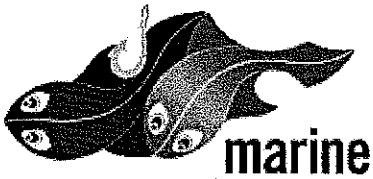

August 11, 2008

Mr. Alan Risenhoover
Director
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway, SSMC 3
Silver Spring, MD 20910

Re: MSA Environmental Review Procedures, 73 Fed. Reg. 27998 (May 14, 2008)

Dear Mr. Risenhoover:

The Marine Fish Conservation Network (Network), representing nearly 200 member organizations nationwide, is submitting the following comments on the draft proposed National Environmental Policy Act (NEPA) regulations for environmental review of U.S. fisheries management actions that were published in the Federal Register on May 14, 2008. When Congress reauthorized the Magnuson-Stevens Act (MSA) in 2006, it directed the National Marine Fisheries Service (NMFS) to revise and update its environmental review procedures for compliance with NEPA. The legislative history makes clear that Congress did not intend to exempt the fishery managers from NEPA compliance or to supplant NEPA with a new environmental impact assessment procedure, but rather to establish a consistent, timely, and predictable regulatory process for environmental review of fishery management decisions.[1] Unfortunately, we conclude the draft proposed regulations do not achieve the intent of Congress.

The National Marine Fisheries Service (NMFS) should withdraw the proposed rule it recently issued to implement the provisions of the Magnuson-Stevens Reauthorization Act (MSRA) addressing integration of the National Environmental Policy Act (NEPA) and fishery management processes. See 73 Fed. Reg. 27998 (May 14, 2008); 16 U.S.C. § 1854(i)(1). While we understand the amount of work the agency has put into the rule, especially because the Marine Fish Conservation Network (MFCN) and many of its member groups have participated in many forms of the public process that NMFS undertook, the proposed rule simply contains too many significant legal and policy flaws for it to be revised in an acceptable way before promulgation. Instead of attempting to fix this fatally flawed proposal, NMFS should draft a new proposed rule that accomplishes the MSRA's goals of streamlining the NEPA process and integrating it into the agency planning and decisionmaking process

[1] Senate Report 109-229 on S. 2012, April 4, 2006, at 6.

In addition to enabling full consideration of the impacts to marketable species of various management actions, NEPA procedures constitute an important means of ensuring that fishery managers consider important issues that the Magnuson-Stevens Act does not address. At a time when we understand better than ever that a healthy ecosystem is necessary to support thriving fisheries, NEPA interjects larger environmental issues into a process that otherwise focuses on how many fish can be caught. Thus, it is imperative that NEPA compliance be fully integrated into the fishery management process as required by the MSRA.

In this context, the proposed rule constitutes a missed opportunity. Rather than streamlining the NEPA/MSRA process, it establishes new forms of paperwork and bureaucracy that will lead to confusion and litigation. Rather than clarifying the roles and responsibilities of the agency and the regional fishery management councils (FMCs), it leaves key questions unanswered and authorizes abandoning numerous key NEPA responsibilities to these advisory, non-federal bodies. Moreover, throughout the proposed rule, the public's ability to participate in the environmental review of fishery management actions is unduly restricted.

Nowhere in the reauthorization did Congress task NMFS with altering the intent, integrity, or requirements of NEPA as applied to fisheries management. Instead, the statute directed NMFS to "revise and update agency procedures for compliance with" NEPA, integrating NEPA compliance into the fishery management process. 16 U.S.C. § 1854(i)(1). As we have explained before, these goals can be accomplished by beginning the NEPA process early and pursuing it at the same time as the development of fishery management action. This approach results in a far more simplified process than the proposed rule outlines. (See Attachment 1, MFCN proposed process.) Although the proposed rule briefly mentions our suggestions, it never addresses why they could not be implemented. Instead, as NMFS has straightforwardly asserted in numerous public meetings, the agency based its approach on the Council Coordinating Committee (CCC) strawman, which embodies the effort – rejected by Congress – to merge the MSA and NEPA process. This starting point taints the entire proposed rule and helps to explain the thoroughgoing problems with it. The many deficiencies outlined below include material violations of Council on Environmental Quality (CEQ) regulations implementing NEPA, despite Congress's directive that NMFS comply with those regulations in implementing the MSRA. See S. Rep. 109-229, April 4, 2006 at 8 ("[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"). To meet the terms of the MSRA and NEPA, NMFS should abandon the proposed rule's approach and begin again with the statutory requirements as the foundation for the new procedures.

I. CONGRESS REJECTED THE NOTION OF EQUATING MSA MANAGEMENT WITH NEPA COMPLIANCE

As you are aware, during development of the legislation that became the MSRA, Rep. Pombo sponsored two versions of language in the original House bill (H.R. 5018)

which would have exempted the MSA entirely from NEPA, effectively providing that the MSA process is functionally equivalent to the examination required under NEPA. Neither of these proposals became law. Yet NMFS appears in the proposed rule to have pursued this approach by formulating a new document that merges fishery management and NEPA efforts and creating a scheme that could result in the fishery management councils undertaking substantial NEPA responsibilities that the CEQ regulations reserve for federal agencies.

A. NMFS should abandon the IFEMS and continue to use EISs and EAs

As noted above, Congress intended for NEPA and the CEQ regulations to continue to apply to the MSA process. We are aware of no other federal agency that has abandoned the use of an environmental impact statement (EIS) to fulfill the mandates of NEPA where an agency undertakes a "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(c). The requirements applicable to EISs are well-established and understood relatively well by decision makers and members of the public. Notwithstanding this fact, NMFS has proposed to introduce a new document: the Integrated Fishery Environmental Management Statement ("IFEMS"). NMFS should adhere to the well-established EIS standards and abandon the use of the IFEMS.

