*U.S. DEPARTMENT OF COMMERCE*
*Office of Inspector General*

# *NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION*

## *The NMFS Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated from the Region's Normal Practice*

***Final Audit Report No. STL – 17242-5-0001/July 2005***

*Office of Audits*
*Seattle Regional Office*

UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

July 8, 2005

**MEMORANDUM FOR:** Conrad C. Lautenbacher
Under Secretary of Commerce for Oceans and Atmosphere and
NOAA Administrator

John J. Kelly, Jr.
Deputy Under Secretary of Commerce for Oceans and Atmosphere

William T. Hogarth
Assistant Administrator for Fisheries

**FROM:** Johnnie E. Frazier

**SUBJECT:** The NMFS Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated from the Region's Normal Practice
Final Audit Report No. STL-17242-5-0001

On October 8, 2004, in a letter to the inspectors general of the departments of Interior and Commerce, 19 members of the U.S. House of Representatives requested a review of allegations that Interior's Bureau of Reclamation, ". . . in its haste to finalize water contracts in California, has improperly undermined the required NOAA Fisheries environmental review process for the proposed long-term Operations, Criteria, and Plan (OCAP) for the Central Valley Project (CVP) and the State Water Project (SWP)."

Attached is our final report on our audit of the process used by the National Marine Fisheries Service (NMFS) to develop its biological opinion during formal consultation on the long-term operations, criteria, and plan for these projects. The objectives of our audit were to (1) identify the review process used to issue NOAA's October 22, 2004, opinion on the Bureau of Reclamation's Central Valley Project and California's State Water Project, and (2) determine whether NMFS—in developing the OCAP opinion—followed the consultation process for issuing biological opinions that is defined by its policies, procedures, and normal practices. We coordinated our work with the Interior inspector general's office, as appropriate. The results of Interior's review are not included in this report.

Our review of the process leading to the October 2004 biological opinion revealed inconsistencies between the way the OCAP consultation was initiated by the NMFS southwest regional office and the way it initiated other consultations. Moreover, we found that the regional office failed to comply with two significant controls in its normal review process. Our findings in this regard were particularly troubling given NMFS' own longstanding recognition of (1) the

need to significantly improve how it handles biological opinions and (2) its own documented efforts to identify and develop policies and internal controls to effect such improvements. Ironically, such policies and internal controls—when followed—can serve to protect NMFS, NOAA and their staff from charges that they acted arbitrarily or inappropriately. Undermining the integrity of the process, as NMFS did here, exposes the agency and its employees to precisely such criticisms.

Based on the steps discussed in NOAA's June 15, 2005, response to our April 12, 2005, draft report and subsequent discussions, we believe that NOAA has a foundation for developing a workable audit action plan. In accordance with Department Administrative Order 213-5, *Audit Resolution and Follow-up*, please provide us with the audit action plan addressing all of the report recommendations within 60 days of this memorandum. If you would like to discuss the report's contents or the audit action plan, please call me at (202) 482-4661, or David Sheppard, Regional Inspector General for Audits, Seattle Regional Office at (206) 220-7970.

We appreciate the general cooperation and courtesies your staff extended to us during our review.

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# EXECUTIVE SUMMARY

California's Central Valley Project (CVP) is one of the nation's major water conservation efforts. First undertaken by the Bureau of Reclamation in 1935, the CVP includes all federal reclamation projects located within or diverting water from or to the watershed of the Sacramento and San Joaquin rivers and their tributaries.

Passage of the Endangered Species Act (ESA) in 1973 required federal agencies, in consultation with the Secretary of Commerce, to ensure that any actions they authorized, funded, or carried out are unlikely to jeopardize the continued existence of any endangered or threatened marine species or destroy or adversely modify critical habitats of listed marine species. As a result of such consultations, NMFS issues its biological opinions on whether a proposed action is likely to jeopardize the endangered or threatened species. The opinion also provides, as appropriate, terms and conditions, and conservation recommendations to minimize or avoid adverse effects on the species.

On March 15, 2004, the Bureau of Reclamation requested formal consultation[1] with the National Marine Fisheries Service (NMFS) on the effects of ongoing CVP operations and facilities and an early consultation[2] on the effects of future operations. On October 22, 2004, under its delegated ESA authority, the NMFS southwest regional office issued a biological opinion on the effects of the proposed long-term operations, criteria, and plan for the CVP in coordination with the operations of California's State Water Project (SWP) on federally listed endangered and threatened salmon and steelhead and their designated habitat in accordance with Section 7 of the Endangered Species Act. The opinion concluded that the project, as proposed, is not likely to jeopardize the continued existence of endangered and threatened salmon and steelhead or destroy or adversely modify critical habitat for the endangered and threatened species.

On October 8, 2004, in a letter to the inspectors general of the departments of Interior and Commerce, 19 members of the U.S. House of Representatives requested a review of allegations that Interior's Bureau of Reclamation, ". . . in its haste to finalize water contracts in California, has improperly undermined the required NOAA Fisheries environmental review process for the proposed long-term Operations, Criteria, and Plan (OCAP) for the Central Valley Project (CVP) and the State Water Project (SWP)." Consequently, we sought to (1) identify the review process used to issue NOAA's October 22, 2004, opinion on the Bureau of Reclamation's Central Valley Project and California's State Water Project, and (2) determine whether NMFS—in developing the OCAP opinion—followed the consultation process for issuing biological opinions that is defined by its policies, procedures, and normal practices. We did not seek to determine whether the issued opinion is scientifically sound or supportable.

[1] A formal consultation is defined as a process between NMFS and a federal agency or applicant that determines whether a proposed federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.
[2] Early consultation is defined as a preliminary consultation requested by a federal agency on behalf of a prospective permit or license applicant prior to the filing of an application for a federal permit or license.

Our findings are as follows:

**The NMFS southwest regional office deviated from the agency's established consultation initiation process.** Contrary to the NMFS normal process, the regional office initiated the formal consultation[3] with insufficient information, rather than suspending it until the Bureau of Reclamation provided the information. To determine whether the regional office typically proceeded without sufficient information, we examined the administrative record for 10 other consultations. There were no cases in which a formal consultation proceeded without sufficient information, as occurred with the OCAP opinion. Instead, we found examples of insufficiency letters suspending formal consultation with agencies until NMFS received the information. (See page 6.)

**The southwest regional office did not follow its process for ensuring the quality of the biological opinion.** The southwest regional office issued the region's policies and procedures for conducting and reviewing Section 7 consultations in October 1999 (see Flowchart 2 on page 12). The region's policy, in addition to its training program, met the conditions stated in the NMFS executive board decision memorandum issued in March 1999, which was intended to ensure the quality of biological opinions. However, the process was not followed. (See page 9.)

- **Previously identified problems with Section 7 consultations led to the development of a review process—a process that should have been followed by the southwest regional office in issuing the OCAP opinion.** On July 28, 1995, the Assistant Administrator for Fisheries delegated to the regional administrators for the southwest and northwest regional offices the authority to conduct formal and informal consultations and issue biological opinions under Section 7 of the Endangered Species Act for activities affecting anadromous species. In September of 1997, NMFS' Executive Board recommended that the 1995 delegation be reviewed prior to making a decision on whether to delegate Section 7 signature authority nationally. A multi-office team[4] was established in June 1998 to evaluate and report on the Section 7 program's effectiveness, efficiency, information systems and quality assurance and quality control measures. The team identified various concerns and concluded that the delegated programs in the southwest and northwest regional offices had many problems, including "debatable adherence to the [Endangered Species Act], regulations and national guidance." It formulated a series of recommendations designed to address the problems it identified, which it presented to the NMFS Executive Board in February of 1999. Among other things, the team recommended that (1) permanent section 7 coordinators be established in each region no later than the end of FY1999 and (2) delegation of Section 7 authority be contingent upon the establishment of a regional section 7 coordinator, the establishment of a training program, and the development of a clear policy on interaction with the Office of General Counsel.

[3] According to NMFS *Final ESA Section 7 Handbook*, formal consultation is "initiated" on the date the request is received, if the action agency provides all the relevant data required by 50 CFR §402.14(c). If all required data are not initially submitted, then formal consultation is initiated on the date on which all required information has been received.

[4] The team was comprised of staff from four of the six regions; the sustainable fisheries, habitat conservation, protected resources, and endangered species divisions; the office of general counsel; and the U.S. Fish and Wildlife Service.

The Executive Board agreed with the review team's findings and recommendations and in March 1999 presented a decision memorandum to the NMFS Assistant Administrator to that effect. The Assistant Administrator noted his concurrence with all of the review team's findings and recommendations on the decision memorandum. In October 1999, the NMFS Executive Board prepared a *Section 7 Implementation Work Plan*. On October 18, 1999, the southwest regional office's section 7 coordinator issued a memorandum introducing that region's new review process and tracking system for biological opinions. The memorandum specifically detailed the responsibilities of the new regional section 7 coordinator and the role of the Office of General Counsel in the review process.[5] As such, the memorandum satisfied two of the three requirements for delegation outlined in the *Section 7 Implementation Work Plan*: establishing a section 7 coordinator and developing a clear policy on interaction with the Office of General Counsel.

As a primary focus of this review, we assessed whether the actions that resulted in the issuance of the OCAP opinion complied with the process outlined in the October memorandum.

We determined that they did not. (See page 9.)

