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Mr. Alan Risenhoover, Director
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway SSMC 3
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RE: Magnuson-Stevens Act Provisions; Environmental Review Process for Fishery Management Actions. Proposed Rule. 73 Fed. Reg. 27998 (May 14, 2008).

Dear Director Risenhoover:

I appreciate this opportunity to provide you with the comments of the Federal Fisheries Policy Reform Project of the Pew Charitable Trusts on the above-referenced proposed rule. We urge the agency to withdraw the procedures described in the proposed rule because they do not meet the intent of Congress when it reauthorized the Magnuson-Stevens Fishery Conservation and Management Act (MSA) in 2006, they are not consistent with the National Environmental Policy Act (NEPA) and the well-tested regulations of the Council on Environmental Quality (CEQ) and they miss the point of a revision and update to procedures by making the agency even more vulnerable to litigation.

In January 2007, the President signed legislation reauthorizing the MSA. One provision of the Act directed the Secretary of Commerce to revise and update its environmental review procedures for compliance with NEPA. The responsibility to carry out this mandate has been delegated to the National Marine Fisheries Service (NMFS). Following a period of information sessions, solicitation of comments on 10 questions and consultation with stakeholder groups, on May 14, 2008, NMFS proposed a new environmental review process for MSA activities.

By requiring a thorough environmental review with public participation, NEPA ensures that public officials make informed policy decisions that benefit our oceans. NEPA environmental reviews have made it possible to protect thousands of square miles of coral formations, begin the rebuilding of depleted fish populations, and reduce mortality of endangered sea turtles.

While some stakeholder groups argue that there are regulatory impediments to integrating and streamlining MSA and NEPA procedures, we have urged throughout the development of the proposed rule that there is no problem with integration of NEPA and MSA. The "problem" lies with the agency's past performance in conducting environmental assessment and analysis. We encouraged the agency to build upon existing regulation, executive order, administrative orders, guidelines and long-standing practice, in keeping with the clear intent of Congress to integrate the two statutes, not supplant one with the other. We offered suggestions that made use of existing regulations and procedures to shorten environmental analytical documents, build upon

existing analyses, and use tactics such as tiering that are already provided for in the CEQ regulations.

To our disappointment, the proposed procedures neither integrate nor streamline. They invent an entirely new set of documents and steps that are inconsistent with congressional direction in the MSA reauthorization and violate both the letter and spirit of NEPA. We have no confidence that another new process will improve the agency's performance of environmental assessment and alternatives analysis. Indeed, many of the flaws with the proposed new procedures illustrate a fundamental lack of understanding of NEPA and the CEQ regulations.

This proposed convoluted, conflicted and confusing process creates new duplicative documents, supplants NEPA and the CEQ regulations, improperly delegates the role of lead federal agency to the non-federal advisors who make up the fishery management councils, significantly limits the public's opportunities to participate, excludes from analysis fishing activities that deserve environmental assessment and fails to fulfill the most important statutory requirement of NEPA and the CEQ regulations by eliminating the concept of reasonable alternatives. Even the preamble to the proposed rule downgrades the purpose of NEPA from one of informed action to mere process.

The procedures put forth by the agency will foster lawsuits, not avoid litigation. They create bureaucracy and duplication and ignore a long history of law, regulation and practice.

Rather than try to repair this seriously inadequate proposal, we ask NMFS to withdraw this proposal and reconsider approaches and procedures it developed following several years of Congressional oversight, more than $11 million in special NEPA compliance appropriations, and detailed guidance from the Department of Commerce and the National Academy of Public Administration (NAPA). Those efforts *did* improve performance, compliance and the agency's litigation record. To walk away from those improvements and embark on an entirely new, untested and burdensome process is wasteful of scarce time and resources, as well as vulnerable to legal challenge.

Our specific concerns with this proposal are listed below.

1. The proposed process is not consistent with MSA or the intent of Congress

The 2006 reauthorization of the MSA (16 U.S.C. 1801 *et seq*. as amended by Pub. L. 109-479) included a provision to revise and update agency procedures for compliance with NEPA (42 U.S.C. 4231 *et seq*.). During the course of the reauthorization debate, Congress heard testimony from regional fishery management councils about the difficulty of integrating procedural requirements of the MSA and NEPA. An attempt to waive NEPA requirements for environmental review and public participation contained in H.R. 5018 failed, but language calling for integration of NEPA and MSA requirements appeared in both House and Senate bills, including H.R. 5946, the measure that passed.

The call for improvements to environmental assessment was spurred by claims that the timing of the NEPA process and the fishery management planning process were incompatible. 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's

NEPA regulations,[1] but by the timelines of the MSA and methods NMFS has chosen to implement them.

