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Re: MSRA Environmental Review Procedures (Request for Comments)

The Marine Fish Conservation Network (Network) welcomes the opportunity to provide the following comments in response to the agency's request for comments on a provision of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) of 2006 which calls for the Secretary of Commerce to revise and update procedures for Magnuson-Stevens Fishery Conservation and Management Act (MSA) compliance with the National Environmental Policy Act (NEPA).

In the MSRA of 2006, Congress ultimately rejected a proposal[1] to exempt federal fisheries management under the MSA from compliance with NEPA, while including language calling for better integration of NEPA and MSA requirements.[2] Both the text of the MSRA and the legislative history make clear that MSA actions and the updated environmental review procedures must comply with the National Environmental Policy Act (NEPA) and the existing Council on Environmental Quality (CEQ) regulations. Clearly the intent of Congress was not to exempt the MSA from complying with NEPA or any of its substantive environmental protections, but to establish a consistent, timely, and predictable regulatory process for fishery management decisions.[3]

The Network firmly supports the framework of NEPA environmental review requirements and CEQ regulations, which are well established in federal resource law and practice. As stated in the National Oceanic and Atmospheric Administration's (NOAA) existing guidelines for compliance with NEPA environmental review (Administrative Order 216-6), it should be the National Marine Fisheries Service's (NMFS) policy to fully integrate NEPA into the agency planning and decisionmaking process, consider the impacts of the agency's proposed actions on the quality of the human environment, and involve the public early in the agency planning and decisionmaking process when evaluating the impacts of proposed federal actions (40 CFR 1500.2).[4]

[1] House bill H.R. 5018, sponsored by former Representative Richard Pombo (R-CA).
[2] MSRA Section 107, amending MSA Sec. 304 (16 U.S.C. 1854), states that "*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.)."
[3] Senate Report 109-229, p. 6.
[4] NOAA Administrative Order 216-6, Section 3.01 (1999).

The February 2007 proposal by a subcommittee of the Council Coordination Committee (CCC), entitled "Revised Procedure for MSA/NEPA Compliance,"[5] is a thinly veiled attempt to resurrect the language and spirit of the defeated proposal sponsored by former Representative Richard Pombo (R-CA), supplanting the established NEPA and CEQ requirements with a Council-driven environmental review process under the MSA, which it is argued would serve as the "functional equivalent" of NEPA environmental review. Congress clearly rejected this idea in the MSRA of 2006, and so must NMFS when updating its existing NEPA compliance guidelines.

The Network believes that the roots of the difficulty in streamlining the respective steps of fishery management and NEPA environmental impact analysis lie not in some incompatibility of MSA and NEPA, but in lack of clarity about roles and responsibilities for decisionmaking between NMFS and the fishery management councils. Based on our analysis, we draw the following conclusions:

- Even though timing, inefficiency and delays were the most often cited reasons for developing new procedures, timing problems in fishery management planning are not caused by NEPA or CEQ regulations, but by the timelines of the MSA and methods NMFS has chosen to implement them. Currently, decisions are too often being made not after NEPA analysis is completed or even underway, but independent of it in a political negotiation among council members and the interests they represent.
- The NEPA process would be improved if NMFS simply implemented its current guidance consistently in all regions. In addition, leadership and oversight by the agency, rather than abrogation of the process to the councils, would improve the outcome. Standards are not applied consistently among regions and the philosophy of flexibility and decentralization has led to inconsistent – and frequently inadequate – practice.
- NMFS should affirm the current procedure recognizing that the agency is the decisionmaker, is responsible for signing the Record of Decision and assuring compliance with environmental analyses and proposed management measures with all applicable law.
- Fishery management planning processes and the environmental impact assessment processes are neither the same nor redundant. NEPA provides a needed societal perspective on what would otherwise be viewed through the narrow lens of fishery management and its associated user groups. Without NEPA, cumulative effects of fishing would not be considered beyond the effect on the target stock. Secretarial oversight provides an important quality control mechanism to ensure that management decisions and associated analyses account for the full range of factors.
- Council representation and processes are not structured to provide full and objective consideration of environmental and human impacts, being focused primarily on resource extraction and fishery management mandates of MSA. The Councils have neither the training, expertise, nor resources needed to develop adequate NEPA analyses. Council decisionmaking currently takes place independent of NEPA in a political negotiation among vested fishery interests.