- **Regional section 7 coordinator did not clear the OCAP opinion.** The regional coordinator reviews the opinion for (1) use of the best available scientific and commercial information, including the most recent status and trend data for each species; (2) adherence to national and regional policies and guidelines; and (3) presentation of logical arguments and discussion. She told us that she did not complete her review of the draft because the assistant regional administrator for protected resources "stepped in" to work with the lead biologist to complete the draft and then sent the draft to the Bureau of Reclamation for review. She also did not complete her review of the final opinion.

  The regional coordinator is normally required to sign off on the opinion, but she did not sign off on either the draft or final documents. In the case of the draft, the coordinator advised us that she did not believe the document was ready to send to the Bureau of Reclamation. As for the final, she reported that the assistant regional administrator sent the opinion out when she was away from the office conducting training on Section 7 consultations. In any event, the coordinator also told us she would not have signed off on the opinion because of her belief that there is a basic disconnect between the scientific analysis and the conclusion.

  We asked the assistant regional administrator whether he had performed the duties of the section 7 coordinator. He believed that he had. In fact, he stated in an email that "In this case it is fair to say I assumed the responsibility of section 7 coordinator" and that he ". . . stepped in because the dialogue that was occurring between staff and [the section 7 coordinator] wasn't producing a sound analysis."

[5] The specifics of the process are outlined in Flowchart 2 on page 12.

In addition to the required regional section 7 coordinator review as stated in the regional policy, the offices in the southwest region also have local section 7 coordinators located in the field offices. The local coordinator is expected to review opinions for clarity, conciseness, and logical analysis and conclusions. Unfortunately, the local coordinator said she was instructed by her managers to send the opinion to the regional office before she completed her review. (See page 10.)

- **The Office of General Counsel did not clear the OCAP opinion.** The attorney assigned to the OCAP opinion did not sign off on the draft or final opinions. When we questioned his supervisor, the regional general counsel, we were told that his office reviews highly controversial or politically sensitive opinions. In fact, he used the OCAP consultation as a specific example of the type of opinion that should be reviewed. He further explained that the typical legal review process his office follows is intended to ensure that an opinion complies with pertinent laws, such as the Endangered Species Act and the Administrative Procedures Act,[6] and is sufficient and defensible. He also noted that the reviewing attorney provides comments on drafts that "must" be addressed before counsel will sign off on a draft opinion. There was no evidence in the administrative record indicating legal review of the opinion by the regional general counsel's office. The regional general counsel later confirmed that the opinion was not cleared by his office, although he could not explain why. (See page 11.)

**We found no evidence to support the allegation that a draft "jeopardy" opinion was previously provided to Bureau of Reclamation officials.** There were allegations that a draft "jeopardy" opinion had been issued by NMFS to the Bureau of Reclamation and was subsequently changed to "no jeopardy" without sufficient justification. Several NMFS staff who worked on the opinion initially told us that on August 5, 2004, a draft was handed to Bureau of Reclamation regional staff with a transmittal letter that stated NMFS had reached a jeopardy conclusion. However, in subsequent interviews, they were unsure whether copies of a jeopardy draft and transmittal letter were, in fact, provided to the Bureau of Reclamation. In addition, an investigator at the Interior inspector general's office stated that no one that she spoke with at the Bureau of Reclamation regarding the OCAP opinion acknowledged receiving a draft jeopardy opinion. And finally, there was no evidence in the administrative record to support the claim that the draft jeopardy opinion was provided to Bureau of Reclamation staff, only that a no jeopardy draft was given to the Bureau of Reclamation for comment on September 27, 2004. (See page 15.)

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In conclusion, by initiating the consultation with the Bureau of Reclamation without sufficient information and failing to ensure the section 7 coordinator and general counsel reviewed and signed off on the opinion, the assistant regional administrator circumvented key internal controls

[6] As noted in the Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service (http://laws.fws.gov/lawsdigest/admin.html#ADPRO), the Administrative Procedures Act "outlines administrative procedures to be followed by federal agencies with respect to identification of information to be made public; publication of material in the Federal Register; maintenance of records, including those involving certain meetings and hearings; attendance and notification requirements for specific meetings and hearings; issuance of licenses; and review of agency actions."

established to ensure the integrity of the biological opinion. In addition, the failure to follow the region's Section 7 biological review process and obtain regional general counsel legal review is contrary to the NMFS executive board's conditions for delegated authority to conduct ESA Section 7 consultations. Our findings in this regard were particularly troubling given NMFS' own longstanding recognition of (1) the need to significantly improve how it handles biological opinions and (2) its own documented efforts to identify and develop policies and internal controls to effect such improvements. Ironically, such policies and internal controls—when followed—can serve to protect NMFS, NOAA and their staff from charges that they acted arbitrarily or inappropriately. Undermining the integrity of the process, as NMFS did here, exposes the agency and its employees to precisely such criticisms. Although we did not assess the soundness and supportability of the opinion's conclusions, the process used by NMFS in this instance understandably raises questions about the integrity of the OCAP opinion.

Given the importance and political sensitivities often associated with these opinions, it is imperative that NOAA has and adheres to a meaningful and transparent process that provides the best opportunity for a sound opinion with maximum integrity. Therefore, we are recommending that the Under Secretary and Deputy Secretary of Commerce for Oceans and Atmosphere takes the necessary actions to ensure that the Assistant Administrator for Fisheries

- (1) reviews existing delegations, policies and directives for Section 7 consultations,

  (2) develops and implements a standard national set of policies and procedures for Section 7 delegations, including clarifying the legal review process,

  (3) issues these policies and procedures to staff through its Policy Directives System, and

  (4) submits these policies and procedures for incorporation into the NOAA Delegations of Authority.

  If these actions are not completed within six months as indicated in NOAA's response, all delegations to perform Section 7 consultations should be revoked until the actions are completed;

- ensures that the NMFS regional offices follow the new policies, directives and procedures for conducting Section 7 consultations; and

- objectively evaluates whether the southwest regional office's questionable handling of the OCAP opinion impaired the opinion's scientific integrity.

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In responding to our draft report, NOAA officials provided clarifying comments, which we have incorporated, where appropriate, in this final report. In response to our first recommendation, NOAA stated that the delegation of authority applicable to the OCAP opinion was issued in 1995. It expressed the belief that the southwest regional office followed the process required under the 1995 delegation and asked that we reconsider our first recommendation. NOAA also

committed to thoroughly evaluate its Section 7 delegations, policies and directives within the next six months. In light of that commitment, we altered the first recommendation contained in our draft report, which focused solely on the southwest regional office. The new recommendation tracks the actions NOAA has committed to do, and notes that if such actions are not completed within the six month time frame used by NOAA, then all Section 7 delegations should be revoked. We feel that such revocation is justified, given the lack of clarity with regard to the processes that must be followed for delegated Section 7 activities. We have added a recommendation requiring the Assistant Administrator for Fisheries to ensure that the new policies, directives, and procedures are followed for the obvious reason that it is not simply the creation of appropriate procedures but adherence to them that matters.

In response to our recommendation in the draft report that the Assistant Administrator evaluate whether the southwest regional office's handling of the OCAP opinion impaired the opinion's scientific integrity, NOAA stated that although NMFS does not subject its biological opinions to peer review, it is trying to reach an agreement with an outside organization to review the science underlying the OCAP opinion. If NOAA, in fact, obtains an outside review of the science underlying the OCAP opinion, that action should meet the intent of our recommendation.

NOAA's response is included in its entirety as an appendix to this report.

# INTRODUCTION

California's Central Valley Project (CVP) is one of the nation's major water conservation efforts. First undertaken by the Bureau of Reclamation in 1935, the CVP includes all federal reclamation projects located within or diverting water from or to the watershed of the Sacramento and San Joaquin rivers and their tributaries. It extends from the Cascade Range in the north to the plains along the Kern River in the south. Initial features of the CVP were built primarily to protect the Central Valley from water shortages and floods. Today, the CVP serves farms, homes, and industry in California's Central Valley as well as major urban centers in the San Francisco Bay Area. It is also the primary source of water for much of California's wetlands.

**Figure 1: State and Federal Water Projects (the red shaded area covers the main portion of the CVP)**
**Source: California Department of Water Resources (the red shared area was superimposed by OIG)**

Passage of the Endangered Species Act in 1973 required federal agencies, in consultation with the Secretary of Commerce, to ensure that any actions they authorized, funded, or carried out are unlikely to jeopardize the continued existence of any endangered or threatened marine species or destroy or adversely modify critical habitats of listed marine species. As a result of such consultations, NMFS issues its biological opinions on whether a proposed action is likely to jeopardize the endangered or threatened species. The opinion also provides, as appropriate, terms and conditions, and conservation recommendations to minimize or avoid any potential adverse effects on the species.

In 1989, Sacramento winter run Chinook salmon, a species affected by the CVP, was listed as threatened. In 1991, NMFS requested formal consultation[7] on the project in accordance with the act. In 1993, NMFS issued a long-term OCAP biological opinion addressing the effects of both the CVP and State Water Project (SWP) on Sacramento winter run Chinook salmon. Since 1993, NMFS has provided six additional interim or supplemental biological opinions on the CVP to address changes to listed species or amendments to the projects.

On July 28, 1995, the Assistant Administrator for Fisheries delegated to the NMFS southwest regional administrator the authority to conduct formal and informal consultations and issue biological opinions under Section 7 of the Endangered Species Act for activities that may affect anadromous species.

