

**Programmatic
ESA Consultation
&
EFH Evaluation
on use of
Dispersants & In-Situ Burning**



Original ESA Consultations on Dispersants & In-Situ Burning

- ▶ Informal ESA Section 7 Consultations completed with NMFS:
 - 1995 for CRRT preauthorization agreement on in-situ burning
 - 1997 for the CRRT preauthorization agreement on dispersants
- ▶ NMFS concurred with the USCG's determination that implementation of the preauthorization agreements was not likely to adversely affect listed species.
- ▶
- ▶ Since then, new species were listed, and Critical Habitats were designated, that required reinitiation of consultation under the ESA.
- ▶ The CRRT also requested the initiation of an essential fish habitat (EFH) consultation pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). An EFH consultation had not been completed previously for the use of dispersants and in-situ burning in the U.S. Caribbean.

FWS Review of ESA Determinations on Use of Dispersants & In-Situ Burning

- ▶ Letter sent to FWS in August 2015
 - No significant changes to listed species, previous findings of impact, or planned response actions
 - Requested reaffirmation of previous determinations
- ▶ Received confirmation letter September 2015
 - FWS continues to concur with determinations that the use of dispersants, in-situ burning and solidifiers are not likely to adversely affect the manatee and roseate tern.

NMFS ESA Consultation and EFH Evaluation:

- ▶ Submitted to NMFS SERO on October 5, 2015
- ▶ CRRT Determinations:
 - **Dispersants** may affect, but not likely to adversely affect, ESA listed species or critical habitat
 - **In-situ burning** may affect, but not likely to adversely affect, ESA listed species or critical habitat
 - Dispersant and ISB may adversely affect EFH because of direct and indirect impacts, but the impacts would be local, short-term and minor

Timeline of ESA Consultation/EFH Evaluation:

▶ NMFS ESA Response:

- 5/19/2017 – Consultation transferred from SERO to Office of Protected Resources (OPR)
- 5/27/2017 – Draft Project Design Criteria (PDC's) and request for additional information sent to EPA and USCG
- 5/31 and 6/9/2017 – CRRT responds to information request and comments on draft PDCs
- 7/26/2017 – NMFS sends revised PDCs to CRRT for comment
- 7/28/2017 – NMFS receives EPA comments on revised PDCs
- 8/1/2017 – Letter from OPR to CRRT, notifying that formal consultation is required:
 - Potential take of sea turtles: rescue of oiled turtles where ISB is proposed
 - Formal consultation completion and Biological Opinion expected by 9/30/2017

Section 7 Biological Opinion Received!

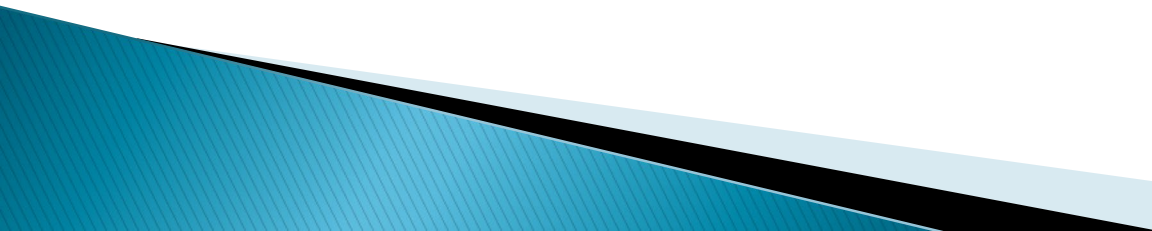
Letter to CRRT Co-Chairs, dated 12/11/2017

- ▶ NMFS concluded that the proposed action:
 - *Not likely to jeopardize* the continued existence of leatherback, hawksbill, or green (North and South Atlantic Distinct Population Segments [DPS]) sea turtles.
 - Will have *no effect* on leatherback sea turtle critical habitat.
 - *Not likely to adversely affect* designated critical habitat for the green sea turtle North Atlantic DPS or hawksbill sea turtles.
 - *May affect, but is not likely to adversely affect* blue, fin, sei, and sperm whales; Nassau grouper; loggerhead sea turtles (NW Atlantic Ocean DPS); scalloped hammerhead sharks (Central and SW Atlantic DPS); and elkhorn, staghorn, lobed star, boulder star, mountainous star, pillar, and rough cactus corals.
 - *Not likely to adversely affect* designated critical habitat for elkhorn and staghorn corals (Puerto Rico, St. Thomas/St. John, and St. Croix units).