The IFEMS is particularly objectionable because it is unclear whether it will comply with all NEPA requirements and case law. For example, the preamble states that:

> The content of the IFEMS would be largely similar to that of an EIS. . . . While the NEPA-related contents of the IFEMS would be similar to the EIS, the procedural requirements would be different. The proposed name change from EIS to IFEMS is intended to make clear that ***the requirements applicable to an IFEMS are distinct from those applicable to an EIS***, especially in terms of ***procedure and timing***, but also regarding the ***identification of alternatives***, how to deal with ***incomplete information***, and the requirement to analyze ***cumulative impacts***.

73 Fed. Reg. at 28004 (emphasis added). Rather than hinting at these differences, NMFS should explain what they are on each point; if the IFEMS would not be stronger than an EIS would ordinarily be, that is unacceptable.

The proposed rule provisions are also ambiguous. NMFS states that it shall "[e]nsure preparation of adequate IFEMSs pursuant to section 102(2)(C) [of NEPA]." 50 C.F.R. § 700.4(c) (73 Fed. Reg. at 28011), which suggests that the IFEMS must comply with NEPA. Yet other parts of the rule indicate that the IFEMS will comprise merely the analysis undertaken to "[d]etermine the necessary steps for NEPA compliance," *id.* § 700.3 (d)(3) (73 Fed. Reg. at 28011), and "will meet the policies and goals of NEPA," *id.* § 700.201 (73 Fed. Reg. at 28014). As we explain below, even if NMFS intends for IFEMS to meet the same standards as an EIS, the agency should not adopt this new

document. But the new approach is even more unacceptable in that it is unclear whether the IFEMS will meet the standards of an EIS.

The form of the proposed IFEMS document is also unclear. In a note to the regulatory section on the form of the IFEMS, the proposed rule states that the IFEMS shall contain various elements required by NEPA "and may also include such other elements as may be necessary to fulfill the requirements of the MSA and other applicable law." 50 C.F.R. § 700.208 note, 73 Fed. Reg. at 28016. While both the CEQ regulations and the proposed rule permit environmental review documents to be combined with other documents "to reduce duplication and paperwork," CEQ has also made clear that the "[t]he EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives," CEQ Forty Questions, Question 23. Therefore, the portions of the IFEMS intended to satisfy the agency's NEPA obligations must be clearly identified as such.

The confusing provisions concerning the contents and form of the IFEMS highlight the problem with instituting a new NEPA compliance document. To the extent that IFEMSs would differ from existing NEPA compliance documents, they would likely violate NEPA and the CEQ regulations; to the extent that they are the same, the IFEMS is not necessary. NMFS should jettison the IFEMS concept altogether and return to the EIS or Environmental Assessment (EA) as the documents for compliance with NEPA.

B. The proposed rule effectively elevates the fishery management councils beyond their properly advisory role

The regional fishery management councils play an important role in fisheries management, but it is an advisory one. NMFS, on the other hand, must ensure that fisheries management complies with federal law including, very importantly, NEPA. Through developing an adequate NEPA analysis, the Secretary can ensure that the Councils have adequate information to recommend lawful actions and determine whether proposed actions fulfill the conservation duties imposed by the MSA, as well as the Endangered Species Act, the Marine Mammal Protection Act, and other statutes. In current practice, NMFS has too often abdicated this role, allowing the regional councils to choose the goals and objectives of actions without regard to affirmative legal duties imposed by Congress and allowing councils to choose ranges of alternatives based on considerations of political, rather than economic, technological, biological, or ecological feasibility. For example, in the first round of fishery management plan amendments to address the essential fish habitat requirement of the Sustainable Fisheries Act, NMFS allowed the councils to prepare EAs that failed to consider any action but retaining the status quo.

Unfortunately, NMFS has not used the proposed rule to clarify its role in NEPA analysis and to rectify the deficiencies that have too often occurred in the past. In scoping comments, the MFCN explained how NMFS could take the leading role in NEPA compliance while working closely with the councils to ensure that NEPA is

properly integrated early in the fishery management process and that the councils' expertise is fully reflected in the NEPA analysis. See Attachment 1.

Instead of using this practical approach that incorporates the appropriate role for the councils, the proposed rule authorizes the transfer of authority for significant NEPA functions to them. Not only does this approach violate CEQ regulations, it essentially elevates the councils from advisory bodies to effectively controlling the substantive outcome of the fishery management process. If the councils reduce the scope of the issues considered in the EIS, determine its purpose and need, and curtail the range of alternatives considered, the information before the Secretary when the time comes to decide whether to approve, disapprove, or partially approve the proposed fishery management action will be so limited that, as a practical matter, the choices will be limited and the substance of the decision will largely have been made. Further, there will be no record on which the Secretary can determine whether the action complies with federal law. Fishery management councils have the authority to use their judgment to develop management actions and develop fishery management plan provisions, but the ultimate decision making authority as well as the duty to determine whether council actions comply with federal law rests with the Secretary and can not be abdicated.

