the National Response Team

¹ The 2001 MOA title is: “Inter-agency Memorandum of Agreement 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.”

(NRT)² established the NEC Subcommittee which quickly began developing guidance for federal agencies in order to assist these agencies maintain environmental compliance for oil and hazardous substance incident response operations. This paper will provide an update from the 2017 IOSC ESA presentation, discuss what products the NEC is currently developing and how previous NEC products have since been implemented.

Action Agencies and Services Responsibilities under ESA Section 7

The Endangered Species Act (ESA) of 1973 [*16 U.S.C. 1531 et seq.*] provides for the conservation of threatened or endangered species and the ecosystems on which they depend. Section 7 of the ESA specifically outlines the procedures for Federal interagency cooperation to conserve federally listed species and designated critical habitats (USFWS and NMFS, 1998). Under environmental laws, such as the ESA, it is the responsibility of the federal agency taking an action (e.g., Coast Guard directing oil spill contingency planning and response efforts in the Coastal Zone or EPA in the Inland Zone) to consider and address any potential impacts to listed species and critical habitats. As defined by 50 CFR § 402.02, a federal action is:

All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air” (50 CFR § 402.02).

Additionally, under the ESA Section 7(a)(2), each Federal agency shall ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, or destroy/adversely modify designated critical habitat (Title 50 of the U.S. Code of Federal Regulations, Part 400 [50 CFR § 402]). The Secretaries of the Interior and Commerce delegated this responsibility to the USFWS and NMFS, respectively.

² The NRT is an organization composed of representatives from fifteen Federal departments and agencies that provide coordination, technical assistance, and resources for oil and hazardous substance pollution incidents (NRT, 2016).

The Services promulgated regulations to define and direct the consultation process in 50 CFR §402. In order to effectively carry out the oil spill preparedness and response activities listed in the NCP and meet the requirements of the ESA consultation processes listed under 50 CFR §402, representatives from the USCG, EPA, USFWS, NMFS, Department of the Interior, and National Oceanic and Atmospheric Administration (NOAA) entered into a Memorandum of Agreement in 2001 to help streamline the process (Crecy, Tarpley, Petras, and Perea, 2017). The 2001 MOA outlines a consultation process for pre-spill planning, emergency response, and post-response and delineates roles and responsibilities of the signatory agencies

DOI's USFWS and DOC/NOAA's NMFS serve as the lead agencies in implementing the ESA. NMFS handles marine species. USFWS handles terrestrial and freshwater species and migratory birds. The most important step in pre-spill, emergency, and post-response consultation efforts includes securing consistent participation and involvement from key players such as the FOSCs, the Action Agencies, and the Services. The importance of the Action Agencies' 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 eliminate the need to conduct subsequent consultations. FOSCs, RRT Co-Chairs and Coordinators, and their staffs all have key roles in supporting regional and local area-level planning, including community engagement and environmental compliance. These Regional, District, and Sector personnel must work together as a cohesive team to ensure successful coordination and completion of consultations.

NEC BACKGROUND

The Coast Guard initiated the formation of the NEC Subcommittee under the NRT to build relationships and develop guidance regarding environmental compliance issues associated with planning and response to oil spills and hazardous substance releases. Several environmental compliance issues became apparent during or directly following the response to the Deepwater Horizon (DWH) oil spill. Regarding Endangered Species Act (ESA) compliance, several non-profit organizations filed lawsuits and notices of intent to sue the USCG and EPA for alleged violations of the Endangered Species Act (ESA) pertaining to oil spill response and contingency planning (Crecy, Tarpley, Petras, and Perea, 2017). Litigation occurred during DWH, as well as in New York/New Jersey and California, while notices of intent were filed in Alaska and the Pacific Northwest. Due to the Action Agencies' prompt engagement in consultation efforts with the NMFS and USFWS, many of these lawsuits were either withdrawn or voluntarily dismissed. However, due to the urgent nature of responding to these lawsuits, the Regional Offices had to take immediate actions to consult with the Services and the consultations often reflected what the lawsuit specified. As a result these consultations were not completed in a standardized fashion that could be utilized by other Regional Offices. Furthermore, the development of Biological Assessments (BAs) in response to these lawsuits took years to develop and costed upwards of \$650,000 (Crecy, Tarpley, Petras, and Perea, 2017). Regional Response Teams (RRTs) and USCG Sector Planning staffs began expressing major concerns over the development of BAs for their respective areas of responsibility due to the time and cost attributed to the breadth and level of detail required by the Services in the previously submitted BAs. Prior to the NEC Subcommittee, the most recent guidance developed for ESA consultation was the interagency-signed 2001 MOA.

