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April 20, 2007

Dr. William Hogarth, Director
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
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Re: MSRA Environmental Review Procedures (Request for Comments)

Dear Dr. Hogarth:

As conservation organizations committed to ensuring the sustainability of our nation's fish populations and the health of our oceans, the above listed groups appreciate the opportunity to provide comments on the National Marine Fisheries Service's (NMFS) efforts to "revise and update" its "procedures for compliance with the National Environmental Policy Act," (NEPA) as required by the Magnuson Stevens Reauthorization Act of 2006 (MSRA). (Pub. L. 109-479) (emphasis added). In addition, our organizations participated in the development of comments submitted today by the Marine Fish Conservation Network (MFCN), and separately in response to the proposal by the Council Coordinating Committee, and we ask that you fully consider those comments.

NEPA is the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1, intended to "insure that environmental information is available to public officials and citizens before decisions are made and action is taken," and to "help public officials make decisions that are based on an understanding of environmental consequences...." *Id.* § 1500.1(b), (c). See Robertson v. Methow Valley Citizens, 490 U.S. 332, 349 (1989). NEPA further makes it the "continuing policy" of the federal government to "use all practicable means and measures, ... in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). See also NOAA Administrative Order 216-6 at 1.01 (1999). NEPA and the Council on Environmental Quality (CEQ) regulations are strongly rooted in the principles of public involvement and improving the level of scientific analysis supporting agency decision making, 40 C.F.R. § 1500.1(b), and ensuring that required analyses are focused and efficient. *Id.* at § 1500.1(b), (c).

As will be explained in detail below, the language and legislative history of the MSRA confirm the continued strong support of Congress for NEPA in the context of fisheries management. Indeed, Congress recognized through the MSRA that it was not NEPA itself, or

the Council on Environmental Quality's (CEQ's) implementing regulations, that has caused delays and confusion in the fishery management process, but rather it was poor and inconsistent implementation of NEPA that needed to be remedied. The importance of NEPA and the intent of Congress in enacting the MSRA must be the guiding factors in the agency's development of its revised procedures.

The Importance of NEPA

An overwhelmingly bipartisan Congress passed NEPA in 1969 under the idea that the "existing governmental institutions" were in no way "adequate to deal with the growing environmental problems and crises" the Nation was facing.¹ This lack of direction helped spur Congress into passing NEPA as the "most important and far-reaching environmental and conservation measure ever enacted."² The Senate report that accompanied the original legislation stated that "The purpose [of NEPA] is to establish, by congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment."³

The purpose of the CEQ regulations is, in part, "to tell the federal agencies what they must do to comply with the procedures and achieve the goals of the Act." 40 C.F.R. § 1500.1(a). Any process to comply with NEPA must also comply with the CEQ regulations. The CEQ regulations themselves acknowledge this point, noting that the regulations are "applicable to and binding on all Federal agencies," and that "[t]he provisions of the Act [NEPA] and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law." 40 C.F.R. § 1500.3. The Supreme Court has stated that these CEQ regulations are to be given "substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). Thus, the CEQ regulations are an integral part of the NEPA process; courts rely upon those regulations in determining whether agency actions comply with that Act.

In addition to specific details on requirements for documents providing environmental analysis, CEQ regulations provide in broad terms that:

NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question rather than amassing needless detail.

40 C.F.R. § 1500.1(b).

As evidenced by this language and history, NEPA and the MSA serve distinct, but complementary purposes. Some of the considerations required by NEPA that are not required by MSA are scoping, alternatives analysis, discussion of alternatives not considered, comparison of

¹ S. REP. NO. 296, at 8 (1969).

² 115 CONG. REC. 40,416 (1969).

³ Id. at x.

environmental impacts including cumulative impacts, mitigation, consideration of direct and indirect effects on the entire affected environment rather than just the fishery, consultation with other agencies and affected parties, and responses to comments.

By providing decision makers and the public with a thorough analysis of the potential consequences associated with management alternatives, the NEPA process helps to inform the development of fishery management plans. Both statutes are necessary for sound ocean conservation and management. Furthermore, the intent of NEPA and the tools it provides are entirely consistent with the intent of the MSRA and sufficient for both effective and efficient fisheries management.