For all these reasons, the Network recommends that procedures for compliance with NEPA be revised and updated to reflect the following:

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

- NOAA/NMFS regulations and operating guidelines implementing NEPA must comply with existing CEQ regulations.
- NMFS should develop consistent, standardized guidance and training for program managers, regional administrators, and other officials who are responsible for ensuring the adequacy of NEPA analyses.
- The agency should prepare environmental analyses, define the range of alternatives, and select the preferred alternative.
- The agency should initiate a system of early communication between NOAA Fisheries and councils to facilitate planning on an annual basis, and conduct specific planning discussions prior to notice of intent to conduct scoping. A 12-24 month planning horizon would reduce conflicts and aid in preparation of environmental analyses.
- Agency procedures and guidance should clarify that 'scoping' is the process defined in the CEQ regulations. It is not appropriate to use a council meeting agenda notice as a Notice of Intent. While scoping may occur at council meetings, such events should not be the only venue or vehicle for scoping.
- NEPA documents should be available in draft form at an early enough stage to inform council deliberations.
- The agency should update all Environmental Impact Statements (EISs) underlying Fishery Management Plans (FMPs) and frameworks to make them current and sufficient for use in streamlining options such as incorporation by reference, tiering, and use of Environmental Assessments (EAs) for subsets of actions under the EIS. Use of Programmatic EISs (PEISs) and tiering off the PEISs could further streamline NEPA compliance.
- The agency should set an appropriate baseline for consideration of cumulative and ecosystem impacts prior to large-scale exploitation, representing the 'unfished' condition of ecosystems.

More detailed responses to specific agency questions follow.

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?***

NMFS should affirm the current procedure that recognizes that the agency is the decisionmaker, is responsible for signing the Record of Decision (ROD) and assuring compliance of the environmental analyses and proposed plan/amendment/rule/management measures with all applicable law.[6]

A review of the requirements of MSA, NEPA and the Administrative Procedures Act (APA) demonstrates that NEPA requirements do not conflict with the MSA timing, particularly not if managers begin at the early planning stages to identify necessary objectives and potential alternatives that might deliver those objectives. The difficulties in merging the respective steps of fishery management and environmental impact analysis lie not in some incompatibility of the requirements or processes of MSA and NEPA, but in lack of clarity about roles and responsibilities for decisionmaking between NMFS and

[6] See, William T. Hogarth Memorandum to Regional Administrators, NMFS; Chairs, Regional Fishery Management Councils. 18 July 21. Also see, NOAA Administrative Order 216-6.

the fishery management councils. Who is the decisionmaker? When is a proposal a decision? To what action does the alternatives analysis apply? How many alternatives are appropriate? Are they alternatives to authorize fishing or just alternative catch levels? Are they really alternatives if the council has already voted? Can the agency analyze alternatives the council has not put forward?

A desirable change in current practice would be to make NMFS more responsible at the front end of the NEPA process, not just at the conclusion of the process and final decision. To that end, the Network recommends that NMFS revise the process so that the agency completes the Draft EIS and describes the range of alternatives, including the agency's preferred alternative, if any, so that the DEIS is available to a council *before* the council debates and provides its advice. Because the councils make policy and planning recommendations, their deliberations would benefit from the alternatives analysis that NEPA affords. Therefore, it is critical that NEPA documents—DEIS stage—be completed prior to council deliberations. Under this staging, a council could identify its preferred alternative, conduct required meetings and public hearings, vote on proposed measures and send the package to the agency as required by MSA. During that period the agency completes a Final EIS, responds to public comments, chooses its own preferred alternative and the preferred alternative voted on by the council (if it differs).[7] The process of completing the final environmental analyses could run concurrent with the council process and be ready when the package is submitted to the Secretary, at which time the Secretary approves or disapproves a final action with ROD. The FEIS, the council record, the proposed rule, and the ROD should be integrated into one combined document (See, e.g., NAO 216-6 (6.03d)).