For example, councils have often rejected alternatives aimed at complying with the affirmative conservation provisions of the MSA as impracticable and omitted them from the range of alternatives. Thus, the current groundfish Amendment 16 in New England sought alternative management approaches, then rejected for consideration all suggestions provided by fishermen and other members of the public (area management, "points", ITQs, and sectors) in favor of only days at sea management. If, pursuant to the proposed rule, the council takes the lead in conducting scoping, see 50 C.F.R.§ 700.108(a)(1) (73 Fed. Reg. at 28013), it may well inappropriately limit the alternatives examined from the very beginning of the NEPA process. Under those circumstances, the Secretary would lack the information necessary to determine whether or not the alternative that was rejected out of hand is superior to the one chosen by the council, effectively limiting the substantive power of the federal agency. Similar results could result if the purpose and need of the EIS is inappropriately constrained or if comments received on the draft EIS are given short shrift. See 50 C.F.R. §§ 700.206, 700.211 (73 Fed. Reg. at 28015, 28016) (NMFS and FMCs will write IFEMS, which will specify purpose and need), *id.* § 700.203(b)(3) (73 Fed. Reg. at 28015) (considering comments on draft).

NMFS acknowledges in the proposed rule that it "bears ultimate responsibility for compliance with the MSA and NEPA." 73 Fed. Reg. at 28005. Yet the proposed rule authorizes delegation to the councils of virtually every facet of NEPA compliance to joint responsibility with the councils. In some instances, the proposed rule states that either NMFS "or" an FMC will accomplish a task. See, *e.g.*, 50 C.F.R. § 700.207(c)(1) (73 Fed. Reg. at 28016) (prepare supplemental IFEMS). For these provisions, the council plainly could receive full authority to accomplish the task in question. In most areas, the proposed rule states the NMFS "and" an FMC will undertake the NEPA responsibility in question. See, *e.g.*, *id.* § 700.212 (73 Fed. Reg. at 28016) (select and evaluate

alternatives). For these tasks, the councils could have veto power over how NMFS choose to undertake them, e.g., which alternatives are chosen and how closely each one is analyzed. Either way, the proposed rule improperly authorizes delegation of authority over the NEPA process to the councils.

Indeed, the proposed rule allows virtually unlimited delegation of responsibility by NMFS to the councils through a memorandum of understanding. *Id.* § 700.112 (73 Fed. Reg. 28014). Therefore, while NMFS is mentioned as potentially responsible for a variety of NEPA tasks in the proposed regulations, the proposed rule authorizes the MOU to give virtually all authority to the councils.

All of this violates the CEQ regulations, and thus Congress's intent in enacting the MSRA, which plainly require a federal agency (lead or cooperating) to accomplish the tasks that the proposed rule suggests the fishery management councils could take over. The following chart illustrates the difference between the proposed regulatory provisions and the CEQ requirements with respect to assignment of NEPA responsibilities:

CEQ regulations (40 C.F.R.)	Proposed rule (50 C.F.R.)
§ 1501.7(a): lead federal agency initiates and has responsibility for scoping	§§ 700.108(a), 700.108(b): NMFS or FMC initiates and has responsibility for scoping
§ 1501.8: lead federal agency sets time limits for action	§ 700.109(a): "NMFS and FMCs shall cooperate" to set time limits for FMC-initiated actions
§ 1503.4: lead federal agency reviews draft document, considers public comment, and solicits public comment on supplemental document	§§ 700.203(b), 207(c): FMC reviews draft document, considers public comment, and solicits public comment on supplemental document
§ 1503.4: federal agency responds to comments	§ 700.207(b)(1): FMC shares duty to respond to comments for FMC-initiated actions
§ 1502.9(c): lead agency prepares supplemental document	§ 700.207(c): NMFS or FMC can prepare supplemental document
§ 1502.11: cover page must list name and contact info of "the person at the agency" who can provide more information	§ 700.209(c): cover page must list information for person "at the agency or FMC" who can provide additional information
§ 1506.6: "agencies shall" perform public outreach for NEPA compliance documents	§ 700.301: For FMC-initiated actions, "NMFS and the FMCs shall solicit public involvement, including through the MSA's public FMC process."
§ 1503.1: "agency shall" obtain comments on draft EIS	§ 700.302(a): "NMFS shall ensure that NMFS or the FMC" obtains comments on draft IFEMS
§ 1503.1: comments on draft EIS go to federal agency	§ 700.303(b): For FMC-initiated actions, public comments on draft IFEMS must go to FMC
§ 1502.8: agency writes EISs	§§ 700.206, 700.202: NMFS and the FMC develop IFEMS

This pervasive, illegal delegation of NEPA responsibilities to a non-federal body impermissibly elevates the councils from advisory bodies contributing to the process of

formulating fishery management policy to having substantive control over the outcome of that process. Due to the thoroughgoing effort to insert the councils into every aspect of NEPA compliance in the proposed rule, remedying this problem will require NMFS to rewrite it.

II. THE PROPOSED RULE SHUTS THE PUBLIC OUT OF THE NEPA PROCESS

The proposed rule creates a perfect storm of limitations on the time available for the public to comment on fishery management actions, the substance of the comments they are able to make, and to whom the comments must be made. Specifically, the proposed rule would require the public to comment (1) to the council, rather than the federal agency (2) on often-complicated draft EISs in only fourteen days while (3) guessing the likely preferred alternative. The proposed rule would then (4) preclude comments on the selected alternative to the Secretary once it is identified. This combination of limitations severely constrains the ability of the public to meaningfully participate in NEPA review and is fundamentally at odds with Congress's NEPA mandates. This approach will likely preclude the Secretary from receiving the informed comments necessary to take the hard look at the proposed fishery management action required by NEPA.