The Language and Intent of the MSRA

The new statutory language contained in the 2006 MSA provides as follows:

“Section 304 (16 U.S.C. 1854) is amended by adding at the end the following:

“(i) Environmental Review Process-

“(1) PROCEDURES- The Secretary shall, in consultation with the Councils and the Council on Environmental Quality, revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.).

The procedures shall--

“(A) conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and

“(B) integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act in order to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork, and effectively involve the public.

“(2) USAGE- The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this Act.

“(3) SCHEDULE FOR PROMULGATION OF FINAL PROCEDURES- The Secretary shall--

“(A) propose revised procedures within 12 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006;

“(B) provide 90 days for public review and comments; and

“(C) promulgate final procedures no later than 18 months after the date of enactment of that Act.

(4) PUBLIC PARTICIPATION- The Secretary is authorized and directed, in cooperation with the Council on Environmental Quality and the Councils, to involve the affected public in the development of revised procedures, including workshops or other appropriate means of public involvement.” (emphases added)

By stating explicitly that the revised procedures are to be established “for compliance with” NEPA, this language plainly mandates that the agency’s revised procedures must not violate that statute. Furthermore, the language that makes these revised procedures “the sole environmental impact assessment procedure” for fishery management plans and other MSA actions in no way detracts from this fundamental requirement of NEPA compliance. Instead, reading these two passages together demonstrates that the Congress meant simply to call for updated procedures for NEPA compliance to ensure timely and useful consideration of environmental issues presented in the nation’s fisheries.

The legislative history of this provision further demonstrates that NEPA compliance remains a top priority for fishery management actions, including not only compliance with statutory requirements, but also existing and longstanding NEPA regulations promulgated by the Council on Environmental Quality (CEQ). The Senate Report accompanying the text of the Section 304 amendment that was passed by that body (and identical to the language enacted into law) states: “[t]he intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation.” Senate Report 109-229, April 4, 2006 at 8 (emphasis added). This Senate Report has controlling weight in interpreting the meaning of that new Section 304 language in the 2006 MSA. In the House of Representatives, Rep. Rahall confirmed this point, stating:

Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but these new procedures will not supersede existing NEPA regulations and guidance issued by the Council on Environmental Quality.

Statement of Rep. Rahall, December 8, 2006 (emphasis added), 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks).

Because NMFS is acting directly at the behest of Congress in its current review and revision process, it is critical that the agency follow the charge actually presented to it by Congress. As indicated in Representative Rahall’s statement, other legislative proposals that would have significantly weakened the applicability of NEPA to fishery management actions, or exempted fishery management actions from NEPA altogether, were explicitly rejected.⁴ Nevertheless, the February 2007 proposal of the Council Coordination Committee (CCC), entitled “Revised Procedure for MSA/NEPA Compliance,”⁵ appears to be an attempt to rewrite the legislative history on this matter. We are disappointed and concerned to see this misdirected document featured prominently alongside the agency’s request for comments on revising its NEPA procedures and caution that any endorsement or adoption of this approach would run

⁴ See, for example, House bill H.R. 5018, sponsored by former Representative Richard Pombo (R-CA).

⁵ See, http://www.nmfs.noaa.gov/msa2007/docs/new_AO_summary_MSA_NEPA_process.pdf.

directly counter to the command and intent of the MSRA. Our detailed comments on that proposal are provided in a separate letter and incorporated herein by reference. The agency must not go down the inappropriate and illegal path presented by the CCC proposal, but rather must move forward with revised procedures that comply with NEPA and the existing CEQ regulations.