NMFS's decisionmaking process has in the past emphasized the need to achieve compliance within the constraints of council schedules. This provides the agency a number of challenges, perhaps the greatest of which is meeting NEPA's requirements for a deliberate and thorough analysis of alternatives before action is taken. This may be problematic for the councils' annual catch specification and allocation determination schedules, which may be driven by the timing of stock assessments. However, the MSA timelines relate only to FMPs and FMP amendments. Some regional fishery management councils have avoided the time squeeze by doing annual specifications and measures under framework adjustments, which are treated with EAs. This might be appropriate if the framework is based upon an FMP with a current and thoroughly prepared EIS or if there is an adequate, up-to-date EIS on the underlying FMP/ FMP amendment.

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

First, the Network reiterates that it is *not* the timing of NEPA requirements that causes inefficiencies or delays in the planning process. NEPA does not add any additional time in the way of comment or waiting periods. Though much of the criticism of the effect of NEPA requirements on the fishery management planning process is based in timing, it is interesting to note that the overlap of NEPA's time requirements on the MSA time requirements does not add any delays.

[7] The CEQ regulations state that in the alternatives section, "agencies shall...identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement..." (40 CFR 1502.14).

NEPA imposes a 45-day review of a DEIS.. Subsequent to the transmittal of the full package (FEIS, Final plan, amendment or proposed rule), CEQ regulations impose a minimum 30-day public comment, but in the same stage, the MSA calls for a maximum 60-day comment period, so there is no reason they cannot run concurrently. The stages where neither NEPA nor MSA impose time requirements are during the planning and consultation period *prior* to the Notice of Intent to Prepare an EIS, during the preparation of the DEIS and the Draft FMP or amendment, and in the period between the close of comments on the DEIS and Notice of Availability of the FEIS and Final Amendment.

In the case of a framework or regulatory amendment that may require only an EA and FONSI, NEPA imposes no deadlines or requirements for comment periods unless the proposal is a borderline case, an unusual or new kind of action, precedent setting, controversial because of science or public interest, or would normally require an EIS. In these cases, the MSA still requires a 15-60 day comment period.

The most effective action the agency could take to streamline the planning and environmental analyses that accompany fishery management measures is to update the EISs underlying FMPs or Frameworks in order to provide thorough consideration of alternatives and impacts that are likely to flow from those plans and potential actions. In doing so, options for efficiency and time-saving become available both through the CEQ regulations and NOAA's own administrative order. Once these foundation documents are made current, subsequent actions can be tiered from them, facilitating the use of EAs.

Another process improvement that should be considered is the use of the programmatic EIS for certain types of actions. Gains in efficiency of environmental review could be facilitated by the use of Programmatic EISs, which typically evaluate broad policies, plans, and programs, emphasizing cumulative impacts, policy-level alternatives, and program level mitigation measures. This is discussed in more detail in response to question 7 below.

In order to make the procedure described in the response to Question 1 workable, there would have to be some early communication or indicator of planning direction from the council, agency, or region that begins consideration of issues and priorities. This planning stage should take place prior to issuance of the Notice of Intent in order to identify the type of environmental analysis required. To that end, the agency should initiate a system of early communication between NOAA Fisheries and councils to facilitate planning on an annual basis, and conduct specific planning discussions prior to notice of intent to conduct scoping. An early (e.g., 12-24 month) planning horizon could help reduce time conflicts and promote the integration of actions the council must perform under MSA requirements with actions the agency must perform under NEPA.