On March 15, 2004, the Bureau of Reclamation requested formal consultation with NMFS on the effects of ongoing operations and facilities and an early consultation[8] on the effects of future operations. The formal consultation included several new projects, such as the Freeport Pumping Plant, the CVP/SWP Intertie, changes in the Central Valley Project Improvement Act policy on water use[9], implementation of Trinity River restoration flows, and long-term water contracts. There are approximately 250 long-term water service contracts dependant upon CVP operations. Most of these contracts are for a term of 40 years and are in the process of renewal. Because they are interrelated with the proposed future operations, the contracts are considered part of the project.

The early consultation included the Bureau of Reclamation and the California Department of Water Resource's proposed implementation of the South Delta Improvement Program. This

[7] Formal consultation is defined as a process between NMFS and a federal agency or applicant that (1) determines whether a proposed federal action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with a federal agency's written request and submittal of a complete initiation package; and (3) concludes with the issuance of a biological opinion and incidental take statement by NMFS.

[8] Early consultation is defined as a preliminary consultation requested by a federal agency on behalf of a prospective permit or license applicant prior to the filing of an application for a federal permit or license.

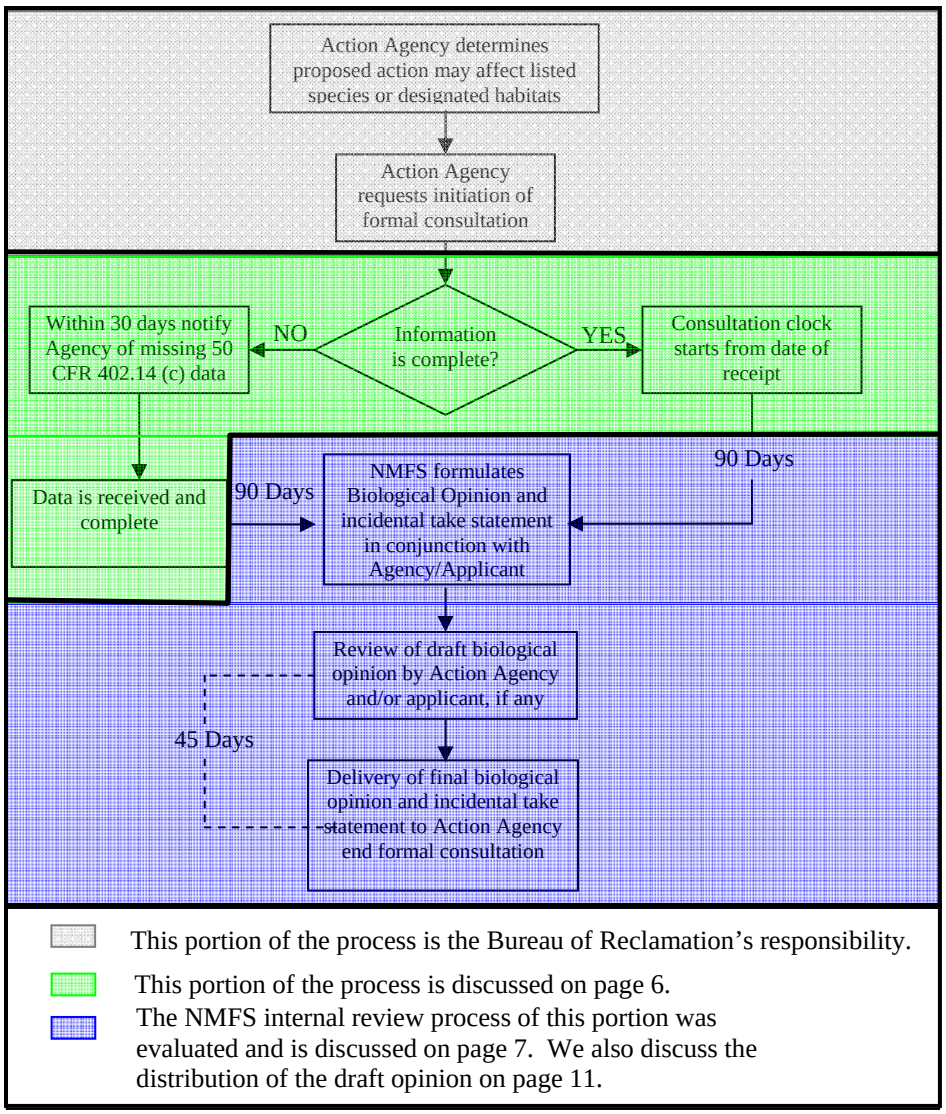
[9] Section 3406 (b) (2) of the Central Valley Project Improvement Act of 1992 (CVPIA) authorized and directed the Secretary of Interior to dedicate and manage annually eight hundred thousand acre-feet of CVP yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by CVPIA; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the CVP under state or federal law following the date of enactment of CVPIA, including but not limited to additional obligations under the Endangered Species Act.

program includes increased water pumping at Banks Pumping Plant, permanent operable barriers in the South Delta, and a long-term environmental water account.

On October 22, 2004, under its delegated authority, the NMFS southwest regional office issued a biological opinion to Interior's Bureau of Reclamation and the California Department of Water Resources on the effects of the proposed long-term operations, criteria, and plan for the CVP in coordination with operations of the SWP on federally listed endangered and threatened salmon and steelhead and their designated habitat in accordance with Section 7of the Endangered Species Act. The opinion concluded that the project, as proposed, is not likely to jeopardize the continued existence of endangered and threatened salmon and steelhead or result in the destruction or adverse modification of designated critical habitat for the endangered and threatened salmon and steelhead. The October 2004 OCAP opinion supercedes the previous opinions.

## OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our audit were to (1) identify the review process used to issue NOAA's October 22, 2004, opinion on the Bureau of Reclamation's Central Valley Project and California's State Water Project, and (2) determine whether NMFS—in developing the OCAP opinion—followed the consultation process for issuing biological opinions that is defined by its policies, procedures, and normal practices. Moreover, we initially sought to determine whether changes made by NMFS to an alleged draft jeopardy opinion that it reportedly gave to Bureau of Reclamation staff were adequately supported and in accordance with established policies and procedures. However, as discussed on page 15, we found no evidence that Bureau of Reclamation staff ever received such a draft. We did not seek to determine whether the issued opinion is scientifically sound or supportable. Flowchart 1 illustrates NMFS' process and timelines for initiating formal consultation and issuing a biological opinion.




**Flowchart 1: Formal Consultation Process**
**Source: Chapter 4, Final ESA Section 7 Consultation Handbook, March 1998**

During our audit, we met with NMFS officials at NOAA headquarters in Silver Spring, Maryland, as well as at the NMFS regional office in Long Beach, California, and the NMFS field office in Sacramento. We reviewed the administrative record[10] of this consultation maintained in the Sacramento field office, other pertinent documentation, and guidance on conducting formal consultations provided to us by the section 7 coordinators at the local, regional, and headquarters levels. We coordinated our review with the Department of Interior Office of Inspector General to determine, among other things, whether Bureau of Reclamation staff previously received a draft jeopardy opinion from NMFS as alleged.

We conducted this audit in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States, and under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

[10] The administrative record should document and support consultations and the resulting biological opinions. According to the *Endangered Species Consultation Handbook*, the administrative record should contain the following types of records as appropriate: (1) letters, memoranda, public notices, or other documents requesting the consultation; (2) summaries of meetings held; (3) summaries of field trips or site inspections; (4) summaries of personal contacts between the biologist, the federal agency, state or tribal biologists, applicant, consultant, private citizens or interest groups; (5) summaries of telephone conversations pertaining to the consultation; (6) written correspondence pertaining to the consultation; (7) electronic mail messages pertinent to the decision-making process; (8) published material used in developing the consultation; and (9) other information used in the consultation process.

## FINDINGS AND CONCLUSIONS

### I. THE NMFS SOUTHWEST REGIONAL OFFICE DEVIATED FROM THE AGENCY'S CONSULTATION INITIATION PROCESS

Contrary to the NMFS normal process, the southwest regional office initiated its formal consultation on the OCAP opinion with insufficient information, rather than suspending it until the Bureau of Reclamation provided the information.

Regulations implementing the Endangered Species Act (ESA), found at 50 CFR §402.14 (c), provide that

> A written request to initiate formal consultation shall be submitted to the Director and shall include: (1) A description of the action to be considered; (2) A description of the specific area that may be affected by the action; (3) A description of any listed species or critical habitat that may be affected by the action; (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects; (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and (6) Any other relevant available information on the action, the affected listed species, or critical habitat.

These six items officially describe the project and its effects to NMFS for use in preparing its biological opinion.

On March 15, 2004, the Bureau of Reclamation requested formal consultation on the Central Valley Project and on March 22 it submitted information to NMFS to comply with the six items in 50 CFR §402.14 (c). NMFS reviewed the material provided and determined that it did not contain all of the information required for NMFS to properly conduct the analysis. NMFS told the Bureau of Reclamation on March 30 that the submission was "insufficient for NOAA Fisheries to determine the potential impacts to listed species and their designated critical habitat associated with the proposed project and early consultation." NMFS listed the additional information required and asked the Bureau of Reclamation to provide it.

According to the NMFS *Final ESA Section 7 Handbook*,

> Formal consultation is 'initiated' on the date the request is received, if the action agency provides all the relevant data required by 50 CFR §402.14(c). If all required data are not initially submitted, then formal consultation is initiated on the date on which all required information has been received.