For example, some councils set annual catch limits with a plan amendment and accompanying EIS. They constrain this action to a period between the receipt of a stock assessment in late summer or early fall and the annual specification rules that must be in place by January 1. This is not required by MSA, NEPA or the CEQ regulations. They could incorporate prior EISs by reference, they could tier off a programmatic EIS, they could develop and prepare an EIS for a 5-year plan and tier off that, all of which might enable them to complete catch specifications with a brief—15 pages or fewer—environmental assessment in fewer than 90 days. The agency and councils have made choices to create a much more time-consuming, burdensome and litigious process that fosters actions that are not only *not required* by NEPA and the CEQ regulations, but in some cases are *discouraged.* These include lack of consistent standards for preparation of environmental documents; absence (until 2002) of a hard and fast rule that the agency would not approve council action that was not supported by adequate and compliant documents; practice by the councils of developing new alternatives after the EA or EIS was complete, necessitating additional analysis; solicitation of public comment after alternatives have been selected, precluding consideration of reasonable alternatives; election to maintain a two-track, sequential rather than combined process that is clearly permissible and encouraged under CEQ and NOAA guidance. The proposed procedures address none of those issues.

Not only were proponents of waiving NEPA for the fishery management planning process not successful, the report language accompanying the reauthorization clearly states that the point of the provision is to integrate the two statutes: "The intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation, but to establish one consistent, timely, and predictable regulatory process for fishery management decisions." (S.Rpt. 109-229 at 10.)

The Congress affirmed the role of the CEQ as the source of expertise on NEPA by explicitly calling for the Secretary of Commerce to consult with CEQ in the development of revised procedures. (Sec. 107(i)(1) and (4) of P.L. 109-479). Among the specific duties assigned to CEQ by the Congress and Executive Office of the President are its responsibilities to issue regulations and other guidance regarding NEPA and provide training and advice to federal agencies regarding NEPA compliance. (E.O.11514 as amended by E.O. 11991(1977)).

The CEQ regulations provide that federal agencies must prepare procedures to describe how they will implement NEPA, and allow flexibility in how agencies adapt such procedures to applicable laws for their programs. (40 C.F.R. §1507.1) However, agency procedures are to be confined to implementation of the CEQ rules, not adaptations of them (40 C.F.R. §1507.3). The National Oceanic and Atmospheric Administration (NOAA) published agency NEPA procedures in 1978, 1983 and revised them in 1991 and again in 1998. The fundamental requirement to implement

[1] The process outlined in the CEQ regulations has two specified time periods: a 45-day comment period on a Draft EIS, and the 30-day period after the Final EIS has been published in the Federal Register. CEQ has not set time requirements on preparation of NEPA documents, but has encouraged federal agencies to do so. (40 C.F.R. 1501.8) The general advice provided is that an EA should take about three months, and the EIS process about 12 months for completion. (40 Questions No. 35) CEQ guidance recommends adoption of deadlines, streamlined review, cooperation and consultation among agencies, and early identification of alternatives as ways to move the process.

the kind of environmental analysis required by NEPA has not been changed by the language of the reauthorized MSA, which specifically directs the agency to "revise and update agency procedures *for compliance with* [emphasis added] the National Environmental Policy Act."

Rather than integrate, or even adapt, the CEQ rules, the proposed process supplants them. It creates a number of new environmental documents such as the Integrated Fishery and Environmental Management Statement (IFEMS),[2] redefines what is an "environmental document," and omits the requirement of inclusion of reasonable alternatives in the definition of the IFEMS. (See discussion at 2, below.)

The purpose of the IFEMS is described in conflicting terms in the proposed rule. In the discussion at 50 C.F.R. §700.4(c) regarding "NMFS capability to comply," the proposed rule states that the agency will ensure that the IFEMS is adequate in accordance with section 102(2)(C) of NEPA. The rule language then reiterates the CEQ regulation at 40 C.F.R. §1507.2(c) but omits the phrase "capability to comment on statements in areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards." Because the CEQ regulations are the default for issues where the NMFS regulations are silent (73 Fed. Reg at 28009), the CEQ requirement would still be in place, but it is unclear why the rule would omit a portion of an otherwise complete reiteration of the CEQ text. Still other parts of the proposed rule state the IFEMS analysis determines whether NEPA has been complied with (50 C.F.R. §700.3 (d)(3) (73 Fed. Reg. at 28011)) and that it will "meet the policies and goals of NEPA." (50 C.F.R. §700.201 (73 Fed. Reg. at 28014)). Does the IFEMS replace the EIS? Does it "determine the necessary steps for NEPA compliance?" Is it NEPA compliance? Or does it meet NEPA's policies and goals?