A. NMFS, not the councils, must receive and evaluate public comments

NEPA requires federal agencies to evaluate closely the actions that they are considering. As discussed above, requiring the public to comment to the councils rather than NMFS is part of a system that effectively delegates substantive authority to advisory bodies. Giving the councils sole discretion on receiving comments may result in unfair processes that violate NEPA. Councils may place limits on how the public can comment on drafts, for example requiring members of the public to attend meetings in order to comment on a given section of a draft EIS. Some councils restrict the numbers of public comments they will receive during the course of a meeting and have no obligation to respond to the comment on the record. Similarly, councils also schedule votes on various sections of the plan documents at different meetings. It is not clear how or when they would schedule public comments on the final documents that were being submitted to NMFS. Members of the public may also be hesitant to comment to a group of interested parties rather than the federal government that oversees them. Nor is there any assurance that councils would give public comments careful review, especially if they were received from entities the council members consider unfamiliar with the fishery management process. NMFS, not the councils, should receive comments on draft EISs.

B. NMFS may not unilaterally shorten the comment period on draft EISs

Although the proposed rule provides that "NMFS shall ensure that the draft IFEMS is made available to the public at least 45 days in advance of the FMC meeting" intended to discuss the management action analyzed by the IFEMS, 50 C.F.R. § 700.203(b) (73 Fed. Reg. at 28015), it also permits NMFS, "in consultation with the

FMC and EPA, [to] reduce the period for public comment on a draft IFEMS to a period of no less than 14 days if NMFS find that such reduction is in the public interest, based on consideration of" seven wide-ranging factors, including "[t]he ability of the FMC to consider public comments in advance of a scheduled FMC meeting" (factor v), *id.* § 700.604(b)(2) (73 Fed. Reg. at 28022). By contrast, the CEQ regulations require agencies to allow comment for 45 days, 40 C.F.R. § 1506.10(c), and permit the lead agency only to ***extend*** comment periods prescribed in the regulations; ***EPA*** may reduce the prescribed periods, but only "upon a showing by the lead agency of compelling reasons of national policy," *id.* § 1506.10(d). "[C]ompelling reasons of national policy" are far more difficult to establish than matters of convenience in the scheduling of FMC meetings. In the past, it was not uncommon for councils to accommodate poor schedule management by taking public comment on the draft EIS right up to the day immediately prior to the council session at which the final decision is made. There can be little doubt that such poor schedule management will not be deterred by the proposed rule but that, instead, councils will simply cut comment periods short. The substantially more liberal standard for reducing the comment period contained in the proposed rule extends an invitation to councils to shorten comment periods and violates the CEQ regulations.

In fact, there is little doubt that the fishery management councils will routinely reduce the comment period to 14 days if allowed to do so. Staff from the Pacific Council has already opined that the proposed rule's effort to undertake NEPA compliance prior to council action is acceptable only if the comment period on draft EISs (or IFEMSs) is reduced to 14 days. See [Pacific] Council Staff Perspective on Revised Magnuson-Stevens Act NEPA Procedures Proposed Rule (50 C.F.R. Part 700) at 4 (June 2008) (Attachment 3). Obviously, 14 days is an extremely short amount of time to allow a commenter to receive, review, analyze, and develop comments on what is likely to be a detailed and complex document. Commenters in the fishing community could miss the entire comment period, or a material portion of it, simply by being at sea when it began. While NMFS' effort to ensure that the councils consider public comment on draft EISs before voting for a particular alternative is appropriate, it must not come at the price of giving the public an adequate opportunity to comment.

Indeed, this comment period reduction is a solution in search of a problem. Nowhere in the proposed rule is there any documented need for this reduction, nor are we aware of any such need from our experience with council proceedings. Schedule crunches, where they have arisen, have resulted from poor schedule management, not conflicting statutory duties or unexpected emergencies. Where true emergencies exist, existing CEQ procedures permit reduction or even waiver of comment periods. See 40 C.F.R. § 1506.10(b)(2) (agency "engaged in rulemaking . . . for the purpose of protecting the public health or safety" may waive the time periods required between the EPA's publication in the Federal Register of EISs filed and a final decision on the proposed action for a final EIS); *id.* § 1506.10(d) (EPA, "upon a showing by the lead agency of compelling reasons of national policy" may reduce the time periods prescribed by CEQ's regulations); *id.* § 1506.11 ("[w]here emergency circumstances make it necessary to take an action with significant environmental impact" without complying with NEPA and the CEQ regulations, the lead agency can consult with CEQ about making alternative

arrangements for NEPA compliance as needed to control the immediate impacts of the emergency). In practice, CEQ has frequently and promptly granted NMFS' requests to reduce the time for NEPA review of actions when emergencies exist. As then General Counsel of CEQ Dinah Bear stated before the House Resources Committee on 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.

NMFS should be limited, like other agencies, to true emergencies when it seeks to reduce the comment period on draft EISs. Requiring the agency to seek approval from CEQ and/or EPA will ensure that NMFS or the councils will do so when it is truly necessary and appropriate rather than on a routine basis. Rather than limit the ability of the public to comment, NMFS should develop overarching (including programmatic) EISs from which it can later tier and begin NEPA review earlier in the fishery management process, thus permitting both thorough analysis and prompt management action.

C. <u>The proposed rule requires the public to predict which management scheme the council will select and then bars the public from commenting substantively once that alternative is selected</u>

The proposed rule outlines a process in which the councils would accept public comments on the draft EIS prior to voting to select a management alternative. See generally 50 C.F.R. § 700.203(b) (73 Fed. Reg. at 28015). This process contains significant flaws.