Efficiency would be improved considerably if the agency consistently implemented its current guidance. Typical agency actions subject to NEPA compliance (including FMPs, FMP amendments, frameworks, framework adjustments, annual quota setting and other measures) are described in NOAA Administrative Order (NAO) 216-6. While the order gives general guidance about what actions are likely candidates for Categorical Exclusions (CEs), EAs and EISs, the decision about what environmental analyses to prepare should be made on a case-by-case basis after some preliminary analysis of the proposed action. In general, clearer standards and consistent application of standards would improve the process and provide more efficient turnaround time for many types of actions.

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?***

This question is not clear in whether it is asking about "level of analysis" as establishing the set of circumstances that determine whether an EA is sufficient or an EIS is required, or whether it is talking about the level of analysis within an EIS examining a range of alternatives. We have responded to both possible interpretations of the question.

The first step in ensuring an appropriate level of analysis "commensurate with the scope of the action" is a clear statement of the purpose and need for the action. An action that anticipated development of an entire FMP for an interrelated suite of species would clearly have a broader scope than a proposal to modify a gear type. The second place to examine the scope of the proposal is during "scoping." Contrary to much of current practice, "scoping" is not the public hearing at which the public may comment on ideas the council already has in mind. Scoping is the process of putting ideas out to affected stakeholders and interested public to find out whether they think the proposals have implications. The scale of analysis is likely to be affected if scoping surfaces concerns about protected species or unrelated but neighboring development proposals or any number of issues that occur to interested parties who are not necessarily at the council or agency table. (See further comments on scoping in response to question 6.) Is the action for multiple species or single species? Multiple fisheries or many gear types? For a large geographic area or a discrete site? For a duration of years or just a season? Is it an entire plan or a measure to change gear? Does it set a Total Allowable Catch (TAC) for a period of years or close the season when the TAC has been met? These are variables that must be assessed on a case-by-case basis using the analytical thinking that NEPA requires. There is no cookie cutter for appropriate scale, but such considerations are guided by the CEQ regulations and decades of experience applying them to federal action.

The CEQ regulations, CEQ's 40 Questions[8] and NOAA Guidance elaborate on the process for determining the level of analysis required. It is a step-wise process that examines aspects of the proposed action to see if it can be exempted, can be handled with an EA, or is an action that rises to the threshold of "significantly affecting the quality of the human environment" and thus requires an EIS. Whether an action is "significant" is determined by considering the context in which it occurs, and the intensity of the action (40 CFR 1508.27). Context includes, in the fishery realm, benefits to the nation as a whole, effects on target and non-target stocks, the surrounding marine and coastal environment, fishing communities, and other affected stakeholders. The "intensity" of the action can be determined by examining issues such as degree of controversy, effects on protected species, cumulative effects, unique characteristics of the geographic area, and similar considerations (40 CFR 1508.27(b)).

NOAA's own guidance on NEPA makes it clear that authorizing fishing most definitely fits well within the kinds of federal action envisioned by the statute. The types of actions that are subject to NEPA review include new or revised rules, regulations, plans, policies, procedures, activities that are financed, assisted, conducted, or approved by a federal agency. (40 C.F.R. 1508.18) Further refinement of that list by NOAA is found in NAO 216.6 (at 6.01): "Federal actions, including management plans, management plan amendments, regulatory actions, or projects which will or may cause a significant impact on the

[8] CEQ memorandum, 1981. 46 FR 18026.

quality of the human environment, require preparation of an EIS." NOAA goes on to provide expanded guidance related to fishery management action in a series of nine specific instances that can be considered significant, including effects on target and non-target species as well as biodiversity and ecosystem function.[9]

With regard to the level of analysis within an EIS examining a range of alternatives, the CEQ regulations state that alternatives analysis should be based on the section describing the "affected environment." (40 CFR 1502.14). The analysis of alternatives should be comparative, "sharply defining the issues and providing a clear basis for choice among options." The analysis is to be objective, rigorous and detailed for the alternatives considered in detail, and brief for those which were eliminated.