Responses to NOAA's 10 Questions

- 1) ***In the context of fishery management actions, how should NOAA Fisheries, in consultation with the Councils and CEQ, revise and update agency procedures for compliance with NEPA?***

The current rulemaking is the agency's opportunity to finally design a NEPA practice for fisheries management that truly implements the fundamental tenants of NEPA. See generally, 40 C.F.R. § 1500.1. Specifically, improvements should be made that would allow for greater public involvement in decision-making, a broader consideration of ecosystem level concerns that go beyond individually managed fish stocks, and a full investigation of these issues before the Councils and NMFS move forward with fishery management actions. These improvements to NEPA compliance and procedure in fisheries management are possible within the current system, including the existing CEQ regulations. What is needed for these improvements, however, is a clarification of the roles and responsibilities in the NEPA process for fishery management actions. The agency, not the Councils, is held legally responsible for NEPA compliance, and should serve as more than simply a post-hoc stamp of approval as in the current NEPA process.

NMFS should revise its procedures to clarify that the agency, rather than the Councils, is responsible for NEPA compliance. This includes the earliest stages of scoping, which must reach out beyond Council meetings, and the narrow interests represented there, to fora which welcome public comment, to development of alternatives and their analysis, to creating the draft and final documents which actually inform the Councils' recommendations. Insuring that NEPA documents are "available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), and that they encourage not just better paperwork, but actually better decisions, id. at 1500.1(c), will also require some adjustments to the timing of NEPA review in the fisheries management context to ensure that draft environmental documents are made available prior to Council deliberation, and final documents and public input are evaluated and incorporated into final agency action. The current NEPA process, in which NMFS is often engaged mainly at the tail-end of the process, has created a system in which NEPA documents do not serve their intended purpose of actually informing decision-making.

- 2) ***What opportunities exist to improve efficiencies in the NEPA process that may not have been applied in the past?***

The opening provisions of the CEQ regulations make clear in broad terms that the federal agencies "shall reduce delay" in their implementation of NEPA. 40 C.F.R. § 1500.5. Options for efficiency measures such as emphasizing early planning, increasing cooperation between agencies, and avoiding duplication are included in that regulatory section, and other options for

improving efficiency through different scale documents and analyses are included throughout the CEQ regulations. *See, e.g.*, 40 C.F.R §§ 1501.7 (using scoping to eliminate issues from consideration); 1502.20 (Tiering); 1502.21 (Incorporation by reference). Many of these options, such as appropriate use of programmatic EISs that could be tiered off of for subsequent environmental documents, and appropriate use of EAs and supplemental EISs, are explicitly recognized in NAO 216-6, but have never trickled down consistently to NEPA practice at the regional level. *See, e.g.*, 6.02 (Specific Guidance on Significance of Fishery Management Actions); 6.03 (Integrating NEPA Into NOAA's Decisionmaking Process).

Advance planning and prioritization of resources are critical to improving the efficiency of the NEPA process in fishery management actions. This approach would require early communication between the Councils and the agency. Updating existing EISs to make them more useful for tiering down the road is yet another up-front investment that would provide significant efficiency improvements in the long term.

Finally, we often hear the refrain from NMFS that essential analyses are slowed because of insufficient resources. The agency should prioritize securing the resources necessary to undertaking its essential management activities, including going to Congress for necessary funding.

3) *How should the Councils and NOAA Fisheries ensure that analysis is conducted on an appropriate scale for various types of fishery management actions? What criteria should be developed and applied to ensure that the level of analysis is commensurate with the scope of the action?*

Again, we urge the agency to look no further than the CEQ regulations and the accompanying caselaw that has been developed over the last 30+ years, for this answer. Scoping is the first step in determining the “appropriate scale” of analysis, with the CEQ regulations defining it as the process for “determining the scope of the issues to be addressed and for identifying the significant issues related to the proposed action.” 40 C.F.R. § 1501.7. Next, the agency must develop a clear statement of “purpose and need” to which it is responding, *id.* at § 1502.13, and an appropriate range of alternatives based on that purpose and need. *Id.* at § 1502.14. The alternatives analysis “is the heart of the environmental impact statement.” *Id.*

40 C.F.R. § 1508.27 and NAO 216-6 Section 6.01b provide further explanation about how to determine the “significance” of an action, and hence whether an Environmental Impact Statement is required, by examining its context and intensity. And NAO 216-6 Section 6.02 goes even farther to provide specific guidance on the “Significance of Fishery Management Actions.” There is no need to change these comprehensive provisions.