First, often a draft EIS will fail adequately to analyze an alternative raised in scoping. Comments on drafts frequently point out flaws or gaps in information that can be remedied only by further analysis. For this reason, CEQ guidance contemplates that the EIS will contain responses to public comments including "[d]evelop[ing] and evaluat[ing] alternatives not previously given serious consideration," "[s]upplement[ing], improv[ing], or modify[ing]," analyses, and/or making "factual corrections." 40 C.F.R. § 1503.4(a). The proposed rule allows this process of developing alternatives, supplementing analysis, and making factual corrections to occur *after* the council has

made its recommendation to the agency, so that neither the public advocating for the council to make a specific recommendation nor the council attempting to arrive at a recommendation have the benefit of the response to comments that must be prepared for the final EIS. Thus proposed 50 C.F.R. § 700.203(a)(3) requires the council to consider public comments prior to developing its recommendations, but not to develop the responses that will be contained in the final EIS.[2] Furthermore, proposed 50 C.F.R. § 700.305(a) requires that comments be addressed in the final IFEMS and that the IFEMS document how the council and agency responded to the comments, but does *not* require that the council have the benefit of a fully analyzed response to the comments prior to making its recommendation to the agency.

This problem is not merely hypothetical. For example, in formulating its recommendation on Framework 14 to the Scallop FMP, the New England Council met and made its recommendation to NMFS the day immediately following the close of the draft EIS comment period. The council meeting transcripts show that the Council failed to consider the comments of the EPA, the NMFS regional administrator, and a conservation group. Remarkably, the final SEIS produced by the agency subsequent to the final council meeting stated without any explanation or justification that the council had considered the alternative proposed by the conservation group.

Accordingly, it is not sufficient to require that public comments be fully responded to in the IFEMS or EIS without requiring that the analysis and development required to respond to such comments be prepared and presented to the council and the public in a sufficiently timely way to play a factor in the council's decision making. Nor is it sufficient to require that the IFEMS document how the council considered comments. As the Framework 14 example shows, it is possible to claim that a comment was "considered" because it was submitted prior to a meeting and to claim that an alternative was "rejected" even though the council had never actually reviewed the comment letter in which the alternative was set forth. Any guidance for integration of NEPA with the council process must be sufficiently strong to address such past deficiencies.

Second, as the preamble candidly notes, "the FMCs rarely have a preferred alternative fully fleshed out prior to their vote." 73 Fed. Reg. at 28007. Indeed, "fully fleshed out" is an understatement. In practice, council members tend to go into the final meeting with a rough idea of how they want the fishery to proceed, undertake some form of horse trading, and then forward the resulting measures, with or without adequate analysis, to NMFS for approval.

For example, when the New England council developed Amendment 13 to the Groundfish fishery management plan, it created and ordered an analysis of a "B-days" category of days at sea at an October 2003 council meeting and approved the amendment

[2] The proposed rule leaves unclear whether NMFS itself will develop the analysis of and response to public comment. This crucial responsibility should rest with the agency.

one month later at the November meeting, even though the analysis of the alternative was not completed until the final EIS appeared in December. The B-days alternative became the foundation of Amendment 13 at the last minute despite the fact that scoping had concluded four years earlier in May 1999 and the DEIS was completed in July 2003.

As this example illustrates, alternatives analyzed in a council-driven EIS will have more to do with political negotiations between specific parties than rational analysis, and commenters will often be unable to comment on a specific alternative that is likely to be selected. The proposed rule mentions several times that the public must comment on the substance of this alternative at the draft EIS stage, notwithstanding the fact that the preferred alternative is highly unlikely to be "fleshed out" prior to the vote; otherwise "NMFS is not obligated to respond to comments relevant to the draft IFEMS that are raised for the first time during Secretarial review." *Id.* at 28006. Once the council has voted,

> [a] final IFEMS could be prepared and submitted with the transmittal package to begin Secretarial review if the FMC voted to recommend: (1) An alternative considered and analyzed in the draft IFEMS; (2) a hybrid of the alternatives analyzed in the draft; or (3) another alternative not specifically analyzed the draft IFEMS, but otherwise within the range of the alternatives analyzed in the draft. If, however, the FMC voted to recommend a completely new alternative ("outside the box" alternative) that was not previously analyzed, there would be a requirement for additional analysis . . . .

Id. at 28007.

Obviously, a federal agency must be able to alter its proposed course of action to some degree in response to public comment without undertaking a new round of comment. In order for the public to make informed comments, however, the proposed course of action must be identified to some reasonable degree of specificity so that commenters are not reduced to making informed guesses about what the action is likely to look like. As elsewhere, it would be useful for the agency to provide in this section some examples and illustrations of how the agency envisions the process working.

Furthermore, the proposed rule overlooks the complex character of many council actions in contemplating that adopting a "hybrid of the alternatives analyzed in the draft" would not require supplementation. For example, the description of the proposed action in the final EIS for the New England Groundfish Amendment 13 took 86 pages to outline the eight major components of the suite of alternatives recommended by the council and adopted by the agency. Those eight major components addressed separate but related issues such as defining overfishing reference points, rebuilding fish populations, ending overfishing, administration of the fishery, controlling capacity, and protecting essential fish habitat. The eight major alternatives frequently contained several sub-alternatives. Because fishing capacity is related to impact on habitat and to ending overfishing, while ending overfishing is related to impact on habitat, and so forth, the need for and impact of

one alternative in the suite of alternatives is dependent on the selection of all the others. To make matters even more complex, the final EIS contained another approximately 125 pages describing the alternatives that were not preferred, including 30 pages describing alternatives that were "considered but rejected." When, as is frequently the case, proposed fishery management actions are this complex, a "hybrid" rearrangement of individual alternatives can yield as many different sets of environmental impacts as a "hybrid" rearrangement of building blocks can yield a different building. The guidance should provide criteria for when such "hybrids" necessitate supplementation.