To ensure that analysis is conducted on an appropriate geographic scale for various types of fishery management actions NMFS 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.

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 two levels of environmental document—the EA and the EIS—provide flexibility and appropriate scale of analysis to the types of actions under consideration. There is no reason to eliminate the distinction between an environmental assessment and environmental impact statement. Such an action would ignore 30 years of established practice and case law. The EA is one of NEPA's most effective tools for streamlining, an objective which NOAA purports to embrace. Congress did not direct NOAA to throw out NEPA or the CEQ regulations. To abandon this standard and shift to an entirely new and untested "integrated environmental impact analysis" is to invite more litigation, not less. There are neither standards, guidance nor case law for a new process.

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

Existing regulations and guidance are more than sufficient to guide the answer to this question. What is necessary is not new or different regulations but compliance with existing regulations. For example, the very first entry in CEQ's "Forty Questions" memorandum asks "What is meant by "range of alternatives." This document describes a "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." Another source of guidance on this topic is NOAA's NEPA Handbook, which states in part: "Reasonable alternatives are those that may be feasibly carried out based on technical, economic, environmental and other factors, and meet the purpose and need for

[9] See NAO 216-6 (6.02a-h).

the proposed action. Pursuant to CEQ regulations 40 CFR 1505.1(e), the alternatives described in this chapter must include all alternatives under consideration by NOAA. This also includes the No Action Alternative." The Handbook also includes a memorandum providing legal advice on range of alternatives. In that memorandum, counsel wrote:

> Once the agency determines what actions need to be in the EIS, the second step in ensuring that agencies meet the requirements of NEPA is providing an adequate range of reasonable alternatives that address the purpose and need of the proposed action. Specifically, 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 actions 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). The statement of purpose and need is important because it explains why the Federal agency is taking action and what objectives are to be achieved. If the purpose and need for the proposed action are rigorously defined, the number of alternatives that will satisfy the need can more readily and aptly be identified and narrowly limited. The careful articulation of the statement of purpose and need is therefore crucial to the development of an adequate range of reasonable alternatives to the proposed action.[10]

Given this guidance, defining a "reasonable" range of alternatives would include the no action alternative, plus alternatives covering a wide spectrum of possible actions that would achieve the objectives stated in the purpose and need.

The topic of alternatives is explored thoroughly in CEQ regulations, CEQ's 40 Questions and the agency's internal guidance documents, including the range of alternatives to be analyzed, the level of detail required for each alternative, and identification of a preferred alternative (e.g., 40 CFR 1502.14). Analysis should include comparisons on environmental (non-target species and ecosystem), biological (fish stock) and socio-economic grounds. Although it is aimed at economic analysis, another good source of direction on how to do analysis is NOAA's Guidelines for Economic Analysis of Fishery Management Actions. This guide points out key elements of analysis, such as comparing each alternative to the others, making a reasoned assessment of the expected direction of change, and considering all aspects of "net benefits to the nation." There is not much more that can be described in updated and revised procedure that is not already on the books.

What is needed is improved practice. Alternatives analysis needs to be transparent. The reader needs to be able to follow the logic of the choices and their respective environmental consequences and impacts. Alternatives, including the no action alternative, need to be comparable to each other. They need to be able to be analyzed in light of their respective impacts and consequences (the environmental consequences section should form the analytic basis for this, not duplicate it). The reader of the analysis section, whether it is the public or the decisionmaker, needs to be able to understand the comparisons and differences among choices, what impacts are likely to follow what choices. Socio-economic, ecological, cultural and biological information need to be integrated in the alternatives and consequences

[10] December 16, 2002, *Memorandum for Legal Guidance on Determining Related Actions and Developing Reasonable Alternatives for Inclusion in a Single EIS.*

discussion so that the reader can understand how certain alternatives affect the entire suite of impacts, not portrayed as separate sets of numbers in a series of tables.