Following the various consultation efforts that resulted from these lawsuits, many USCG District/Sectors expressed the need for more guidance from USCG Head Quarters on how to

adequately complete ESA Section 7 consultations. The USCG initially wanted to form an ESA workgroup to address these consultations. However, after several discussions with NRT members, the need for a NRT subcommittee to address all types of consultations, became apparent. Soon after, the NRT established the NEC Subcommittee in 2015 (with both Action Agencies and Service representatives) to develop new guidance and tools for pre-spill, emergency and post-spill environmental compliance.

The purpose of the National Environmental Compliance Subcommittee is to improve federal agencies' capability to meet the environmental compliance requirements of federal statutes as they apply to oil and hazardous substances planning, preparedness, and response activities. For the purposes of this Subcommittee, the term "environmental" encompasses the natural and physical environment as well as the relationship of people within that environment (e.g., all natural, cultural, tribal, and historical resources). Relevant federal statutes include (but are not limited to) ESA, Marine Mammal Protection Act (MMPA), Magnuson-Stevens Act (MSA), Migratory Birds Treaty Act (MBTA), and the National Historic Preservation Act (NHPA).

The Subcommittee is chaired by a representative from the USCG and reports to the NRT Preparedness Committee. The Subcommittee has representatives from agencies within the NRT; specifically, from certain agencies which provide federal On-Scene Coordinators (OSCs), agencies that are natural, cultural, tribal, and historical trustees, and any other agencies that have a role in environmental compliance. Consequently, the subcommittee will have representatives from the USCG, EPA, NOAA's Office of Response and Restoration and NMFS, the Advisory Council on Historic Preservation, and the Department of the Interior, including the Office of Environmental Policy and Compliance, USFWS, and the National Park Service (NPS). Other agencies, tribal

trustees, or entities may be called upon to participate in Subcommittees activities when they are needed to represent their program's authorities and roles in environmental compliance issues.

NEC Objectives and Activities

In consultation with RRTs and Area Committees, the NEC Subcommittee:

- Reviews existing national policies and agreements regarding environmental compliance and evaluate their effectiveness (e.g., the “Inter-agency Memorandum of Agreement 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” and the “Programmatic Agreement on Protection of Historic Properties During Emergency Response Under the National Oil and Hazardous Substances Pollution Contingency Plan”).
- Identifies and promotes efficient, state-of-the-art approaches and programs to fulfill current and emerging environmental compliance requirements in relation to corresponding National Oil and Hazardous Substances Pollution Contingency Plan processes and roles.
- Develops guidance and proposals to address specific compliance requirements and issues (e.g., ESA Section 7 consultation requirements and measures to protect historic properties pursuant to Section 106 of the NHPA).

The NEC Subcommittee prepares recommendations for the USCG’s and EPA’s oil and hazardous substances environmental compliance activities to include:

- Increasing or improving the use of the existing interagency agreements.
- Increasing interagency awareness (e.g., between USCG, EPA, NOAA, USFWS, NPS and other natural, cultural, tribal, and historical trustees) of current resources and tools available to support protection of environmental resources.

- Providing technical assistance and strategic guidance for environmental compliance procedures that are prepared at the national, regional, and area levels.
- Cataloguing existing training and identifying training needs and gaps for the NRT, RRTs, and Area Committees, as well as EPA and USCG OSCs, that meet identified needs.
- Investigating the viability of developing a resource proposal allowing the use of the Oil Spill Liability Trust Fund for pre-oil spill compliance costs.