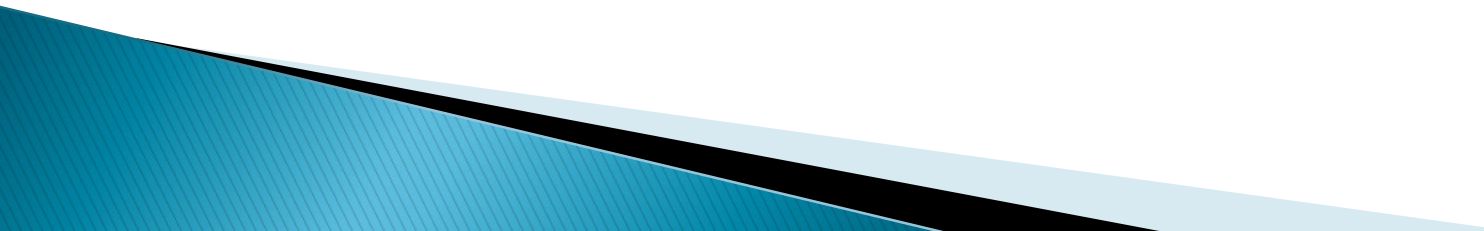
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Project Design Criteria:

- ▶ Identified to limit environmental effects of the use of dispersants & ISB during oil spill response, as well as impacts of associated interdependent/interrelated response activities.
 - ▶ Taken from the BMP's compiled/submitted by the CRRT (RCP Appendix 7), and following emergency consultations in the Caribbean.
 - ▶ When applied, will minimize effects to ESA-listed species & designated critical habitat
 - ▶ The nature of the response will dictate which PDCs are applicable to the planned activities.
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PDC Categories:

1. General PDCs applicable to all activities addressed in the consultation
 2. PDCs applicable only to dispersant operations
 3. PDCs applicable only to in-situ burning operations
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Project-Specific Review & Consultation:

- ▶ Prior to authorizing dispersants or ISB, the CRRT must complete a project-specific review to ensure all relevant PDCs are met.
- ▶ If dispersant/ISB use will occur *in preauthorized areas*, the CRRT may proceed without submitting an emergency consultation request to NMFS SERO, *with the following exceptions*:
 - If during August–October period for ESA-listed corals spawning
 - If during December–February period when Nassau grouper may be spawning, *if response activity will take place in or near* one of the historical spawning aggregation sites (SPAGS) – *Figure 4*