The proposed rule states that if a council selects a "completely new" or "outside the box" alternative, a supplemental draft, including a new round of public comment, will be required. See *id.*; 50 C.F.R. § 700.207(c) (73 Fed. Reg. at 28016).[3] But the proposed rule then gives the Councils the alternative of submitting the supplemental draft directly to the Secretary without allowing the council or the public the benefit of considering the supplemental draft and the comments on the supplemental draft prior to a final council vote. 73 Fed. Reg. at 28007. The preamble states that NMFS expects this approach to be used "rarely, if ever, and only to address extraordinary circumstances" and notes that it "would involve extremely tight turnarounds due to the MSA's statutory time periods[,] . . . severe workload burdens on staff and . . . a high risk of failure to meet the statutory deadline." *Id.* If councils did take this option, the role of NEPA in informing decision making would be eviscerated. NMFS should amend the proposed rule to prohibit the councils from submitting a supplemental EIS directly to NMFS. Instead, the councils should be required to consider public comments on the new alternative and an analysis of it before taking a fully informed new vote. This process will both ensure that the councils are fully informed of the impacts of their action and encourage participants to proffer management alternatives before the council meeting at which a vote will be taken. Under no circumstances should the final NEPA rule create situations in which the public opportunity for comment on a preferred alternative may be effectively foreclosed procedurally, as envisioned in this draft rule.

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[3] The proposed rule seems to provide that the supplemental analysis will be submitted for public comment. See 50 C.F.R. § 700.207(c)(4) (73 Fed. Reg. 28016). However, the language of the proposed rule is somewhat confusing on this point. For example, it is possible to read Sec. 700.207(c)(6) as differentiating between, in the first sentence, an amended analysis of "an alternative not within the range of alternatives analyzed in the draft IFEMS" that can be sent directly to the Secretary and, in the second sentence, a "supplemental draft IFEMS . . . available for public comment." In preparing a new draft proposed rule, NMFS might address this problem by stating (assuming the IFEMS is abandoned): "If an FMC modifies the proposal and votes to recommend an alternative not within the range of alternatives analyzed in the draft EIS or EA, NMFS shall prepare a supplemental draft EIS or EA that analyzes the effects of the recommended action and that shall be available for public comment as specified in § 700.203(b)." Similarly, in section 700.203(b)(5), NMFS should replace "If necessary" with "If an FMC modifies the proposal and votes to recommend an alternative not within the range of alternatives analyzed in the draft EIS or EA, NMFS shall supplement . . ."

III. THE PROPOSED RULE ENDEAVORS TO SHIELD FEDERAL ACTIONS WITH POTENTIALLY SIGNIFICANT ENVIRONMENTAL CONSEQUENCES FROM NEPA REVIEW

A. "Framework" actions may not be exempted from NEPA analysis

The proposed rule contains the remarkable suggestion that federal actions may be taken without preparation of a NEPA document so long as "NMFS determines through a Framework Compliance Evaluation [FCE] that the management measures in the action and their environmental effects fall within the scope of a prior analysis." 50 C.F.R. § 700.104(b) (73 Fed. Reg. at 28013). NMFS would make this determination pursuant to a Framework Implementation Procedure [FIP] allowing "actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis." *Id.* § 700.104(a) (73 Fed. Reg. at 28012). Should this entirely internal process convince NMFS that another NEPA document addressed the management measure, it would draft a two-page memo to the file that "briefly summarizes the fishery management action taken pursuant to a [FIP], identifies the prior analyses that addressed the impacts of the action, and incorporates any other relevant discussion or analysis for the record." *Id.* § 700.104(c) (73 Fed. Reg. at 28013).

The new, abbreviated, internal process could apply to a large array of fishery management actions. According to the proposed rule, "FIPs could be used for a variety of fishery management measures and actions, including traditional framework actions, annual specifications, and other fishery management actions, as appropriate." 73 Fed. Reg. at 28005. Annual specifications often authorize fishing for millions of pounds of (often overfished) fish species by hundreds of vessels, and the "other fishery management actions" language could cover virtually any activity. Although NMFS may intend to suggest that "framework" actions are usually simple undertakings that merely implement existing management schemes, in practice they have been used to make fundamental fisheries policy decisions. For example, the New England Council granted scallop vessels access through framework actions over a period of years to areas closed to scallop fishing after the 1994 collapse of sectors of the groundfish fishery -- decisions that fundamentally changed the nature of the scallop fishery. To show how wide ranging the framework procedure can be, Amendment 13 to the New England Groundfish FMP contains a bullet point list of 15 separate categories of action that can be frameworked, covering every aspect of the fishery. The actions include fundamental issues such as revising biological "status determination criteria" for fish stocks, allocating the right to fish ("DAS"), establishing sectors of the fishery, gear changes to protect habitat, and, in case the list was somehow incomplete "other management measures adopted through this management plan." Thus, as proposed the FIP exception could subject significant management actions to only cursory examinations of whether an existing document arguably discusses them. If the agency expects to limit the framework compliance evaluation process to a subset of fishery management actions, NMFS should supply examples and illustrations of the kinds of frameworks that would fall within and outside the process.

While NMFS should certainly take advantage of previously completed NEPA analysis when it implements fishery management actions, the proper method for doing so is the well-established process of tiering and incorporation by reference. Indeed, the proposed rule's discussion of tiering largely echoes the CEQ regulations on this point, noting that

> [w]henever a broad IFEMS has been prepared . . . and a subsequent IFEMS or environmental assessment is then prepared on an action included within the entire program, policy, or fishery management plan or plan amendment, the subsequent IFEMS or environmental assessment need only summarize the issues discussed in the broader IFEMS, incorporate discussions from the broader IFEMS by reference, and shall concentrate on the issues specific to the subsequent action.