The handbook provides a sample insufficiency letter that states the following.

> The formal consultation process for the project will not begin until we receive all of the information, or a statement explaining why that information cannot be made available. We will notify you when we receive this additional

> information; our notification letter will also outline the dates within which formal consultation should be complete and the biological opinion delivered on the proposed action.

In the case of the OCAP opinion, NMFS did not suspend the formal consultation until it received all of the data required by 50 CFR 402.14(c). Instead, its insufficiency letter to the Bureau of Reclamation stated:

> The formal consultation process for this project **would not normally begin until we receive all of the above information, or a statement explaining why that information cannot be made available**. Section 7 allows NOAA Fisheries up to 90 calendar days to conclude formal consultation and an additional 45 days to prepare our biological opinion . . . **however, my staff has been fully involved in the informal consultation process since its start and is dedicated to providing you with a biological opinion earlier than the allowed 135 day statutory time frame.** Therefore, we will make every effort to meet your requested deadline of June 30, 2004. (Emphasis added.)

NMFS regional staff told us that they often work closely with agencies requesting information and are typically knowledgeable about the listed species that may be affected by a project.

We could not find in the administrative record an acknowledgment from NMFS that it ever received a final, complete, and accurate description of the project. Although NMFS regional management stated that there was sufficient information, the information was initially deemed insufficient. In fact, a biologist at headquarters emailed the staff of the southwest regional office in April 2004 and informed them that some of the information in the biological assessment was "not nearly adequate for consultation on effects to SONCC Coho." Biologists who worked on the project stated that they were not sure whether a final information package accurately defining the project was ever actually received. They stated that the Bureau of Reclamation provided several changes to the project description, even after the opinion was issued.

The fact that NMFS initiated the consultation with insufficient information complicated its analysis of the proposed project. The assistant regional administrator acknowledged that the Bureau of Reclamation had a hard time nailing down the project and issued numerous biological assessments. In fact, our review of the administrative record and interviews with NMFS staff revealed that the Bureau of Reclamation provided at least 18 amendments or clarifications to the information package from April until October 2004—days prior to the issuance of the opinion. Several biologists who worked on the OCAP opinion expressed frustration with all the changes, noting that working under such conditions was like trying to hit a moving target. By initiating the consultation in this fashion, NMFS has raised a question as to whether its analysis is based on the best available scientific information.

To determine whether the regional office typically proceeded without sufficient information, we examined the administrative record for 10 other consultations it had handled. In 6 of the 10 consultations, requesting agencies initially provided insufficient information. In none of the six consultations did NMFS allow formal consultation to continue without the information. In fact,

NMFS issued insufficiency letters to the agencies that suspended formal consultation until NMFS received the information.

**NOAA Response and OIG Comments**

NOAA responded that neither the statute, regulations, nor the consultation handbook authorize NMFS to delay consultation as a way of forcing the consulting agency to provide more information. According to NOAA's response, the regulations envision that consultation is an iterative process allowing NMFS to ask for additional information as NMFS' opinion crystallizes. The response suggests that NMFS should proceed with the consultation regardless of whether additional information is provided. They quote their handbook, which states "the formal consultation process for the project will not begin until we receive all of the information or a statement explaining why that information cannot be made available." They went on to state that in either case, the consultation should proceed. NMFS also points to an August 9, 2004, Bureau of Reclamation letter stating that all the information requested in the insufficiency letter had been provided.

As NOAA noted in its response, according to NMFS' own Section 7 Consultation Handbook, formal consultation should not begin until "we receive all of the information <u>or</u> a statement explaining why that information cannot be made available." (emphasis added) In this case, neither event occurred: consultation began in the spring of 2004 even though all of the requested information had not been provided and no evidence exists in the administrative record that the Bureau of Reclamation contended that the information was unavailable. In fact, given how the information trickled into NMFS, as stated by the Bureau of Reclamation in its letter of August 9, 2004, that information does not appear to have been unavailable.[11] In addition, that letter states the Bureau of Reclamation's belief that the information required to initiate consultation was provided, there is nothing in the administrative record that confirms, from NMFS' perspective, whether that belief is accurate or whether the information received is acceptable and sufficient. By initiating the consultation in this fashion rather than waiting until sufficient information was received, NMFS has raised a question as to whether its analysis is based on the best available scientific information.

NOAA further stated that

> Had NMFS suspended consultation between March 30, 2004 and the receipt of the requested information on August 9, 2004, NMFS would have been able to extend the date for issuance of the biological opinion until November 17, 2004 (135 days after March 30 less the suspension period). Alternatively, NMFS could achieve essentially the same result by negotiating an extension of the consultation period with the action agency. In this case, NMFS agreed on an extension of the consultation period and NMFS took 221 days to issue the biological opinion on October 22, 2004.

NOAA's concern about the extension of the consultation period is off point. Our report does not criticize the southwest regional office for failing to comply with the statutory and regulatory

[11] It should also be noted that the Bureau did not claim that the information was unavailable in its August 9th letter.

timeframes governing Section 7 consultations. Rather, it questions the office's decision to initiate a formal consultation prior to receiving all of the requested information or an explanation that that information was not available.

Finally, we recognize and accept the iterative nature of the consultation process. Our concern here is not that the Bureau provided information throughout the entire process, but with the fact that by its own admission it did not provide the information required to initiate consultation until June 30, 2004—months after the formal process began. As noted previously, by proceeding in this fashion NMFS has raised a question as to whether its analysis is based on the best available scientific information.

## II. THE NMFS SOUTHWEST REGIONAL OFFICE DID NOT FOLLOW ITS PROCESS FOR ENSURING THE QUALITY OF THE BIOLOGICAL OPINION

### A. Problems Previously Identified by NMFS with Section 7 Consultations Led to Review Process That Should Have Been Followed by the Southwest Regional Office in Issuing the OCAP Opinion

On July 28, 1995, the Assistant Administrator for Fisheries delegated to the regional administrators for the southwest and northwest regional offices the authority to conduct formal and informal consultations and issue biological opinions under Section 7 of the Endangered Species Act for activities affecting anadromous species. Unfortunately, the delegation did not specify any process that was to be followed in conducting such consultations.

In September of 1997, NMFS' Executive Board recommended that the 1995 delegation be reviewed prior to making a decision on whether to delegate Section 7 signature authority nationally. A multi-office team[12] was established in June 1998 to evaluate and report on the Section 7 program's effectiveness, efficiency, information systems and quality assurance and quality control measures. The review team was specifically charged with examining the existing Section 7 programs in the southwest and northwest regions as pilots for establishing a delegated Section 7 program in all NMFS regions, and was told to recommend changes needed to ensure the creation of a successful national program that meets the goals and purposes of the Endangered Species Act.

The team identified various concerns and concluded that the delegated programs in the southwest and northwest regional offices had many problems, including "debatable adherence to the [Endangered Species Act], regulations and national guidance." It found similar problems in the nondelegated Section 7 programs. The team concluded that if NMFS' goal was to establish a successful delegated Section 7 program in all regions, then it must address existing program challenges as well as new challenges that might arise when authority is delegated. It formulated a series of recommendations designed to address the problems it identified, which it presented to the NMFS Executive Board in February of 1999.

[12] The team was comprised of staff from four of the six regions; the sustainable fisheries, habitat conservation, protected resources, and endangered species divisions; the office of general counsel; and the U.S. Fish and Wildlife Service.

Among other things, the team recommended that (1) permanent section 7 coordinators be established in each region no later than the end of FY1999 and (2) delegation of Section 7 authority be contingent upon the establishment of a regional section 7 coordinator, the establishment of a training program, and the development of a clear policy on interaction with the Office of General Counsel. Regional section 7 coordinators with expertise in ESA and related disciplines were needed, the team concluded, because "Regional managers cannot personally provide in-depth reviews or policy interpretation for the large number of consultations that comprise Regional workloads." The recommendation related to the Office of General Counsel grew out of an "immediate need" identified by the review team to develop national policy and guidance that defines the role of General Counsel in a delegated Section 7 program, including establishing appropriate procedures, roles and responsibilities for GC staff during the preparation and review of Section 7 documents.

The NMFS Executive Board agreed with the review team's findings and recommendations and in March 1999 presented a decision memorandum to the NMFS Assistant Administrator to that effect. The Assistant Administrator noted his concurrence with all of the review team's findings and recommendations on the decision memorandum.

In October 1999, the NMFS Executive Board prepared a *Section 7 Implementation Work Plan*, which was intended to assign responsibility for implementation of the review team's recommendations to various parties within NMFS and to establish timeframes for implementation of the various recommendations. According to this document, the regional administrators were responsible for (1) ensuring that each region has a regional section 7 coordinator, (2) a commitment to and resources for training, and (3) a clear policy on interaction with General Counsel. The target date for implementation of this recommendation was described as "immediate."

On October 18, 1999, the southwest regional office's section 7 coordinator issued a memorandum introducing that region's new review process and tracking system for biological opinions. The memorandum specifically detailed the responsibilities of the new regional section 7 coordinator and the role of the Office of General Counsel in the review process.[13] As such, it satisfied two of the three requirements for delegation outlined in the *Section 7 Implementation Work Plan*: establishing a section 7 coordinator and developing a clear policy on interaction with the Office of General Counsel.