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?***

Revisions to procedures should describe procedures to make scoping occur as the CEQ regulations define it. The procedures should clarify that it is a process, not an event. Guidance also must be clear that it is broader than a public hearing at council meeting where the public comments on proposals or what the council wants to do. It is a broader, issue-spotting discussion. While eliciting comments during scoping can be more effective if there are ideas for public to comment upon, such as preliminary ideas about alternatives, it is not appropriate to constrain what the public may suggest during scoping. The CEQ regulations describe the objectives of scoping as the following: identify the affected public and agency concerns, facilitate efficient EIS preparation process, define issues and alternatives that will be examined in detail and those that will not, save time by trying to ensure that new comments will not re-open the entire draft (40 CFR 1501.7).

It is not appropriate to use a council meeting agenda notice as a Notice of Intent. The wider environmental impacts of fishery management decisions may be of interest to sectors of the public who are not part of the so-called "council family." Fishery management decisions might impinge on coastal land use plans, protected species, marine area management, and a host of other activities that affect public resources that may be of interest to persons who would not otherwise be looking at a council meeting agenda.

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's NEPA office offers guidance on 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. Specific examples and approaches are described in NAO 216-6 at 6.03.d.1-4(b). This guidance illustrates that the environmental analysis for opening or closing a season would be of a different scale than, for example, developing a new FMP or designating essential fish habitat for an entire region. (See discussion above, at question 3.)

For example, in 1999 the U.S. District Court in Seattle cited NEPA's cumulative effects provision as requiring a programmatic analysis of the Alaska groundfish FMPs since the first EISs were prepared in the late 1970s and early 1980s. In this instance, the long interval since the agency had reviewed the management programs and the widespread changes to the FMPs and the human environment clearly required a *programmatic* evaluation of the FMPs in their entirety:

> "*NEPA does not permit NMFS to continue making individually minor but collectively significant changes to the FMPs without preparing an SEIS analyzing these changes. The Court has no doubt that the vast changes to the FMPs have reached the threshold of 'cumulatively significant*

> *impact on the environment,' thereby requiring preparation of an SEIS addressing these vast changes. For the same reasons, NMFS cannot then break the FMPs down 'into small component parts' by analyzing only the setting of TAC levels rather than these FMPs in their entirety. The Court therefore concludes that NEPA's cumulative effects provision requires a programmatic analysis of the FMPs in their current form.*"[11]

The appropriate scope of consideration in this case was an action spanning two decades whose impacts were geographically widespread and the subject of intense scientific and legal controversy, and therefore a comprehensive analysis of the fishery management policies and programs was in order. Lack of appropriate NEPA review of the original EISs over a long period of time, coupled with major changes in the FMPs and widespread changes to the environment, should have been a clear indicator to NMFS of the need for a programmatic EIS.

Depending on the scale of a proposed action, a Programmatic EIS may be appropriate and the groundwork laid down in such a document can both improve and expedite later stages of action by tiering or by incorporation by reference of material contained in the programmatic EIS. On example of a programmatic EIS would be one that provides an integrated plan looking across species and resources, including non-managed species and the environment for a period of years. A programmatic review provides analysis of the consequences of a package of activities and reasonably foreseeable subsequent actions under that program, and serves as a central planning document for future actions.[12] For example, such a document might take a zoning approach in a region and look at all the possible activities likely to occur there, including commercial fishing, recreational fishing, diving, no-take zones, marine mammal migrations, incidental permits, and so on. The agency would look at the package together and construct a management plan to integrate the actions and choices. Analysis of the environmental impacts of subsequent actions could then be tiered off the Programmatic EIS. By making important decisions at the programmatic level on a multi-year basis, fishery managers can respond in a more expedited fashion to the annual choices that are governed by those larger, longer-term decisions and management plan objectives.[13]

In addition, the duration or effect of the action calls for the need to improve examination of cumulative impacts. As with other areas, CEQ and NOAA guidance provide direction and examples for how to do this effectively. The item that would be appropriate for revised procedures would be selection of a time scope and scale, such as the era prior to large-scale modern fishing, even though a baseline is not a legal requirement of NEPA or the CEQ regulations. This era is widely regarded as a period of significant technological and capacity expansion in fisheries, and provides a proxy for unexploited stocks and ecosystems. Certainly the examination of cumulative impacts needs to be more far-reaching than one or two years in the past and into the future, and beyond the target stock and its EFH on a geographic scale.