50 C.F.R. § 700.218 (73 Fed. Reg. at 28017). Compare 40 C.F.R. § 1502.20 (similar language in CEQ regulation). See also 50 C.F.R. § 700.219 (73 Fed. Reg. at 28017) (NMFS rule on incorporation by reference). NMFS does not explain in the proposed rule why the new framework process is necessary in light of the availability of tiering to make use of pre-existing analysis when appropriate without creating an entirely new, non-NEPA process not foreseen by the MSRA.

NMFS may have created the FIP process in order to substitute a shorter, less analytical, entirely in-house alternative to the EA that would normally accompany "actions . . . undertaken pursuant to a previously planned and constructed management regime," 50 C.F.R. § 700.104(a) (73 Fed. Reg. at 28012).[4] But this rationale illustrates why the FIP process improperly short-circuits NEPA. The lawful use of frameworks to implement guidance already contained within fishery management plans is, of course, appropriate. But such framework rules must continue to be subject to appropriate

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[4] The conclusion of an EA in this situation may well be a finding of no significant impact (FONSI), eliminating the need for further analysis. But the proposed rule contains a discussion of "[d]etermining the significance of NMFS's actions" stating that the agency can make a finding of no significant impact (FONSI) even where an action will have significant impacts. 50 C.F.R. § 700.401 (73 Fed. Reg. at 28020). The proposed rule's FONSI definition properly tracks CEQ's definition of "significantly" at 40 C.F.R. § 1508.27, discussing the need to consider the context and intensity of effects in order to determine whether they are significant. The NMFS provision then asserts that a "FONSI may be appropriate for an action that may have significant or unknown effects, as long as the significance and effects have been analyzed previously." 50 C.F.R. § 700.401(d) (73 Fed. Reg. at 28020). NEPA does not permit an agency to issue a finding of no significant impact where significant effects exist. See 42 U.S.C. § 4332(C) (agencies must produce a detailed statement concerning any proposal "significantly affecting the quality of the human environment"); 40 C.F.R. § 1508.13 (CEQ regulations defining FONSI as "a document by a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment"). NMFS should clarify those circumstances under which it would make a FONSI on the basis of pre-existing analysis.

environmental impacts analysis under NEPA. As discussed above, see *supra* at 2, in the MSRA Congress did not authorize NMFS to dilute NEPA as applied to the fishery management process by creating new documents and processes to avoid taking the necessary hard look at federal action.

B. The Categorical Exclusions established by the proposed rule are too sweeping and lack an exception for extraordinary circumstances

Categorical exclusions (CEs) include activities that "do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. The CEs established in the proposed rule cover a wide array of actions which would not meet these criteria. In addition, the proposed rule does not identify "extraordinary circumstances in which a normally excluded action may have a significant environmental effect," 40 C.F.R. § 1508.4, as required by the CEQ regulations.

The proposed rule states that NMFS has already found that three types of activities fall under a CE and do not require an EA or EIS:

"[o]ngoing or recurring fisheries actions of a routine administrative nature";

"[m]inor technical additions, corrections, or changes to a Fishery Management Plan or IFEMS"; and

"[r]esearch activities permitted under an EFP or Letter of Authorization where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or Fishing Mortality."

Id. § 700.702(a)(1-3) (73 Fed. Reg. at 28022). NMFS does not explain what it means by the first two of the listed categorical exclusions. The first category, in particular, could be construed to include annual quota setting, which can have significant environmental impacts.

The EFP exclusion is particularly problematic. According to the preamble, "[t]he public raised the issue that NEPA's requirements sometimes hinder the ability of research organizations to obtain EFPs." 73 Fed. Reg. at 28003. While useful information can be gained through EFPs, very often they permit fishing in otherwise closed areas or using specialized gear. Therefore, even if the impact of the removal of the fish themselves has been analyzed by factoring it into the ABC, OY, or fishing mortality rate, there may well be additional environmental impacts from the fact that fishing is occurring where it otherwise would not be and/or with specially modified gear. For example, NMFS is currently considering whether to permit an EFP that would allow longlining in an otherwise closed area in the EEZ off the Pacific coast. See 73 Fed. Reg. 22340 (April 25, 2008). This EFP, which would authorize a single vessel to be exempted from limits on fishing in the Pacific EEZ, could result in impacts to sea turtles, marine mammals, sea

birds, and non-target finfish. *Id.* None of these implications would be reflected in the analysis addressing the fishing mortality caused by the EFP. Similarly, a recent proposed EFP would allow take of horseshoe crabs, whose eggs are an important food source for many migratory birds, in the Carl N. Shuster Jr. Horseshoe Crab Reserve, 73 Fed. Reg. 31434 (June 2, 2008). The Federal Register notice announcing the application for the EFP notes that the applicant would be required to "limit[] trawl tow times to 30 minutes as a conservation measure to protect sea turtles, which are expected to be migrating through the area during the collection period, and are vulnerable to bottom trawling." Obviously, significant issues having nothing to do with fishing mortality can and do arise in the EFP context.

Nor would NEPA analysis necessarily slow down the process of approving EFPs as set forth at 50 CFR § 600.745. If the NMFS regional administrator determines that any application warrants further consideration, notification will be published in the FR with a 15 to 45-day comment period. The regional administrator will forward copies of the application to the council, coast guard, and any state agencies, if appropriate, accompanied by information showing the effect of the proposed EFP on target and incidental species, including the effect on any TAC, as well as biological information relevant to the proposal, including impacts on marine mammals and protected species. There are established grounds for denying EFPs. See 50 C.F.R. § 600.745(b)(3). This process and the information collected through it would be appropriately incorporated into a brief EA. Expanding the number of EFPs approved through a CE would short-circuit a well-established procedure that is not onerous.