The terminology is confusing, vague and conflicting. For example, at 50 C.F.R. §700.207(c)(6), the proposed rule states that the affected portion of an IFEMS will be "amended" to include an analysis of the effect of an as yet unanalyzed alternative if a fishery management council modifies its proposal and votes to recommend an alternative not previously analyzed. It is not clear whether the choice of the word "amended" is supposed to be distinguished from "supplemented," which triggers specific action. The standard term in the CEQ regulations is "supplement." See CEQ regulation at 40 C.F.R. §1502.9.

Another ambiguous issue is the confusion of roles between the fishery management councils and the agency. In the proposed rule the responsibility for environmental documents is vested in both, in contrast to the CEQ regulations, which require the lead agency to take responsibility for the process from scoping through final decision. The role of lead agency, and the improper delegation of authority to the councils, is discussed in more detail below.

The confusion raised by variations in terminology, definitions, partial reiteration of portions of the CEQ regulations and omission of other portions raise the question of whether the proposed new procedures meet the congressional directive to "revise and update agency procedures for compliance with the National Environmental Policy Act." Moreover, such ambiguities will

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[2] The rule defines "environmental documents" as an EA, FONSI, Draft Integrated Fishery and Environmental Management Statement (DIFEMS), final IFEMS, supplement to a final IFEMS, the Determination of a Categorical Exclusion, Framework Compliance Evaluation and Record of Decision. 50 C.F.R. §700.3 (c). In contrast, the CEQ regulations specifically do not include a ROD as an "environmental document" because it is actually the decision document, not an analytical document, and most of the time, a decision not based solely on environmental considerations. CEQ's regulation defining "environmental documents" is at 40 CFR §1508.10.

cause more litigation, not less, thus failing to address one of the motivating concerns of the reauthorization discussion. The CEQ regulations are a restatement of decades of practice and case law related to compliance with NEPA and environmental assessment. Why open the door to the uncertainty that arises with an entirely new set of procedures and documents? At best, the confusion sets the stage for litigation aimed at securing more precision; at worst, the new procedures are in violation of congressional direction and current law that preclude the agency from declaring its procedures to be the functional equivalent of NEPA.[3]

2. The proposed process is not consistent with NEPA or the CEQ regulations

According to the preamble to the proposed rule, "Ultimately NEPA is designed to ensure that federal agencies utilize a sound and public process in making decisions that affect the environment, and to ensure that agencies consider the environmental impacts of, and alternatives to, their proposed actions." (73 Fed. Reg. 27999) While it is true that part of the purpose of NEPA is a sound and public process and consideration of environmental impacts, this sentence downgrades what the CEQ regulations characterize as the "ultimate" purpose of NEPA; to wit: "Ultimately, of course, it is not better documents, but better decisions that count. NEPA's purpose is not to generate paperwork-even excellent paperwork-but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and *take actions that protect, restore, and enhance the environment*." (40 C.F.R. §1500.1(c)) (emphasis added).

A glaring omission from the definition of the IFEMS is the lack of a requirement for reasonable alternatives. (50 C.F.R. §700.3 (d)) Alternatives analysis is the most important part of the environmental impact analysis. See 40 C.F.R. §§1502.1, 1502.14. Failure to mention alternatives as a requirement of the document that appears to substitute for the EIS is inconsistent with NEPA and CEQ regulations. While there is a requirement to include reasonable alternatives in IFEMS later on in the proposed rule, its omission here is glaring given that it is both a statutory requirement and, under the CEQ regulations, the "heart of the EIS."

Contrary to the direction of the proposed rule, the agency needs to improve its development of the range of alternatives and in how alternatives are analyzed. Analysis should include comparisons on environmental (non-target species and ecosystem), biological (fish stock) and socio-economic grounds. Key elements of analysis include comparing each alternative to the others, making a reasoned assessment of the expected direction of change, considering all aspects of "net benefits to the nation."

What is needed is improved practice? The 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 decision maker, needs to be able to understand the comparisons and differences among choices, and what impacts are likely to follow what choices. Socio-economic, ecological, cultural and biological

[3] For a fuller discussion of the law surrounding functional equivalence and other legal inadequacies of the proposed rule, see comments of the Marine Fish Conservation Network.

information need to be integrated in the alternatives and consequences 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. None of this improvement emerges from the proposed rule.