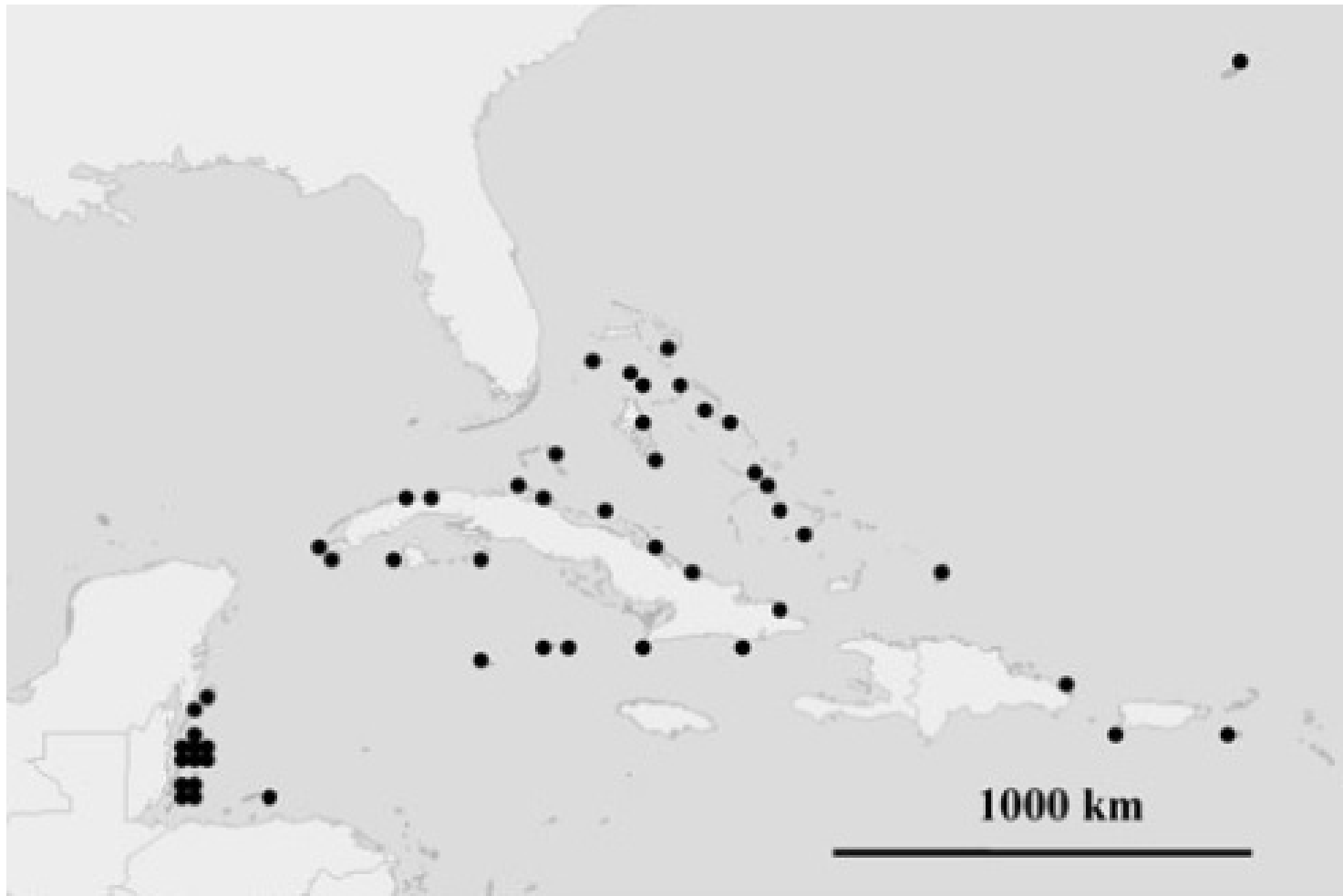


Figure 4. Locations of known historical Nassau grouper spawning aggregations (from NMFS 2013). The sites in the U.S. Caribbean include Bajo de Cico, Tourmaline, and Abrir la Sierra off western Puerto Rico and Red Hind and Grammanik Banks south of St. Thomas, USVI. A number of additional sites were identified around Puerto Rico particularly off the west and south coasts and around Vieques Island through interviews with fishers but these have not been confirmed (Ojeda-Serrano et al. 2007).