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[11] Greenpeace et al. v. NMFS, 55 F.Supp.2d 1248, 1274 (W.D.Wa. 1999).

[12] See, for example, the statement of Dr. Patricia Livingston, Program Leader, Resource Ecology and Ecosystem Modeling, Alaska Fisheries Science Center, in testimony to the Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans, June 14, 2001: "*It is intended that the* [Alaska groundfish] *programmatic SEIS will serve as the central environmental planning document for both the BSAI and GOA* Groundfish *FMPs, which are not presently oriented to promote ecosystems*."

[13] The Alaska Region has taken this approach, completing a Programmatic Supplemental EIS on the fishery management plans in 2004 and tiering an annual catch specification EIS off the Programmatic in 2007.

Both the Pew Ocean Commission and the U.S. Ocean Commission emphasized in their reports the need to take a larger view in fishery management, to look at the effects of fishing on other parts of the marine ecosystem. More recently, in a 2006 letter to Congress, the chairmen of the Joint Ocean Commission Initiative pointed out that "NEPA's role is to ensure careful and full consideration of the environmental impacts of all classes of activities and their alternatives." They emphasized the importance of using NEPA to "fully understand, reconcile and balance fishing's impact on the ecosystem."[14] This is an area where the agency's efforts on ecosystem-based approaches to fishery management should come into play.

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

CEQ's regulations should not be modified in the course of the revision and update. To do so would run afoul of both the explicit command and legislative intent of the MSRA, which states that 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 Senate Report accompanying the text of the Section 304 amendment that was passed in the Senate (with language identical to that which was enacted into law) further clarifies that "[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."[15] This Senate Report has controlling weight in interpreting the meaning of that new Section 304 language in the 2006 MSRA. Accordingly, NOAA must confine itself 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.*

The CEQ regulations are general rules designed to apply equally to the siting of nuclear power plants, paving of the parking lot of a scenic overlook in a national park, permitting hog farms on Indian reservations, allowing public trust land transfers, planning highway interchanges and setting the TAC for groundfish. There is nothing in the amendments to the MSA provision on the procedures update to suggest that the fishery management tail should wag the nation's entire environmental evaluation dog. Indeed, CEQ has always demonstrated considerable flexibility and responsiveness in aiding agencies that need to adapt their NEPA processes to meet specific contingencies. (See, e.g., Testimony of Dinah Bear before House Resources Committee.)[16] The CEQ regulations call for flexibility and responsiveness to emergencies. (40 CFR 1506.2, 1507.1, 1507.3)

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[14] USCOP Chair Admiral Watkins and POC Chair Leon Panetta, Letter to Representative and House Natural Resource Committee Chair Richard Pombo, 16 May 2006.

[15] Senate Report 109-229, April 4, 2006 at 8 (emphasis added).

[16] Statement of Dinah Bear, House Resources, April 13, 2005. "Given the focus of this hearing, let me say a few words about our recent involvement with the National Marine Fisheries Service/NOAA. First, NOAA last amended its NEPA procedures in 1999. On November 14, 2003, NOAA requested approval of proposed alternative arrangements to complete a supplemental EIS for federal management of pelagic fishery resources in U.S. waters and the Exclusive Economic Zone in the Western Pacific Region. CEQ granted approval on November 20, 2003. On January 29, 2004, NOAA asked for alternative procedures for rulemaking for sea turtle bycatch and bycatch mortality reduction in the Atlantic Pelagic Longline Fishery. CEQ approved these alternatives arrangements on February 4, 2004. On June 3, 2004, NOAA requested a modification of those alternative procedures; that modification was granted on June 22, 2004."