The NEC Subcommittee also provides a forum for interagency coordination on policy actions affecting oil and hazardous substance response, planning, and preparedness activities as they relate to federal environmental compliance requirements (e.g., ESA, MMPA, MSA, and NHPA) at the national, regional, and area levels. The Subcommittee also identifies anticipated challenges that the USCG, EPA, and natural, cultural, tribal, and historical trustees will face in meeting environmental compliance requirements and develops recommendations and compliance strategies for addressing those challenges.

NEC SUBCOMMITTEE PRODUCTS

Response Action Matrix and Species Matrix

As described by the USCG in the 2017 IOSC paper, the NEC Subcommittee was in the process of drafting and developing a Response Action Matrix and Species Matrix to streamline the consultation process and provide the Action Agency field personnel and Services personnel a common language to more efficiently conduct consultations (Crecy, Tarpley, Petras, and Perea, 2017). The goal of these NEC Subcommittee products was also to insure consistent and standardized consultation processes and communication among the Action Agencies and Services. This would then ensure different Regional Offices could approach consultations in an efficient way that is compliant with environmental laws and regulations while simultaneously

dealing with the uncertainties of oil and hazardous substances response operations. The goal of the Response Action Matrix is to help build a common understanding between the Action Agencies and the Services of the proposed spill response activities (actions that are authorized, directed or carried out) and their potential impacts on threatened and endangered species and critical habitat (Crecy, Tarpley, Petras, and Perea, 2017). The matrix attempts to deconstruct the activities in order to more effectively identify and evaluate their potential impacts. The matrix may be used in the development of Biological Assessments/Evaluations to aid in fully describing the proposed actions and facilitating discussions on what and how species or habitat may be affected. This Response Action Matrix, once filled out, then combines with a second Species Matrix where species and habitats are cross-examined with potential response actions that could have an effect on identified species and habitats.