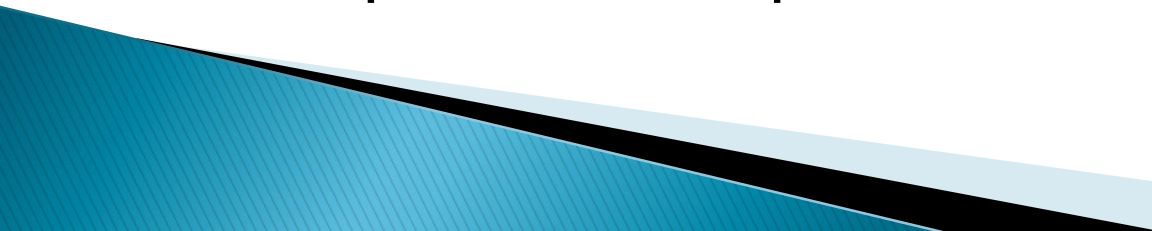
Emergency Consultation Required when:

- ▶ Outside the dispersant preauthorization areas but in areas around Puerto Rico with a water depth of at least 30 ft and around USVI that are 1.0 mile from any shoreline and have a water depth of at least 30 ft,
- ▶ During the August–October time period when ESA–listed corals may be spawning, regardless of whether the response is located in a dispersant preauthorization area or ISB Zones "A" or "B," or
- ▶ During the December–February time period when Nassau grouper may be spawning *and the response activity is in or near historical SPAGS*, regardless of whether the response is located in a dispersant preauthorization areas or ISB Zones "A" or "B"

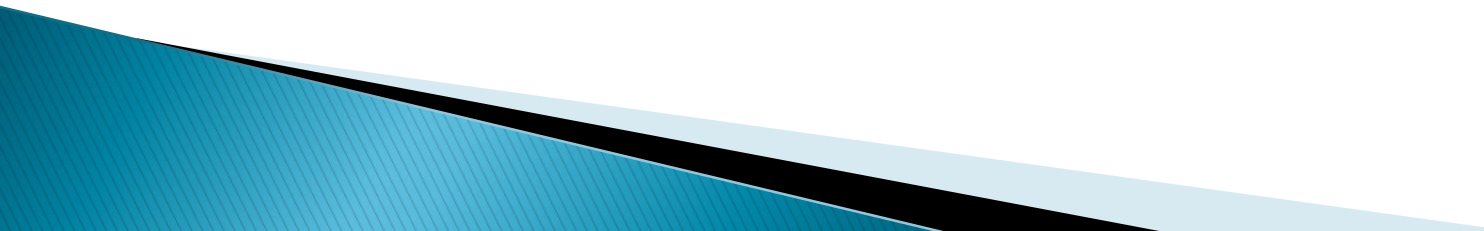
Emergency Consultation Requirements:

- ▶ Submit required information (list of 9 items) to NMFS using SERO's emergency consultation email notification system (nmfs.ser.emergency.consult@noaa.gov)
- ▶ The subject line should include a reference to *"FPR-2017-9214, Programmatic Consultation with the CRRT for Use of Dispersants and In-Situ Burning"*
- ▶ The existing *"Endangered Species Consultation for Emergency Responses in Puerto Rico and U.S. Virgin Islands Form"* (Appendix B) can be used to provide all of the information requested, with the exception of the information related to application of the PDCs (#8), which can be addressed in the email or in the *"List any standard protective measures that will be used"* box at the end of the form.

What Happens after Submittal?

- ▶ NMFS will assess the individual proposed activity's compliance with the PDCs identified as applicable by the CRRT, and ensure that the additive effects of dispersants and/or ISB and associated response activities do not result in adverse effects to protected species.
 - ▶ Due to the emergency nature of response actions, the timeframe for a final response will be within 12 hours of receipt of the CRRT's email.
 - ▶ If no notice is given by NMFS within 12 hours of submission of information related to the proposed use of dispersants and/or ISB as part of an oil spill response in the U.S. Caribbean by the CRRT, compliance is implied.
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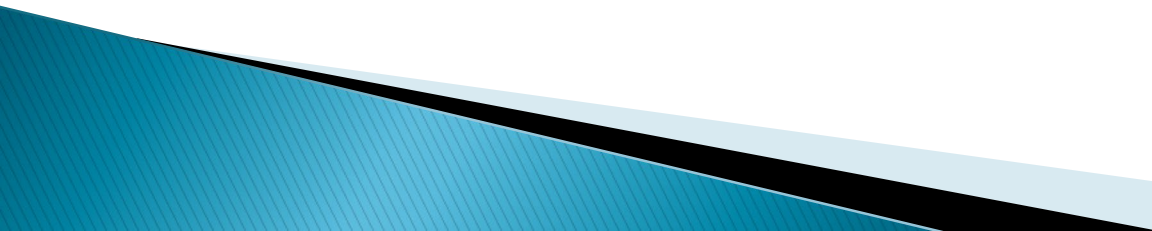
Activities Not Covered under the Programmatic Consultation:

- ▶ Any activities occurring in ISB Zones "C" or "R" or that cannot comply with the PDCs relevant to the particular response will require individual ESA section 7 consultations and are not covered under this programmatic consultation.
 - ▶ The CRRT will coordinate with SERO on these individual actions to determine the emergency consultation procedures to be used based on the location of these actions and the potential effects on ESA resources.
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Annual Programmatic Review:

- ▶ The CRRT and NMFS will conduct an annual programmatic review of the use of dispersants and ISB in oil spill response operations *only if these response tools have been used in the U.S. Caribbean in a particular year.*
- ▶ This review will evaluate, among other things, whether the scope of the activity is consistent with the description of the proposed activities; whether the nature and scale of the effects predicted continue to be valid; whether the PDCs are being complied with and continue to be appropriate; and whether the response-specific consultation procedures are being complied with and are effective.
- ▶ To assist in this annual review, the CRRT will submit an after-action report within 30 days following each use of dispersants and/or ISB in the U.S. Caribbean.
- ▶ If these tools have not been used during a given year, the CRRT will send notification of a negative response to NMFS rather than a report at the end of the corresponding year.

Incidental Take Statement:

- ▶ Incidental take statements serve a number of functions, including identifying reasonable and prudent measures (RPMs) that will minimize the impact of anticipated take.
 - ▶ For this consultation, no incidental take of ESA-listed species is anticipated or authorized because the take that will occur – *the directed take of sea turtles captured for relocation outside planned ISB areas, for treatment or for analysis of dead animals* – is covered under the existing Sea Turtle Stranding and Salvage Network (STSSN) consultation.
 - ▶ Therefore, no RPMs are provided for this consultation.
 - ▶ Appropriate measures to avoid take of ESA-listed species are reflected in the PDCs for this programmatic consultation.
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Conservation Recommendations:

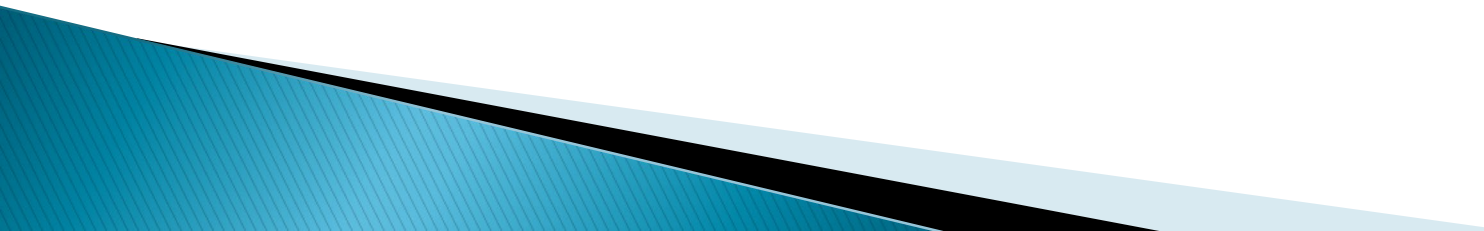
- ▶ Discretionary agency activities to minimize or avoid adverse effects of a proposed action on ESA-listed species or critical habitat, to help implement recovery plans, or develop information.
- ▶ NMFS believes the following conservation recommendation would further the conservation of ESA-listed whales, sea turtles, corals, Nassau grouper, and designated critical habitat for leatherback, hawksbill, and green (North Atlantic DPS) sea turtles, and elkhorn and staghorn corals in the U.S. Caribbean:

The CRRT should develop, in coordination with the Puerto Rico and USVI Area Planning Committees and partners such as industry and academia, a science plan to determine the fate and effect of oil, dispersed oil, ISB, and tarballs from ISB that could be implemented should a spill occur in the U.S. Caribbean. The science plan should focus on impacts to ESA-listed species and their habitat.