An examination of the studies, statements and criticisms that fueled the legislative debate about NEPA compliance issues demonstrates that the timing problems are not caused by NEPA or CEQ's regulations, but by the timelines of the MSA and the methods the agency has chosen to implement them.

Following numerous internal and external reviews, congressional oversight hearings and special appropriations aimed at improving NEPA compliance, NOAA has been working to revise its operational guidelines related to fishery management planning and environmental assessment. In a follow up report on its review and recommendations, the National Academy of Public Administration wrote in February 2005:

> "*But NMFS officials are not sure when the revised Operational Guidelines will be issued. They explained that they have used a very inclusive process to develop the guidelines, including many discussions with regional, center, and council staffs, as well as all involved headquarters offices. The process has taken longer than expected; NMFS originally hoped to issue them in 2002, then estimated issuance in 2003, then 2004; as of this report, they expect to issue them in the spring of 2005*."

That "inclusive process" must be expanded beyond the agency and councils in order to determine whether any of the work completed as part of the regulatory streamlining process is relevant to the MSA directive to revise and update procedures.

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

There is no need to change how emergency actions are treated. Both NOAA's own NEPA guidance and the CEQ regulations (40 CFR 1506.11) provide for emergency actions. NAO 216.6 at 4.01f and 5.06 describes how agencies may take emergency action that requires environmental analysis, recommending consideration of approaches such as categorical exclusions or environmental assessments. Section 5.06d says: "Because an EA or CE has no statutory time requirement for public notice or comment, emergency actions that are appropriate for a CE or require an EA leading to a FONSI should not be delayed by any time constraints or requirements established by NEPA or this Order." The procedures go on to say that actions that are not appropriate for an EA or CE should be raised immediately with the NOAA NEPA coordinator and CEQ to find ways to handle the situation in order to prevent harm to the human environment.

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?***

The CEQ regulations require at least 45 days for public comment, and we believe this minimum level should be maintained. 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. Moreover, the existing baseline 45-day NEPA comment period is not onerous, nor does it add time to the MSA process. The comment

periods in fishery management planning include a minimum of 45 days on a DEIS (NEPA), 60 days on an FMP package (MSA), and 30 days on the FEIS (NEPA), plus Councils often insert additional comment periods on their proposals. The 45-day period runs during the time that the draft FMP is under revision preparatory to submission to the Secretary, and the 30-day period runs concurrent with the 60-day comment period required by MSA. As such, a 15-day reduction in public involvement will not improve either efficiency in the process, or improve management of the public's resources. There is no apparent benefit to cutting these periods and we object to any changes in the timing set out by the CEQ regulations.

In conclusion, NEPA is a complementary law to the MSA. It provides decisionmaking tools for fishery managers to produce information critical to achieving healthy oceans and productive fisheries that the MSA does not provide. It also provides opportunities for the public to be informed and participate in fisheries management that the MSA does not provide.

The intent of NEPA is to inform decisionmaking. Currently, however, decisions are too often being made prior to NEPA analyses and independent of NEPA review in a political negotiation among council members and the interests they represent. The councils were created to provide regional expertise and practical input into fishery management decision-making, to provide policy recommendations, and to provide a forum for public participation in the process, as envisioned in the MSA – not to supplant the agency as the decisionmaker.

The 2006 amendments do not change the underlying framework that places the agency in the decision role. Congress intended to establish new procedures for compliance with NEPA in order to ensure efficient consideration of environmental issues presented in the nation's fisheries. We believe that both efficiency and consideration of environmental issues can be improved through better adherence to the existing CEQ regulations, and close attention to the original purposes of NEPA – to ensure we are taking a hard look at the environmental consequences of federal actions, and to ensure that the public is fully involved in that process.

Sincerely,

Lee R. Crockett

Lee R. Crockett
Executive Director