Figure 1: Response Action Matrix

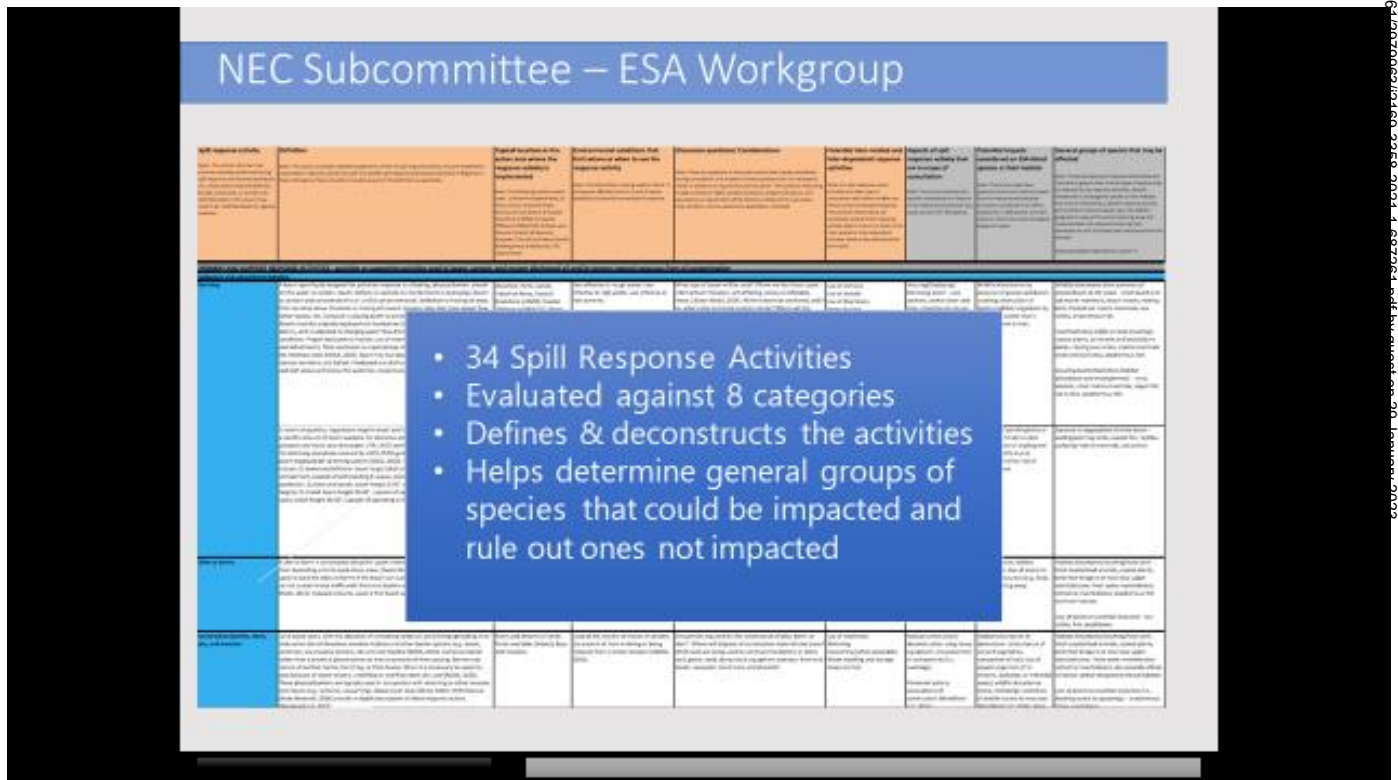
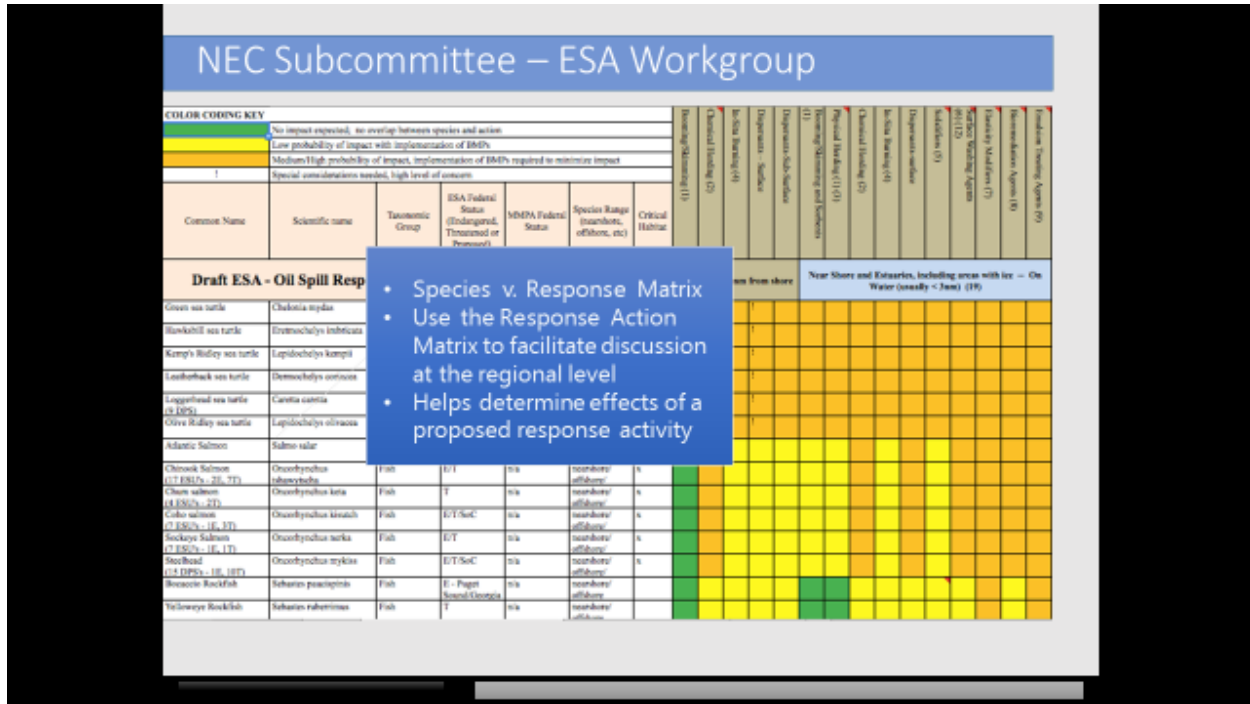