As a primary focus of this review, we assessed whether the actions that resulted in the issuance of the OCAP opinion complied with the process outlined in the October memorandum. We determined that they did not. Specifically, we found that neither the regional section 7 coordinator nor the Office of General Counsel cleared the OCAP opinion, as required by the southwest regional office's review process.

## B. Regional Section 7 Coordinator Did Not Clear the OCAP Opinion

As stated in the October 18, 1999, memorandum, the regional section 7 coordinator reviews the opinion for (1) use of the best available scientific and commercial information, including the

[13] The specifics of the process are outlined in Flowchart 2 on page 12.

most recent status and trend data for each species; (2) adherence to national and regional policies and guidelines, and (3) presentation of logical arguments and discussion. The regional coordinator also ensures that the discussion throughout the document guides the reader to the conclusion reached in the opinion.[14] If the coordinator determines that major revisions to the document are necessary, she returns it to the consulting biologist, along with a discussion of the changes that need to be made. Once the appropriate revisions are made and Office of General Counsel review has been completed, the coordinator signs off on the opinion.

In this particular case, the regional section 7 coordinator told us that she did not complete her review of the draft opinion because the assistant regional administrator for protected resources "stepped in" to work with the lead biologist to complete the draft. She stated that she did not sign-off on the draft because she believed it was not ready to send to the action agency. The regional coordinator also informed us that she did not review the final opinion prior to its issuance on October 22, 2004 and that she did not clear the final because the assistant regional administrator sent it out when she was away from the office conducting training on Section 7 consultations. She indicated that, if given the opportunity, she would not have signed off on the opinion because of her belief that there is a basic disconnect between the scientific analysis and the conclusion.

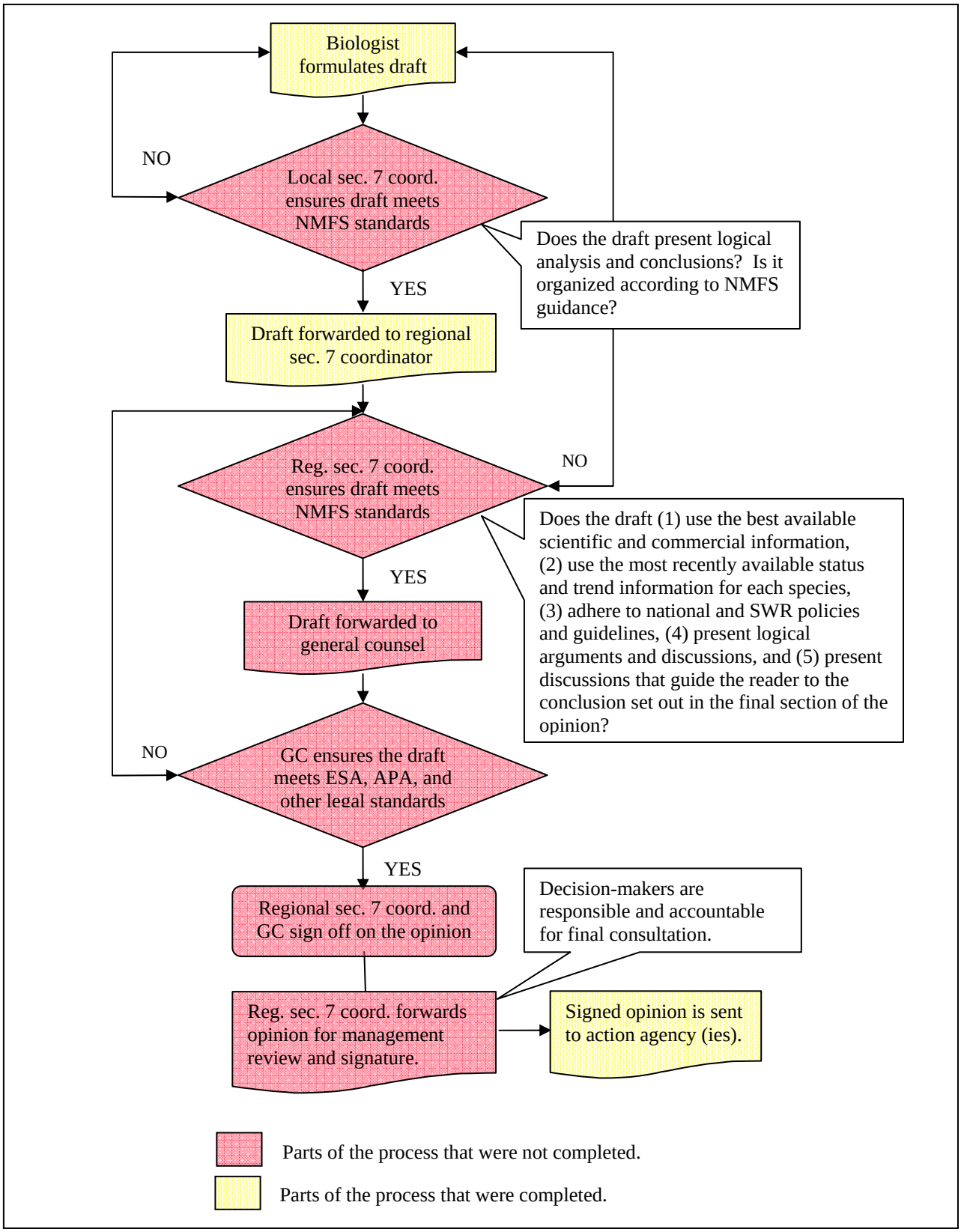
The assistant regional administrator informed us that "In this case it is fair to say I assumed the responsibility of section 7 coordinator" and that he ". . . stepped in because the dialogue that was occurring between staff and [the section 7 coordinator] wasn't producing a sound analysis."

It should be noted that, while it is not required to do so by the October 18 memorandum, the southwest regional office also has local section 7 coordinators who review biological opinions. Those local coordinators are expected to review biological opinions prepared by the lead biologists to ensure that the opinions present clear, concise, and logical analysis and conclusions. The local coordinator involved in the OCAP opinion said she was told by her managers to send the draft opinion to the regional office before she completed her review, and she did not review the final.

## C. The Office of General Counsel Did Not Clear the OCAP Opinion

The *Section 7 Implementation Work Plan* also required a "clear policy on interaction with General Counsel." In response to that document, the October 1999 memorandum produced by the southwest regional office's regional section 7 coordinator specified a process for legal review and clearance of all informal consultations and formal biological opinions. According to that document, an attorney from the regional general counsel's office is supposed to review the relevant documents for legal, statutory, and judicial compliance and provide comments to the regional section 7 coordinator; the regional coordinator then discusses these comments with the

[14] According to the NMFS *Standards that Will Apply to Reviews of Regional Section 7 Programs for Quality Assurance and Quality Control*, standards used to prepare and review biological opinions are established by the Administrative Procedures Act [APA; 5 USC 701 et seq], sections 7 and 10 of the Endangered Species Act of 1973, as amended [ESA; 16 USC 1536 and 1539], and regulations promulgated to implement section 7 of the ESA [50 CFR 402].




**Flowchart 2: SW Region's Internal Review Process**
**Source: Southwest Regional Office**

consulting biologist, and the attorney as necessary. When the issues raised by the Office of General Counsel have been appropriately resolved, that office will sign off on the document.

In the case of OCAP, the responsible attorney did not sign off on either the draft or final opinions. We questioned his supervisor, the regional general counsel, about the legal review policy and were told that highly controversial or politically sensitive opinions are reviewed by his office. In fact, he used the OCAP opinion as a specific example of the type of opinion that should be reviewed. He explained that his office's review is intended to ensure that opinions comply with pertinent laws, such as the Endangered Species Act and Administrative Procedures Act, and are defensible. He also added that legal comments on drafts "must" be addressed before his office will sign off on them. The regional general counsel learned from us that the OCAP opinion had not been reviewed by his office and could not explain why. He later confirmed that the opinion was not cleared by his office.[15] He stated that except for this opinion, he is not aware of any other opinion that has not had a waiver or been reviewed.

## D. NOAA Response and OIG Comments

Our draft report initially used criteria contained in NOAA documents related to a 2002 delegation of Section 7 authority to assess the validity of the process that resulted in the OCAP opinion. However, in its response to that report, NOAA informed us that the 2002 delegation was only for intra-agency delegations and that the delegation that resulted in the OCAP opinion occurred in 1995. It further noted that an October 1999 memorandum written by the southwest region's section 7 coordinator set forth the review process that should have been followed for the OCAP opinion. The response stated NOAA's belief that the southwest regional office followed the process required under the 1995 delegation and requested that we re-examine our findings and recommendations using the 1995 delegation as the governing authority.

We reviewed the 1995 delegations incorporated in the NOAA Handbook, as well as the Section 7 Delegation/Program Review Report and The Executive Board Recommendations regarding ESA Section 7 Delegation/Program Review. We accept NOAA's position that the 1995 delegation is the appropriate one, although as we noted in the body of the report it did not specify any process to be followed in conducting such consultations.

The confusion over the delegation of authority was due in no small part to the fact that, in our search for criteria, we were directed by NMFS employees from NMFS headquarters to documents associated with the 2002 delegation. While we appreciate the clarification from NOAA, we are concerned that some NMFS employees appear to be confused on this issue.

We have also added to the report a discussion of the evolution of the process the southwest regional office should have followed for this consultation, in light of the fact that that process

[15] In addition to the legal review required by the October memorandum, NMFS guidance provides that the general counsel review of the draft biological opinion is a required part of the administrative record. We found no evidence of such a review in the OCAP administrative record.

was developed to address recommendations made by a multi-office team that identified problems with the southwest and northwest regional office's consultations under the 1995 delegation.