The proposed rule anticipates that NMFS or the councils will develop alternatives and narrow the issues to be discussed in the document. 50 C.F.R. §700.108(b)(2)-(3). "Scoping meetings should adequately inform interested parties of the proposed action and alternatives." Timing and process. III.C.1 at 28006. This appears to occur prior to public scoping, a change from the existing process described at 40 C.F.R. §1501.7. This defeats the spirit of scoping and limits the scope of alternatives that might be considered.

Other inconsistencies between the proposed procedures and the CEQ regulations are improper delegations of tasks from lead federal agency to the councils, the addition of new required documents to CEQ process, proliferating paperwork and bureaucracy; omission of references to the circumstances that would disqualify a particular proposed action for a categorical exclusion, contrary to CEQ's regulation at 40 CF.R. 1508.4;[4] making a FONSI appropriate for an action that may have significant or unknown effects, as long as the significance and effects have been previously analyzed. The last provision demonstrates a lack of understanding of the CEQ rules on tiering at 40 C.F.R. §§ 1508.20, 1508.28 and 1508.13. Under the CEQ regulations, prior analysis enables the agency to incorporate by reference, analyze new information without restating the entire analysis, or build upon prior analysis; it does not warrant a FONSI under the CEQ regulations.

The proposed new procedures undermine the lead agency role described in the CEQ regulations in almost every instance. The language of the rule appears to assign equal authority to fishery management councils, which are not federal agencies, to conduct most aspects of environmental analysis. The councils are authorized to perform all the listed functions for council initiated actions, while NMFS performs environmental assessment for agency initiated actions, response to comments on the final IFEMS, and completion of the Record of Decision. This is a significant departure from the CEQ regulations, which reserve NEPA tasks to federal agencies. The table below illustrates the difference between the agency proposal and the CEQ rules.

Table 1. Comparison of proposal and requirements for lead agency role in CEQ Regulations.

Proposed rule authorizes FMCs (for actions proposed by FMC) to:	CEQ regulations require lead federal agency to:
Initiate scoping (§700.109(c)); take responsibility for scoping (§700.108(a))	Initiate scoping (40 C.F.R. §1501.7)
Take responsibility for draft document (§700.203)	Retain responsibility for statement (CEQ regulation does not distinguish between draft and final) (40 C.F.R. §1501.7(4))

[4] In a later provision at §700.702(c), the proposed rule states that NOAA and NMFS *may* develop guidance on how NMFS will determine whether extraordinary circumstances exist, but that direction is not included in this proposal.

Proposed rule authorizes FMCs (for actions proposed by FMC) to:	CEQ regulations require lead federal agency to:
Set time limits (§700.109(a))	Responsibility vested in federal agency (40 C.F.R. §1501.7)
Combine NEPA document with an FMC document (§700.111)	Confines integration of documents with other agency documents (40 C.F.R. §1506.4)
Review draft IFEMS, consider public comments, solicit public comment on supplemental IFEMS (§700.203)	Review draft, consider public comment, solicit public comment on supplemental EIS (40 C.F.R. §1503.4)
Respond to comments (§700.207)	Have sole responsibility for response to comments (40 C.F.R. §1503)
Prepare a supplement (§700.207(c))	Retain responsibility to prepare a supplement (40 C.F.R. §1502.9)
Serve as contact (§700.209(c))	Provide the contact information of a person at the agency (40 C.F.R. §1502.11)
Make draft IFEMS available to public (§700.301)	Exercise responsibility to make DEIS available to public (40 C.F.R. §1506.6(c)(2))
Obtain comments on the draft IFEMS (§700.302(a))	Receive all comments (40 C.F.R. §1503)
Select a contractor (§700.602(c))	Select a contractor "solely by the lead agency" or, in certain instances, a cooperating agency. 40 C.F.R. §1506.5(c)

Every one of these actions is reserved to the lead federal agency in the CEQ regulations. The only role left to NMFS for FMC initiated actions in the proposed rule is the responsibility for the final environmental document (§700.108(b)(4)). We do not understand how the agency can describe the proposed rules as a "customization of and a supplement to the CEQ NEPA implementing regulations" (FR 28009) when they are so thoroughly in conflict with those provisions.

The new framework procedures and categorical exclusions that allow experimental fishing permits and other actions that have potentially significant impacts to escape environmental analysis altogether also run counter to NEPA.