Figure 2: Species Matrix:



Developed mainly for use in pre-spill ESA Section 7 discussions at the RRT level, the Response Action Matrix and Species Matrix was designed to improve coordination and consistency to better achieve timely, efficient, and effective compliance with the ESA. Action Agencies can now work with their regional ESA Section 7 personnel from NMFS and USFWS to identify and continue to vet threatened and endangered species and critical habitats specific to the defined geographic area in consultation (Crecy, Tarpley, Petras, and Perea, 2017). The two Matrix documents were created as “living” documents that can (and should) be modified as necessary, depending on the activities and protocols specific to a region. The two matrix documents can also be used to inform or facilitate emergency ESA Section 7 consultations. In 2018, the NEC Subcommittee successfully briefed the Response Action Matrix and Species Matrix to the NRT members and posted the documents for use to the NRT webpage at NRT.Org.

Biological Evaluation (BE) TEMPLATE:

As was learned from previously completed BEs, hiring contractors to perform BE/BA work is extremely time consuming and costly. To, again, assist with the efficiency in which an Action Agency and the Services can complete an ESA Section 7 consultation the NEC Subcommittee developed a BE template that explains exactly what is needed by both the Action Agencies and Services to complete a consultation process. Though it is understood that consultation processes are unique / regional specific and different response actions and impacts will have different levels of consultation, this template was developed to inform and initiate these often complex processes to efficiently complete an otherwise costly and time consuming consultation effort. The Action Agency completes the BE and sends to the Services to begin the consultations process. This is an open dialog process that often times requires two way conversations on potential impacts, Best Management Processes (BMPs), and final determinations. The Action Agencies, utilize the Response Matrix and Species Matrix to help support their assessments of what actions or activities may result in “take” or adversely affect listed species or critical habitat. The BE Template is composed of eight sections and seven appendices to inform and initiate the consultation process. The below is a description of each section from the BE Template guidance document located at NRT.Org and previously highlighted by the USCG during the IOSC in 2017:

“Section I: Executive Summary:

- This section serves as concise and high-level overview of why the consultation is being requested and performed, and highlight the most important aspects of the document and serves as a form of cover page to the entire document.

Section II: Introduction:

- The purpose of this section is to identify who the lead and co-action agencies are as well as the basic information that will be covered in the consultation.
- Describe the background of the document, including legal authorities/policy that apply to the action agency(s) conducting the BE. Authorities can include statutes, executive orders, regulations, ordinances, laws, or other plans, policies, or procedures.
- The history – The BE will describe where spills have occurred in the past; identify the size, scope, impacts of previous spills that occurred after the publishing of the Oil Pollution Act of 1990.

Section II: Potential Response Actions:

- In this section, the objective is to broadly describe and create a frame of reference for the potential response actions. Action agencies provide the details on response actions including where and when they may occur, and plan to work with the Services to drill down to a more specific level of detail. The actions should be described in general terms per the Response Action Matrix. Actions that may have greater impacts on species should be described in greater detail, as available. Identification of activities that may be more likely to have an impact on species may be accomplished by reviewing the Response Action Matrix and through ongoing discussions with the NMFS and USFWS ESA Section 7 biologists. The additional detail may be included into the write up in this section or into a modified Response Action Matrix.