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NOAA also noted that, based on the findings in our draft report, NMFS has committed within the next six months to (1) review existing delegations, policies and directives for Section 7 consultations, (2) develop and implement a standard national set of policies and procedures for Section 7 delegations, including clarifying the legal review process, (3) issue these policies and procedures to staff through its Policy Directives System, and (4) submit these policies and procedures for incorporation into the NOAA Delegations of Authority.

In light of NOAA's commitment to thoroughly evaluate its Section 7 delegations, policies and directives, we have altered the first recommendation contained in our draft report, which focused solely on the southwest regional office. The new recommendation parallels the actions NOAA has committed to do, and notes that if such actions are not completed within the six month time frame used by NOAA, then all Section 7 delegations should be revoked. We feel that such revocation is justified, given the lack of clarity with regard to the processes that must be followed for delegated Section 7 activities. We have added a recommendation requiring the Assistant Administrator for Fisheries to ensure that the new policies, directives and procedures are followed for the obvious reason that it is not simply the creation of appropriate procedures but adherence to them that matters. The second recommendation contained in the draft report, now the third, remains unchanged.

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NOAA's response also stated that the assistant regional administrator supervises the section 7 coordinators and is capable of performing the duties of that position and routinely performs that function when the section 7 coordinator is unavailable. NOAA further noted that in July 2004, the assistant regional administrator determined the consultation team needed assistance and assumed the role of section 7 coordinator for this consultation.

We, however, found nothing in the administrative record indicating that change. We did find a letter dated August 13, 2004, in the administrative record from the regional section 7 coordinator, conveying her pen and ink comments on an early draft of the opinion. It is clear that her comments are from the perspective of a section 7 coordinator, not a "team member" as indicated in NOAA's response.

We discussed with the regional section 7 coordinator NOAA's statement that the assistant regional administrator routinely performs the role of the section 7 coordinator when the coordinator is unavailable. She indicated that she could only recall one other notable instance when the assistant regional administrator performed her duties: according to her recollection, the 2002 consultation on the Klamath operations was completed without her involvement or review. She noted that since October of 2003, each field office in the southwest region has had local section 7 coordinators who review documents before they come to the regional office. According to the regional coordinator, since that time the local coordinators should have taken care of the substantive aspects of the opinion in her absence. For truly routine opinions, she

noted, she has waived the regional review, which would mean that the assistant regional administrator would have no reason to act on her behalf.

Given that the Klamath opinion and the OCAP opinion are two complex, controversial reviews, it is troubling that neither the regional section 7 coordinator nor the local coordinator were able to perform their duties in those cases.

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Regarding legal review, our draft report contained statements attributed to the attorney who was supposed to have reviewed the OCAP opinion as to why he did not review that opinion. NOAA's response states that "[t]he responsible attorney does not recall making the comments as reported."

The response noted that the southwest regional office's practice is to give the General Counsel for the Southwest Region the opportunity to review each biological opinion at the final review and clearance stage. GCSW discusses the need for review with the section 7 coordinator in a face-to-face meeting on every SWR opinion. This usually occurs after the opinion has been completed but before it is signed. After this discussion, GCSW often "waives" further review. Alternatively, GCSW will review the opinion and "clear" it before signature. GCSW generally only reviews opinions that present a relatively high litigation risk or are controversial or complex. As such, GCSW only normally reviews a very small percentage of the consultations conducted by the SWR.

NOAA notes that the responsible attorney gave oral advice on a draft of the opinion to the regional coordinator and the ARA, which he followed up with written advice in the form of one or more e-mails. The response also states that, while the opinion was not required to undergo legal review, the regional administrator did discuss the consultation with the office of General Counsel.

With regard to the disputed statements attributed to the regional attorney, all three auditors who participated in the interview with the attorney have consistent recollections of and detailed working papers documenting the conversation. While we stand by the statements in our draft report, we have removed them from the final version so that the focus of the section will be on the critical, undisputed point, which is that this extremely complex, controversial opinion was not cleared by the Office of General Counsel. It is also important to highlight that in our meetings, even the regional counsel conceded that "**except for this opinion**, he is not aware of any other opinion that has not had a waiver or been reviewed."

## III. THERE IS NO EVIDENCE THAT A DRAFT "JEOPARDY" OPINION WAS PROVIDED TO BUREAU OF RECLAMATION OFFICIALS AS ALLEGED

Initially, our third objective was to determine whether any changes made by NMFS to a draft jeopardy OCAP opinion reportedly given to Bureau of Reclamation staff were adequately supported and in accordance with established policies and procedures. We included this as an

objective because there were allegations that a draft jeopardy opinion had been issued by NMFS and was subsequently changed to no jeopardy without sufficient justification.

Several NMFS staff who worked on the opinion initially told us that on August 5, 2004, Bureau of Reclamation regional staff received a partial draft with a transmittal letter stating NMFS had reached a jeopardy conclusion for the continued existence of Sacramento River winter run Chinook salmon, and Central Valley steelhead. In subsequent interviews, these same staff stated they were unsure whether a copy of the jeopardy draft and transmittal letter were provided to the Bureau of Reclamation. In addition, an investigator at the Interior inspector general's office stated that no one that she spoke with at the Bureau of Reclamation regarding the OCAP opinion acknowledged receiving a draft jeopardy opinion. Although the administrative record contained a copy of the August 5 jeopardy draft and transmittal letter, it held no evidence to support the claim that these documents were actually provided to Bureau of Reclamation staff. The record only documented delivery to the Bureau of Reclamation of a September 27, 2004, "no jeopardy" draft.

## IV. CONCLUSION

Although the southwest regional office has processes in place to ensure projects meet the requirements of the Endangered Species and Administrative Procedures acts, it deviated from them. Specifically, (1) the regional office initiated the consultation without sufficient information, and (2) neither the regional section 7 coordinator nor the office of general counsel cleared the opinion. By failing to ensure review and sign-off by the coordinators and counsel, the assistant regional administrator for protected resources bypassed key internal controls over the integrity of the biological opinion. In addition, the regional staff's failure to follow their own review and approval processes is contrary to the NMFS executive board's conditions for delegated authority to conduct ESA Section 7 consultations. Our findings in this regard were particularly troubling given NMFS' own longstanding recognition of (1) the need to significantly improve how it handles biological opinions and (2) its own documented efforts to identify and develop policies and internal controls to effect such improvements. Ironically, such policies and internal controls—when followed—can serve to protect NMFS, NOAA and their staff from charges that they acted arbitrarily or inappropriately. Undermining the integrity of the process, as NMFS did here, exposes the agency and its employees to precisely such criticisms. Although we did not assess the soundness and supportability of the OCAP opinion's conclusions, the process used by NMFS in this instance raises questions about the integrity of that OCAP opinion.

Given the importance and political sensitivities often associated with these opinions, it is imperative that NOAA has and adheres to a meaningful and transparent process that provides the best opportunity for a sound opinion with maximum integrity

## RECOMMENDATIONS

We recommend that the Under Secretary and Deputy Under Secretary of Commerce for Oceans and Atmosphere take the necessary actions to ensure that the Assistant Administrator for Fisheries

1. (a) reviews existing delegations, policies and directives for Section 7 consultations,

   (b) develops and implements a standard national set of policies and procedures for Section 7 delegations, including clarifying the legal review process,

   (c) issues these policies and procedures to staff through its Policy Directives System, and

   (d) submits these policies and procedures for incorporation into the NOAA Delegations of Authority.

   If these actions are not completed within six months as indicated in NOAA's response, all delegations to perform Section 7 consultations should be revoked until the actions are completed;

2. ensures that the NMFS regional offices follow the new policies, directives and procedures for conducting Section 7 consultations; and

3. objectively evaluates whether the southwest regional office's questionable handling of the OCAP opinion impaired the opinion's scientific integrity.

**Appendix**

UNITED STATES DEPARTMENT OF COMMERCE
The Deputy Under Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

JUN 15 2005

MEMORANDUM FOR: Alexis M. Stefani
Assistant Inspector General for Auditing

FROM: John J. Kelly, Jr.

SUBJECT: *The NMFS Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated From Normal Practice*
Draft Audit Report No. STL-17242-5-xxxx/April 2005

Thank you for the opportunity to provide comments on the Office of Inspector General's draft audit report on the review process used by the National Marine Fisheries Service's (NMFS) Southwest Region (SWR) to develop its biological opinion during formal consultation on the long-term operations, criteria, and plan for the Bureau of Reclamation's Central Valley Project and California's State Water Project.

As my staff has discussed with you and as reflected in the comments attached, we believe the NMFS SWR did follow the process required under the applicable July 28, 1995 delegation. NMFS acknowledges the need to further strengthen its process for development and issuance of Section 7 consultation policies and procedures to ensure they are current, accurate, and accessible to employees; and has committed to issuing standard national policies governing such consultations.

The attached comments request the IG to re-examine its findings and recommendations using the July 1995 delegation as the governing delegation; and further request the title of the report be revised accordingly.