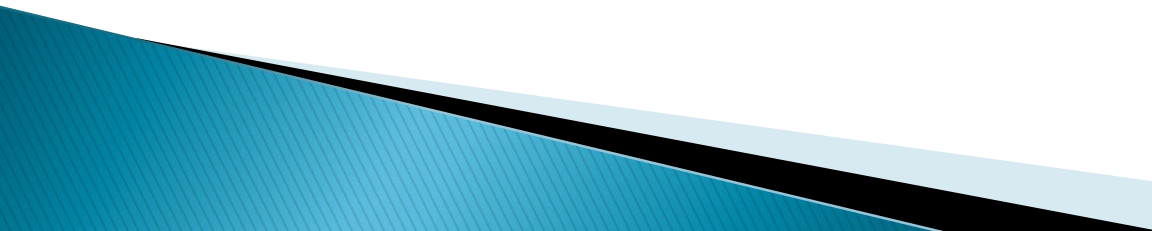
CRRT Required to Reinitiate Formal Consultation if:

1. Take occurs as a result of response actions involving dispersant application or in-situ burning, such as if vessel strikes occur that affect ESA-listed whales or sea turtles or vessel groundings occur that affect ESA-listed corals;
2. Sea turtles suffer mortality due to mishandling during rescue and recovery efforts associated with the use of ISB as a response tool;
3. New information reveals effects of the agency action that may affect ESA-listed species or critical habitat in a manner or to an extent not considered in this consultation;
4. The identified action is subsequently modified in a manner that causes an effect to ESA-listed species or critical habitat that was not considered in this consultation; or
5. A new species is listed or critical habitat is designated under the ESA that may be affected by the action.

Response from EFH program

- ▶ Letter received from NMFS SERO Habitat Conservation Division on March 2, 2018
 - ▶ Acknowledges CRRT Co-Chairs determination that any impacts from dispersant and in-situ burn response operations on EFH are expected to be minor, based on the CRRT's best management practices (BMPs), policies, and procedures for the use of dispersants and in-situ burning, which incorporate measures to minimize overall harm to EFH.
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Response from EFH program (continued)

- ▶ The actions identified in the BA and EFH Evaluation as well as the consolidated BMPs indicate they are intended to avoid and/or minimize impacts to ESA and EFH resources.
 - ▶ However as written, many of the BMPs specify “ESA-listed corals” or “designated critical habitat”.
 - ▶ Whereas only a few corals are listed under the ESA, *all* corals are considered EFH under the MSFCMA.
 - ▶ HCD recommends the CRRT update the BMPs to avoid confusion and clarify actions are protective of EFH as well as ESA resources.
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EFH BMP's for Certain Response Activities in the NMFS Southeast Region

- ▶ Developed to minimize impacts to trust resources and serve as EFH conservation recommendations for certain, frequently utilized, emergency response activities.
- ▶ Intended to prevent the need to conduct emergency consultation with HCD during every oil spill occurring in the NMFS Southeast Region's area of responsibility.
- ▶ Also provide the USCG and EPA advice on when it may be necessary to conduct after-the-fact consultation; generally when response activities result in unexpected or unanticipated adverse effects to habitats identified and described as EFH.
- ▶ The BMPs are also maintained on SERO's HCD website.

Next Steps

- ▶ ESA and EFH Correspondence will be incorporated as Appendices to the Regional Contingency Plan
 - ▶ Will be posted on the CRRT website
 - ▶ BMPs will be reviewed and revised to clarify that actions are protective of EFH as well as ESA resources
 - ▶ Will submit annual notification of a negative response to NMFS
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