However, while changes to the regulations are not necessary, we do urge the agency to expand its thinking about opportunities for ecosystem based management. To ensure that analysis is conducted on an appropriate geographic scale for various types of fishery management actions NOAA Fisheries should consider whether the analysis addresses all aspects of the affected environment identified in the document, including target and non-target species, habitats, and the potential for wider ecosystem effects. Relative to the time scale of the proposed action, and the

range of alternatives under consideration, the analysis should consider their relative benefits to the nation, including the long-term benefits of rebuilding overfished stocks as well as the short-term effects on fishing communities of various alternatives. The level of the analysis will depend on the type of fishery management action.

- 4) ***Should NOAA Fisheries consider eliminating the distinction between an environmental assessment (EA) and environmental impact statement (EIS), and instead, rely solely on an integrated environmental impact analysis?***

The agency should absolutely not consider eliminating the distinction between EISs and EAs. As an initial matter, such a fundamental change from existing practice under the CEQ regulations would directly conflict with the language and intent of the MSRA, as described above. Furthermore, this type of change would insert significant inefficiencies and uncertainty into the NEPA process for fishery management, including a likely explosion in litigation over appropriate standards for this new hybrid approach. EAs are an effective tool for improving efficiency and the agency should take advantage of them in appropriate circumstances.

- 5) ***How should a “reasonable” range of alternatives be defined for purposes of the new procedures?***

As with many of these questions, this is again answered by the CEQ regulations themselves. CEQ’s “Forty Questions” describes “reasonable” range as alternatives that cover the spectrum of alternatives, not an infinite number, but representative examples of possible actions that are then “rigorously explored and objectively evaluated.” 40 C.F.R. 1502.13 requires that the EIS “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” To be found reasonable, the alternatives developed must each achieve the proposed action’s objectives as stated in the statement of purpose and need. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991); Alaska Wilderness Recreation v. Morrison, 67 F.3d 723 (9th Cir. 1995).

- 6) ***What opportunities, if any, exist to develop a more effective scoping process? Should scoping occur at Council meetings and should Council meeting agenda notices serve as a traditional Notice of Intent to prepare an environmental analysis?***

Scoping is one of the key areas the agency should focus on in making the NEPA process not only more efficient, but also more effective in terms of public involvement. 40 C.F.R. § 1501.7 provides that this process should be “early and open” and “invite the participation of ... interested persons.” Council meetings and Council agenda notices are not sufficient to ensure full participation from the public, but rather are targeted only at narrow fisheries interests. NOAA Fisheries should improve scoping by ensuring that public hearings are held in locations that are accessible to the general public, and that preliminary alternatives are not selected until the public is given the opportunity to provide input. The agency should also focus its attention on where the effects of the action are likely to be felt, rather than only on where the action will be initiated. Electronic outreach through email, the agency website and local media outlet websites could be especially helpful in expanding public involvement in this process. Finally,

the Council should be considered a member of the public for scoping, and not given any special status that elevates an interest in encouraging fishing over other considerations.

We note that although the existing NAO 216-6 states that the CEQ regulations govern the agency scoping process, the process described in that document and currently playing out in fisheries management actions place too much control with the Councils rather than NMFS as the agency responsible for NEPA compliance. Sections 5.02c.4 and 5.02d.5, in particular, seem to encourage the current ad hoc approach to involvement through the Council process. These procedures should be changed to allow for a more open and effective process that better implements the CEQ regulations.

Furthermore, the “scoping” process the agency has undertaken with its revision of its NEPA policies and procedures has been woefully inadequate. The agency confined itself to hearings at Council meetings, which were often plagued by confusion, with participants given insufficient information or opportunity to provide comment. The agency also did not even publish a Federal Register notice to solicit broader public participation, but instead posted these 10 questions on an agency website alongside the CCC proposal, as noted above. Broader public outreach must be part of the agency’s continued rulemaking on this topic, as well as moving forward under revised NEPA procedures.