Attachment

**NOAA Comments on the Draft OIG Report Entitled**
**"The NMFS Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated from Normal Practice"**
**(Draft Audit Report No. STL–17242-5-xxxx/April 2005)**

**General Comments**

We have reviewed the process followed by the National Marine Fisheries Service (NMFS), Southwest Region (SWR) leading to the October 2004, biological opinion on the Operations, Criteria, and Plan (OCAP) for the Central Valley Project and State Water Project, and the findings and recommendations of the Office of Inspector General with respect to the consultation and review process followed by SWR.

The findings and recommendations contained in the draft IG report reflect confusion over the delegation of authority and resulting process governing the consultation process followed by the SWR in developing this biological opinion. Specifically, the IG cites the April 1, 2002 delegation of authority for intra-agency consultations. The "Temporary Authority for *Intra-agency consultations*: April 1, 2002" is **not** applicable in this case. That delegation only covers "intra-agency" consultations, i.e., consultations between various branches of NOAA or the National Marine Fisheries Service. Where it applies, the temporary delegation requires the following:

- "Regions establish full-time section 7 coordinator staff position whose primary responsibility is to assist and oversee consulting biologists, and to assist managers in ensuring regional consultations are biologically and legally sound."
- "Regions have in place a process to ensure legal clearance of all informal consultations and formal biological opinions."

The applicable delegation is the "Authority for *Inter-agency anadromous species*: July 28, 1995 (NOAA Organizational Handbook Transmittal Memo 40)": DELEGATION OF AUTHORITY TO THE REGIONAL DIRECTOR, SOUTHWEST REGION. This delegation has not been superseded by any more recent delegation and is the appropriate authority for the OCAP consultation, an interagency consultation between NMFS and BOR on anadromous species.

The July 28, 1995 transmittal delegates authority from the Assistant Administrator of NMFS to the Regional Director, SWR as follows:

> Conduct of formal and informal consultations and issuance of biological opinions under section 7 of the Endangered Species Act, 16 U.S.C. 1536, for activities that may affect anadromous species for which the Southwest Region has primary ESA responsibility … with the following reservation: for activities the RD considers controversial, the RD must consult with F/PR [Protected Resources] and advise the AA before final action is taken.

In addition, the SWR Section 7 Coordinator outlined, in an October 18, 1999 memorandum issued to SWR, "the review process and tracking system for biological opinions" that would be followed by the Section 7 Coordinator. That memorandum outlined tracking procedures, review process, and the

Section 7 Coordinator review process. The memorandum acknowledges this is a "new review process" and the purpose of the memorandum was to "introduce" this process within SWR. We are not aware of any subsequent guidance issued by the SWR Section 7 Coordinator either to clarify, confirm (or reaffirm the current applicability), or revise the October 18 memorandum. Nor are we aware of formal process guidelines being issued by either NMFS leadership or the SWR Regional Administrator.

NMFS recently implemented a Policy Directives System designed to ensure policies and directives are kept current and are readily available to staff. The process outlined in the October 18, 1999 memorandum is not part of this Policy Directives System. The Policy Directives System is intended to address many of the underlying issues reflected in the draft IG report. Specifically, the Policy Directives System:

- Requires draft policies/directives be reviewed and approved by appropriate parties prior to issuance.
- Requires policies/directives be reviewed periodically and updated as necessary.
- Minimizes potential for creation of confusing or conflicting policies/directives.
- Provides online access so staff has ready access to current policies/directives.

Based on the findings of the IG report, NMFS has committed, within the next six months, to

- Review existing delegations, policies and directives for Section 7 consultation,
- Develop and implement a standard, national set of policies and procedures for section 7 delegations including clarifying the legal review process,
- Issue these policies and procedures to staff through its Policy Directives System, and
- Submit these policies and procedures for incorporation into the NOAA Delegations of Authority.

We believe SWR did follow the process required under the July 28, 1995 delegation, and would request the IG re-examine their findings and recommendations using the July 1995 delegation as the governing delegation. Further, we believe the title of the report should be revised accordingly.

**NOAA Response to OIG Recommendations**:

**Recommendation 1:** We recommend that the Deputy Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator take the necessary actions to ensure that the Assistant Administrator for Fisheries suspends the southwest regional office delegation of authority to approve section 7 consultations until that office demonstrates consistent compliance with its internal control process for these consultations and NMFS headquarters' Office of Protected Resources conducts a quality assurance review of the process;

**NOAA Response:** NOAA requests the IG reconsider this proposed recommendation. NOAA believes the SWR followed the process required under the July 28, 1995 delegation. We believe a recommendation to suspend SWR's delegation of authority to approve Section 7 consultations is unwarranted. NMFS does acknowledge the need to improve its process for development and issuance of Section 7 consultation policies and procedures to ensure they are current, accurate, and accessible to employees. NMFS has committed, as stated above, to completing a review of existing

Section 7 policies and procedures, and developing and issuing standard national policies governing such consultations through its Policy Directives System within the next six months.

**Recommendation 2:** We recommend that the Deputy Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator take the necessary actions to ensure that the Assistant Administrator for Fisheries evaluates whether the Southwest Regional office's handling of the OCAP opinion impaired the opinion's scientific integrity.

**NOAA Response:** NMFS does not subject biological opinions to peer review. However, NMFS has supported outside independent review of the science underlying some of the more complex biological opinions. The Alaska Sea Grant (1994), the Marine Mammal Commission (1999) and the National Academy of Sciences (2003) facilitated peer reviews of the science underlying three biological opinions on Alaska groundfish. The National Academy of Sciences (2002) also reviewed the science underlying the biological opinion on the dam operations in the upper Klamath River basin. The Committee for Independent Review (2002) reviewed a population model that was used to determine the status of Atlantic marine turtles and was the basis of a biological opinion on the effects of longline fishery operations.

Efforts were initiated in January-February 2005 for a California group to review the science underlying the October 2004 opinion; however, we could not reach agreement. We are now considering the Center for Independent Experts and hope to reach agreement with this organization such that their review could be completed by April 2006.

**Comments Regarding Factual/Technical Information:**

BACKGROUND

The State and Federal Water Projects are operated under a federally recognized Coordinated Operations Agreement. This vehicle allows NMFS to consider the State water project as a federal project for purposes of section 7 consultation under the ESA. The State and Federal Water projects include the coordinated operations of over 50 reservoirs impounding approximately 12 million acre-feet of water for delivery to 2 million acres of irrigated agricultural lands and 22 million municipal and industrial users through a system canals extending for 1,000 miles. These facilities affect fishery resources in the Trinity River, the Sacramento River, the San Joaquin River, and most their major tributaries.

In striving to conclude this highly complex consultation on State and Federal Central Valley Project operations using the best available information, the SWR agreed to work collaboratively (during the period of 2002 to March 2004 with the Bureau of Reclamation (BOR) and the California Department of Water Resources (DWR) in developing the project description and biological assessment. For example, SWR biologists participated in modeling exercises to ensure the parameters modeled were those needed in the later SWR analysis, and to ensure SWR understood the model inputs, outputs, and limitations so the results could be appropriately weighed in the SWR assessment of effects. SWR also worked closely with BOR and DWR during the analytical phase of the consultation to ensure its analysis was using the information developed by those agencies appropriately. We believe

this collaborative approach resulted in a more robust and timely biological opinion than otherwise would have been produced.

On March 15, 2004, BOR requested initiation of formal consultation with SWR on the Operations, Criteria, and Plan (OCAP), and provided SWR on March 22, 2004 a revised draft biological assessment (BA). Following review of the draft BA by SWR, SWR sent BOR a letter finding the information contained in the March 15 and 22 documents to be "insufficient for NOAA Fisheries to determine the potential impacts to listed species" and requesting additional information. The letter went on to state "The formal consultation process for this project would not normally begin until we receive all of the above information, or a statement why that information cannot be made available ... however, my staff has been fully involved in the informal consultation process since its start and is dedicated to providing you with a biological opinion earlier than the allowed 135 day statutory time frame."

On August 9, 2004, BOR officially responded to SWR's March 30 letter; SWR did not provide written acknowledgment of receipt or determination of sufficiency of information. In July 2004, the ARA determined that the consultation team needed assistance to deal with the complexity of this consultation, and assumed the role of Section 7 coordinator for this particular consultation and performed that function. In turn, the Section 7 Coordinator joined the biological opinion drafting team. During the period of August – October, 2004, SWR consulted informally with the General Counsel Southwest (GCSW) staff attorney. The GCSW staff attorney provided oral and written comments, but was not requested to provide formal review of the final biological opinion.

The Assistant Regional Administrator, SWR (acting for the SWR Regional Administrator) consulted with PR/HQ and the Assistant Administrator on three occasions, during the September – October timeframe, regarding the opinion. The Regional Administrator signed the biological opinion on October 22, 2004.

APPLICABLE DELEGATION

The draft report states: *"The regional office's delegation of authority to conduct Section 7 consultations is conditioned upon the region having in place (1) a full time section 7 coordinator ... and (2) a process of legal clearance."* The applicable delegation of authority for this consultation does not contain these conditions.

The applicable delegation is the "Authority for *Inter-agency anadromous species*: July 28, 1995 (NOAA Transmittal Memo 40)": DELEGATION OF AUTHORITY TO THE REGIONAL DIRECTOR, SOUTHWEST REGION. This delegation has not been superseded by any more recent delegation and is the appropriate authority for the OCAP consultation, an interagency consultation between NMFS and BOR on anadromous species. The Assistant Regional Administrator (acting for the RD) did consult with F/PR and the AA on at least three occasions between August and October of 2004 before taking final action on this consultation. Although legal review was not required by the delegation, the RD did informally discuss the consultation with GC.