This CE is particularly problematic in the absence of an explicit extraordinary circumstances exception, since, as illustrated by the Pacific longlining proposal, EFPs may permit fishing that affects endangered or threatened species as well as sensitive habitat areas. Instead of providing that extraordinary circumstances might preclude an otherwise appropriate CE and identifying what those circumstances are, the proposed rule states that "NOAA and NMFS ***may*** develop guidance on how NMFS will determine whether extraordinary circumstances exist such that an action that normally qualifies for a categorical exclusion requires the preparation of an EA or IFEMS," 50 C.F.R. § 700.702(c) (73 Fed. Reg. at 28022-28023) (emphasis added), and notes that "NOAA has developed additional guidance on the identification and use of Categorical Exclusions [NOAA Administrative Order 216-6]," *id.* § 700.702(d) (73 Fed. Reg. at 28023). That guidance specifies that "under extraordinary circumstances in which normally excluded actions may have a significant environmental impact . . . an EA or EIS is required." NOAA Admin. Order 216-6 § 5.05a (May 20, 1999). The guidance further identifies as having extraordinary circumstances proposed actions that

> involve a geographic area with unique characteristics, are subject of public controversy based on potential environmental consequences, have uncertain environmental impacts or unique or unknown risks, establish a precedent or decision in principle about future proposals, may result in cumulatively significant impacts, or may have any adverse effects upon endangered or threatened species or their habitats.

Id. Rather than elliptically referencing this guidance, NMFS should explicitly provide in the CE regulation that specific extraordinary circumstances could result in a normally excluded action having a significant effect.

IV. THE PROPOSED RULE COMPLICATES RATHER THAN STREAMLINES NEPA PROCESSES

Congress sought, via the MSRA, to "streamline th[e] environmental review process in the context of fishery management," S. Rep. 109-229 at 8 (cited at 73 Fed. Reg. at 28000), and the proposed rule states that one of NMFS' goals for the revised NEPA procedures is to "achieve greater efficiencies in fisheries management," 73 Fed. Reg. at 28001. Unfortunately, several of the proposed rules innovations are likely to slow NEPA compliance rather than expedite it.

For example, the framework implementation plan process seeks to eliminate the need for a NEPA document for a wide array of fishery management actions. While we oppose this new method for substantive reasons, we also believe that it will also impose burdensome administrative requirements in the form of an amendment to each FMP for which the agency would like to use the new method. Specifically, FMPs would have to include FIPs that, among other things, "specif[y] criteria that would trigger a requirement to supplement the prior analysis or would require an IFEMS or EA for the fishery management action taken pursuant to a [FIP]." 50 C.F.R. § 700.104(a)(2).[5] Determining these criteria would undoubtedly require a substantial amount of work by NMFS, council staff, and the public as everyone attempts to determine the universe of actions to which the new procedure could properly apply.

As a practical matter, litigation is the likely outcome of the effort to determine when to use a memorandum of framework compliance rather than tier or when to use an IFEMS rather than an EIS. Those involved in the NEPA process – agencies, non-governmental organizations, courts, etc. – have come to recognize certain terms in the NEPA lexicon. People generally understand both the process and the substance required when an agency drafts an EIS or an EA. By creating a constellation of new documents and bureaucratic processes, NMFS will prompt litigation while the proponents of various points of view and the courts determine what it all means. As noted throughout this comment letter, existing NEPA processes can accomplish the goals NMFS seeks to achieve in the proposed rule with less bureaucracy, more transparency, and far less likelihood of litigation.

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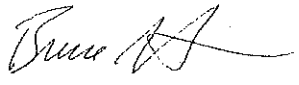
[5] Although the proposed rule speaks here in terms of when an EIS should be supplemented, the inquiry an agency should undertake when considering a new action (such as a framework) is not whether it should ***supplement*** a preexisting EIS that covers the general subject area of the action but whether it can ***tier*** from that EIS as it develops an EA or, if necessary, a separate EIS.

Instead of using so much energy inventing new documents and processes to ***avoid*** NEPA analysis, NMFS should instead ***do*** NEPA analysis: prepare thorough, overarching NEPA documents such as EISs from which fisheries managers can tier subsequent analysis of specific management actions that fall within the scope of the parent document, a procedure sanctioned by CEQ's NEPA regulatory guidance. Better coordination and advance planning by the Fisheries Service in its role as lead agency, rather than abrogation of the environmental review process to the fishery management councils, is the appropriate way to establish a consistent, timely, and predictable regulatory process for environmental review of fishery management decisions.

The Network firmly believes that NEPA is complementary to the Magnuson-Stevens Act and promotes the core goals of the fisheries law by informing fishery managers about the environmental impacts and consequences of fishery management decisions. By ensuring that managers take a hard look at the environmental consequences of federal actions affecting the ocean commons, NEPA environmental review can improve the fishery management process in multiple ways: providing greater transparency, fostering public participation for all sectors concerned with healthy fish populations and fishing communities, and promoting sustainable fisheries practices. These outcomes are in the interest of fishermen and the non-fishing public alike.

Thank you for the opportunity to submit these comments. My staff and I, as well as the other members of the Marine Fish Conservation Network, are available to discuss these issues at your convenience.

Sincerely,



Bruce J. Stedman
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