Section IV: Action Area

- Action area” means all areas affected directly, or indirectly, by the Federal action, not just the immediate area involved in the action (50 CFR 402.02). Describe the area where the implementation of the response actions may occur. Provide brief, general descriptions

of the habitats within the action area and proximity to high-risk areas. The categories of habitats should match with those listed in the Response Action Matrix and Species Matrix.

Section V: Status of Species and Critical Habitats in Action Area

- In this section, provide information about the threatened/endangered/proposed species and proposed/critical habitat. Include details on the status of the species and habitats' natural history pertinent to exposure and effects. For instance, if the oil spill response action will drive species out of the habitat or will impact the species food source, include that. If there is not a connection to the response actions, do not include that. For example, sea turtles don't nest at beaches along the U.S. West Coast so shoreline activities wouldn't have a direct effect on them. However, sea turtles do nest along the Gulf of Mexico, so shoreline activities could have a direct effect on turtles there. Information on the characteristics of species in the areas helps inform the Effects Section of the BE.

Section VI: Effects on Protected Species and Critical Habitats

- This section evaluates the direct and indirect effects of a response action on the species or critical habitat, together with the effects of other activities are interrelated or interdependent with that action. Indirect effects are those that are caused by the proposed action and are later in time, but still reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration . Interdependent and interrelated activities are assessed by applying the "but for" test which asks if any action and its associated impacts would occur "but for the proposed action." If the action agency finds no interrelated or interdependent

activities in the analysis, simply state, “Considered interrelated and interdependent activities and did not identify any that would be applicable.” Supporting activities are often used to effect an efficient and coordinated response (e.g., to lay boom use vehicles, vessel, machinery, etc. is required).

Section VII: Cumulative Effects (required for Formal Consultation)

- This Section takes into account all non-federal activities expected to occur in the action area that may have a future impact on species. This section is only required after formal consultation has been initiated. This section does not need to include an in-depth analysis. It can include a general search and assessment or a general look at possible stressors if any project is planned in the proposed action area.

Section VIII: Determination of Effects

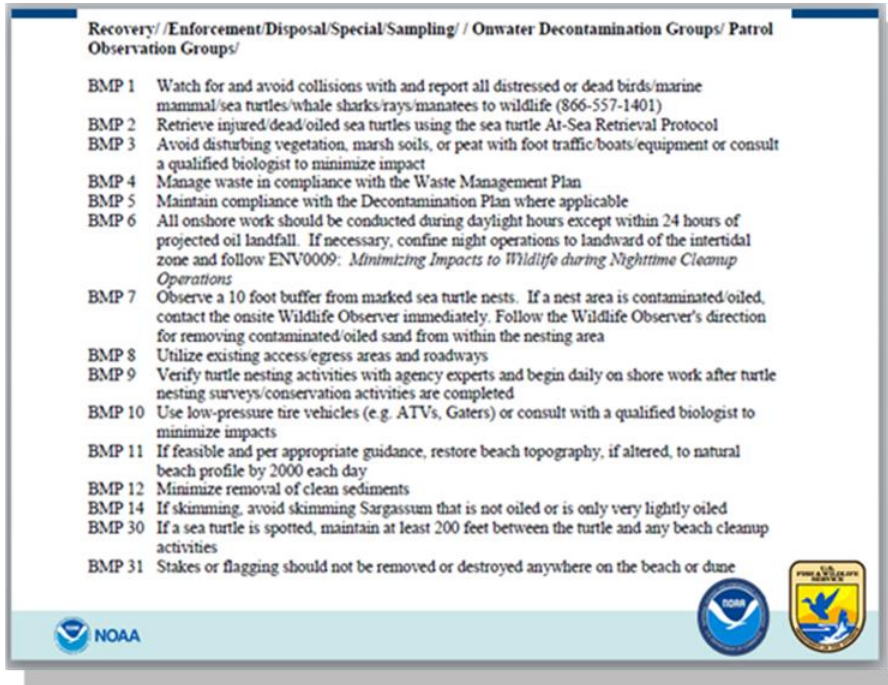
- This section includes a bulleted list of factors that action agencies used to make their determination of effects included in Section VI. For each species, provide a determination. This is similar to a conclusion for the BE. It is a summary of how the action agencies came to the decisions described in the document. Be clear that these are the species likely to be affected based on the proposed actions.
- The action agencies’ determination of effects is for individuals of the species and not on the species as a whole. Effects on the species population will be determined by the Services and documented in the Biological Opinion.