7) *Should the environmental analysis for different types of fishery management actions be developed on a different scale based on the action’s duration or effect?*

NOAA guidance provides specific examples as to whether EAs, EIS or Categorical Exclusions apply to a variety of actions including FMPs, FMP amendments, framework measures, allocations, changes in management units, and a variety of other actions. NAO 216-6 at 6.03.d.1-4(b). Both the duration and effect of fishery management actions will naturally affect the scale of the analysis in an environmental document in the ways described above, as well as through expanded attention to possible uses of programmatic documents.

8) *What key features of the current NOAA NEPA process or of CEQ’s regulations should be modified in the new procedures?*

The MSA amendments called for the creation of NEPA procedures for NOAA Fisheries fishery management actions, not for any change in CEQ regulations. As noted above, dispositive evidence of the fact that the CEQ regulations must be satisfied as part of the Commerce Secretary’s new NEPA procedures is contained in the language in the Senate Report: “[t]he intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation.” Senate Report 109-229, April 4, 2006 at 8 (emphasis added). This Senate Report accompanied the text of the Section 304 amendment that was enacted into law verbatim (with the exception of a change in deadlines); therefore, it has controlling weight in interpreting the meaning of that new Section 304 language in the 2006 MSA. Its reference to “existing regulation” plainly identifies the existing CEQ regulations as remaining in full force; it also emphasizes that the new NEPA procedures must comply with these regulations, not a revised or amended version of the CEQ regulations.

The floor statement of Rep. Rahall quoted above confirms this point: “these new procedures will not supersede existing NEPA regulations and guidance issued by the Council on Environmental Quality.” (Statement of Rep. Rahall, December 8, 2006) (emphasis added). Thus the legislative history – evidenced plainly by both the Senate Report and the statement of Rep. Rahall – demonstrates that the new language leaves in full force the existing regulations and guidance provided by CEQ.

Accordingly, NOAA must confine itself in this rulemaking to adjusting its own “procedures.” This is entirely consistent with the CEQ regulations at 40 C.F.R. § 1507.3(a) which command agencies to “as necessary adopt procedures to supplement these regulations,” but caution that such agency procedures “shall confine themselves to implementing procedures.” *Id.*

9) *How should emergency actions be treated under the new procedures?*

40 C.F.R. § 1506.11 defines how emergency procedures are dealt with under NEPA. It provides that alternative arrangements may be possible when “emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of [the CEQ] regulations,” but cautions that such arrangements will be limited “to actions necessary to control the immediate impacts of the emergency. *Id.* NAO 216-6 further expounds on emergency procedures specific to NOAA. There is not reason to change these existing procedures.

10) *To what extent do you feel that shorter comment periods (e.g., a minimum of 30 days) could affect your ability to participate effectively in the NEPA process?*

For major federal actions with significant effects on the human environment, the CEQ regulations require at least 45 days for public comment, a time period which is reasonable and necessary, and has not caused any significant problems. Even with 45 days, it is often difficult to analyze and digest a fishery management amendment and its accompanying environmental analysis and therefore any shortening of the public comment period would simply curtail public involvement. Furthermore, due to the overlapping nature of the MSA and NEPA review requirements, a 15-day reduction in public involvement on the “NEPA side” will not in any way improve efficiency. There is absolutely no benefit to cutting these comment periods and we object to any changes in the timing set out by the CEQ regulations.

Conclusion

There are several tools available for implementing NEPA than can be used by managers to help accomplish the goals of developing timely and useful analysis for decision-making. Accordingly, NEPA and the existing CEQ regulations are entirely consistent with the intent of Congress in enacting the MSRA, and the current review process is an opportunity to improve implementation of both statutes. We look forward to working with the agency as it moves forward with revising and updating its procedures for compliance with NEPA, as required by the MSRA. We caution the agency to resist the efforts of the Council Coordinating Committee and

others that would have it ignore the intent of Congress in passing the MSRA and work to undermine rather than enhance the agency's NEPA compliance.

Thank you for your attention to these comments. We would be pleased to meet with you and your staff to discuss these issues in greater detail.

Sincerely,

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