In contrast, the "Temporary Authority for *Intra-agency consultations*: April 1, 2002" is not applicable in this case. The April 2002 delegation only covers "intra-agency" consultations (i.e.,

consultations between various branches of the National Marine Fisheries Service). It does not supersede the July 28, 1995 delegation for inter-agency anadromous fish consultations. Where it applies, the temporary delegation requires

- "Regions establish full-time section 7 coordinator staff position whose primary responsibility is to assist and oversee consulting biologists, and to assist managers in ensuring regional consultations are biologically and legally sound."
- "Regions have in place a process to ensure legal clearance of all informal consultations and formal biological opinions."

The more rigorous procedures required for the intra-agency delegation are designed, in part, to address the perceptions of conflict of interest often arising when NMFS is consulting on its own actions.

LEGAL REVIEW

The draft reports states: *"The attorney assigned to the OCAP opinion did not sign off on the draft or final opinions, nor did he review the "unofficial" version of the draft that was e-mailed to him by the regional section 7 coordinator. He stated he was too busy to review the document and that he thought counsel reviews of opinions were no longer conducted in the southwest region."*

The responsible attorney does not recall making the comments as reported. According to his recollection, he gave oral advice on a draft of the opinion to the regional Section 7 coordinator and to the ARA. He then followed up that oral advice with written advice in the form of one or more emails. He does not recall stating he thought "counsel reviews of opinions were no longer conducted in the southwest region" and suspects this statement was a result of a miscommunication during the initial face-to-face interview with the auditor. The responsible attorney thought the miscommunication had been remedied during later follow-up interviews in which he stated "GCSW does not *normally* (or *ordinarily*) review biological opinions."

The SWR's general practice is to give GCSW the opportunity to review each biological opinion at the final review and clearance stage. GCSW discusses the need for review with the Section 7 coordinator in a face-to-face meeting on every SWR opinion. This usually occurs after the opinion has been completed but before it is signed. After this discussion, GCSW often "waives" further review. Alternatively, GCSW will review the opinion and "clear" it before signature. GCSW generally only reviews opinions that present a relatively high litigation risk or are controversial or complex. As such, GCSW only normally reviews a very small percentage of the consultations conducted by the SWR.

LEGAL REQUIREMENTS FOR INITIATION OF CONSULTATION

The draft IG report found the "*regional office initiated consultation without sufficient information.*" However, neither the statute, regulations, nor consultation handbook authorize NMFS to delay consultation to force the consulting agency to provide more information.

*Statutory Requirements*: The ESA requires "Consultation ... shall be concluded within the 90-day period beginning on the date on which initiated or ... within such other period of time as is mutually

agreeable to the Secretary and the Federal agency." ESA Section 7(b). The ESA also states, in conducting the consultation "each agency shall use the best scientific and commercial data *available.*" ESA Section 7(a)(2) (emphasis added). Because consultation can only be based on *available* data, NMFS may not delay the initiation of consultation in order to force the action agency to generate more data. Preamble to 1986 Consultation Regulations. 51 Fed.Reg. 19926, 19951 (June 3, 1986).

*Regulatory Requirements*: The regulations impose certain requirements on written requests to initiate consultation. 50 C.F.R. 402.14(c) The regulations envision this information will often be included as part of a biological assessment. A biological assessment is prepared by the action agency, often with input from NMFS, and is designed to "evaluate the potential effects of the action on listed ... species ... and is used in determining whether formal consultation ... is necessary." 50 C.F.R. 402.12(a) Despite the apparent mandatory language regarding the information required to initiate consultation, "the contents of a biological assessment are at the discretion of the [action] agency and will depend on the nature of the Federal action." 50 C.F.R. 402.12(f) *See also Strahan v. Linnon*, p. 967 F.Supp. 581, 594-95 (D.Mass. 1997), *aff'd* (1st Cir. 1998).

In addition, the regulations envision that consultation is an iterative process allowing NMFS to ask for (and the action agency to provide) additional information as NMFS's opinion crystalizes. Thus, the regulations provide:

> "When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how and to what extent the action may affect listed species or critical habitat.... The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available." 50 C.F.R. 402.14(f)

Both of these provisions must be interpreted in accordance with the overall statutory requirement that consultations be based on *available* information. The preamble to the consultation regulations describes these requirements as follows:

> "The Service adopts the proposed rule because it recognizes the need for an opportunity to request additional data while deferring to the Congressional intent that consultation have a definite end point. Additional data may be requested by the Service, but the Service is not relieved of its duty to issue a biological opinion unless appropriate time extensions are obtained...." 51 Fed. 19926, 19951 (June 3, 1985) (Preamble to Joint Consultation Regulations)

*Guidance From Handbook*: As indicated, the regulations allow NMFS to request additional information where the initial information needs to be supplemented but if the additional information is not provided, NMFS must generally proceed with the consultation. The handbook provides guidance on following this process. "The formal consultation process for the project will not begin until we receive all of the information or a statement explaining why that information cannot be

made available." *Handbook* (pp.4-6). In either case, the consultation should proceed. 50 C.F.R. 402.14(f).

INITIATION OF OCAP CONSULTATION

The draft report discusses the events surrounding the initiation of consultation and states: "*In the case of the OCAP opinion, NMFS did not suspend the formal consultation until it received all of the data required by 50 C.F.R. 402.14(c).*"

In this case, the Bureau of Reclamation provided a biological assessment ("BA") designed to initiate consultation on March 15, 2004. The BA was the result of two years of collaboration between NMFS and BOR. On March 30, 2004, NMFS sent BOR a letter requesting that BOR develop and analyze additional information, specifically to develop model runs and other estimates of impacts on listed fish. Nevertheless, the Regional Administrator determined to concede that consultation had been initiated prior to the development of new information because the SWR staff "has been fully involved in the informal consultation process since its start and is dedicated to providing [BOR] with a biological opinion earlier than the allowed 135 day statutory time frame."

As indicated above, while NMFS can request such information, consultation cannot legally be delayed if BOR declines to develop information that is not currently available. Nor is it likely that BOR's biological assessment would be found to be legally deficient. *Strahan v. Linnon*, 967 F.Supp. 581, 594-95 (D.Mass. 1997) (upholding BA against claims that it contained insufficient information). Given these limitations, NMFS often attempts to work with action agencies such as BOR to persuade them to voluntarily develop and provide additional information.

The draft report states: "*we could not determine whether [BOR] eventually provided sufficient information, nor did we find in the record an acknowledgment from NMFS of having received it. NMFS regional management stated that there was sufficient information. However, biologists who worked on the project stated that they are not sure whether a final information package accurately defining the project was actually received.*"

On August 9, 2004, BOR officially responded to NMFS's March 30, 2004 letter stating:

> "There were six items outlined in your letter that Reclamation needed to provide. The first item was modeling runs separating the effects of formal versus early consultation. They were provided on CD at the April 8, 2004 OCAP meeting, documented in the Meeting Summary of that meeting and sent by e-mail April 20, 2004 (enclosure 1). The third item on cold-water pool was provided on April 14, 2004 as e-mail from Ann Lubas-Williams (enclosure 2), the technical memorandum was an attachment. On April 21, 2004, items two and four were provided by e-mail from John Hannon the unscreened diversion information and the fish salvage expanded for loss (enclosure 3). The Essential Fish Habitat, item 5 was provided by e-mail from Ann Lubas-Williams on May 20, 2004 (enclosure 4). The updated BA was provided to the agencies on June 30, 2004 with some additional minor revisions which is item 6."

The official BOR response is not reflected in the draft report. While NMFS did not acknowledge that the information request was complete for the record, "[t]his acknowledgment process is *optional*." Consultation Handbook, P. 4-6 (emphasis added). Further, as explained above, NMFS's has a very limited ability to legally delay consultation had the information been inadequate.

In this case, BOR requested consultation on March 15, 2004. Under the statutory and regulatory timeframes, NMFS's biological opinion was due on July 28, 2004. Had NMFS suspended consultation between March 30, 2004 and the receipt of the requested information on August 9, 2004, NMFS would have been able to extend the date for issuance of the biological opinion until November 17, 2004 (135 day after March 30 less the suspension period). Alternatively, NMFS could achieve essentially the same result by negotiating an extension of the consultation period with the action agency. In this case, NMFS agreed on an extension of the consultation period and NMFS took 221 days to issue the biological opinion on October 22, 2004.

REGIONAL SECTION 7 COORDINATOR

The draft report stated the "*Section 7 Coordinators did not complete biological reviews of the opinion.*"

The Assistant Regional Administrator (ARA) for Protected Resources supervises the Section Coordinators and is capable of performing the duties of that position and routinely performs that function when the Section 7 coordinators are unavailable due to travel, vacation, or illness. Normal office practice does not require written documentation when the ARA assumes the role of the Section 7 Coordinator. In July 2004, the ARA determined the consultation team needed assistance and assumed the role of Section 7 Coordinator for this consultation.

Regardless of whatever role the ARA played in the internal preparation process, this opinion was signed ultimately by the Regional Administrator and not the ARA.

**Editorial Comment**:

Page 1. Introduction: This is only a partial description of the project upon which NMFS consulted. The consultation addressed the coordinated operation of the State and Federal Water Projects which affects resources in the Trinity River and throughout the Central Valley and provides water to municipal and agricultural areas from Redding to San Diego.