Appendix C: Standard BMPs or Conservation Measures:

- “BMPs are modifications to the response action designed specifically to reduce potential impacts to listed species and habitats” (IOSC, 2019). Within this appendix, the NEC

Subcommittee has listed many of the BMPs for specific species and habitats. Examples of those lists are provided in Figure 3” (Crecy, Tarpley, Petras, and Perea, 2017).

Figure 3: BMP list from 2017 IOSC Conference



Emergency Consultation Guidance:

Though much of the pre-spill planning documentation can be used for emergency consultations, the NEC Subcommittee recognized the need for a short and usable form to meet compliance requirements under ESA Section 7 regarding emergency response operations. Considering the immense pressure that is on FOSCs and field response personnel during an emergency response, the NEC Subcommittee developed a user friendly checklist and emergency consultation guidance (NRT.org). The emergency consultation form/checklist is intended to provide as much detailed information as possible within 48 hours of an Action Agency undertaking emergency response actions to the Services. It is not intended to be comprehensive or delay responders operating during an emergency response. This form may be used to assist FOSCs in meeting their statutory obligations to conduct emergency consultation under Section 7 of the ESA.

This form is also designed to document communication efforts between the Action Agencies and the Services as well as provide a consistent template for the Services to use in compiling relevant information and recommendations during emergency response operations.

Post Emergency Response Guidance:

The purpose of this guidance document is to inform Federal OSC's of the potential need to conduct consultations after the emergency response phase of an incident is over. During the course of emergency response operations FOSCs must document and track environmental compliance implementation procedures regarding ESA Section 7 to include, but not limited to: ICS 232-CG Resources at Risk Summary reports, ICS 201, ESA Emergency Consultation checklists, etc. The FOSC must comply with consultation requirements for ESA Section 7 pursuant to 50 CFR 402.14. Furthermore, during a response, the OSC is responsible for ensuring that response activities do not put ESA listed species at risk or destroy formally designated critical habitats of ESA listed species. This process is accomplished through pre-spill planning consultations along with documenting the results of those consultations within Area Contingency Plans. However, spill response remains incredibly dynamic and not all federal actions and impacts can be appropriately planned for. During an emergency response, where federal actions were not appropriately accounted for within pre-spill planning, an FOSC must follow ESA emergency response procedures and complete ESA consultations in collaboration with the Services once the emergency phase of the response is over.

CONCLUSION:

Through interagency collaboration, the NEC Subcommittee has managed to produce numerous guidance tools, documents and checklists that are able to assist the Action Agencies and the Services comply with ESA Section 7. Since its inception in 2015, the NEC has worked diligently to not only develop guidance tools, but assist units in implementing these tools to

ensure ESA Section 7 compliance is better understood and achievable. Currently, every District and Region within the interagency is either working on or has completed their ESA Section 7 pre-spill planning consultations and is in the process of updating their applicable Area Contingency Plans in accordance with the 2001 MOA and ESA Section 7. The NEC subcommittee has made incredible progress towards environmental compliance since the 2010 DWH event and continues to do so since the NEC Subcommittee was established in 2015. The NEC Subcommittee plans to continue to develop and refine job aids, tools, and new guidance documents in efforts to achieve environmental compliance in accordance with the ESA, as well as other environmental laws, during spill response operations (USCG, 2017).

DISCLAIMER

The information in this paper reflects ongoing work and the views of the author, and does not necessarily reflect the official positions or policies of the U. S. Coast Guard or the NRT. All documents and products discussed above are currently in development or have been recently approved through interagency process identified within the NRT.

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