Although incorporation by reference and tiering are well-accepted streamlining procedures encouraged by the CEQ regulations (40 C.F.R. §1502.20, 40 C.F.R. §1502.21) nowhere do the rules or NOAA guidance provide for framework documents of the type proposed by the agency. (50 C.F.R. §700.104(a) – (c) 73 Fed. Reg. at 28012-13). The new documents eliminate any analysis of new information, provide for no opportunity of public review, and create confusion regarding what type action requires a certain analysis. The framework documents appear to

supplant the EA, which serves an important analytical function: either the analysis in the EA is sufficient, or an EIS is needed. Circumventing this important function with a brief memo declaring that prior analyses fill the bill misses the entire point of "assessment." Creation of these new documents not only creates confusion and duplication, their use as a mechanism to avoid the tested structure of NEPA documents (CE, EA, EIS) to analyze the possible impacts of a federal action may violate NEPA.

The proposed rule adds a new activity to the list of categorical exclusions (50 C.F.R. §700.702 (a)(3). The addition of experimental fishing permits to the list of Categorical Exclusions is problematic. NOAA guidance has provided for routine, administrative actions, minor technical corrections and grant programs through NAO 216-6 since 1999. Experimental fishing permits are not necessarily the type of activity anticipated by the CEQ regulations: "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency. . . Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." (40 C.F.R. §1508.4) Examples of past experimental fishing permits have included fishing in closed areas (scallop and groundfish), fishing on species for which no fishery or stock assessment or basic biological information was available (royal shrimp), use of pair trawls in areas where protected species occurred (Northeast groundfish). None of these examples could be assumed without analysis to have no individual or cumulative significant effect. Nor does the proposed rule provide for consideration of extraordinary circumstances as required by the CEQ regulations.

3. The proposed rule ignores advice, investment and improvements NMFS has made in NEPA compliance

Compliance with NEPA requirements and integration of the CEQ regulations in the fishery management process has improved since the 1990s and the so-called "litigation crisis" that was blamed on NEPA. Since 2001, the agency has received more than $11 million in special appropriations to beef up its NEPA staff, has generated several reports to Congress, conducted staff training in every region, hired NEPA coordinators and proposed ways to streamline the regulatory process. All this investment will be wasted and improved practices jettisoned if the proposed rule is adopted.

The requirement to prepare environmental analyses for regulations and planning documents has been standard procedure at NOAA for nearly 30 years, and the debate about integration of NEPA with the fishery management planning process and the deadlines and timetables of the MSA has continued for almost that long. In 1991, NMFS recognized that it needed policy guidance on the linkage between NEPA and MSA:

"In the past, NMFS did not have an official policy concerning the scope of the environmental analyses prepared under NEPA for Fishery Management Plans (FMPs), FMP amendments, and other fishery regulatory actions under the Magnuson Fishery Conservation and Management Act. In most cases, the Environmental Impact Statement (EIS) or Environmental Assessment (EA) evaluated only the impacts of the proposed management measures. Only occasionally have EISs or EAs also analyzed the broader impacts of the fishery on the human environment.... In particular I am concerned about fishery impacts on species that are protected under the ESA and the Marine Mammal Protection Act, as well as impacts on non-target fish species (bycatch or

other incidental fishing mortality) and fishery habitats." (Memorandum to Regional Directors from William W. Fox, Jr., Asst Admin, April 22, 1991)

Throughout the 1990s NMFS became increasingly active as a regulatory agency, and by 2000, an external review ranked NMFS as the 4th most prolific regulator in government, outstripped only by the Environmental Protection Agency (EPA), the Federal Aviation Administration (FAA) and the Federal Communications Commission (FCC) in terms of the number of Rules, Proposed Rules, and Notices published in the Federal Register[5] . That same review discovered that of 41 FMPs in place in 1999, only 16 had current (prepared after 1995) EISs. By 2002, the National Academy of Public Administration found that 30 of 42 FMPs had not had comprehensive environmental analyses completed within the previous five years.

Concomitant with its rulemaking activity, the agency was subject to an increasing number of lawsuits. By 2000, there were 90 open lawsuits against NMFS. Of these, 15 were filed before 1997, 10 were filed in 1997, 14 in 1998, 35 in 1999 and 16 through the first three months of calendar year 2000 (through April 1)[6]

In 1999, council chairs of all eight regions sent a memo to then Assistant Administrator Penny Dalton on timely review of actions. They suggested improvements and asked for revisions to the Operational Guidelines. Since 1999, internal and external assessments, consultations, workshops and strategy sessions have generated notebooks full of ideas and possible approaches NMFS could apply to improve its performance under NEPA and other mandates. The table below outlines some of the relevant reports and projects. Consistent themes from the reports were the confusion of roles and responsibilities between the agency and the councils, lack of resources in both sectors to comply with NEPA and other administrative requirements, and management shortcomings in communication, organization and coordination.

Table 2. Summary of Attempts to Integrate NEPA and MSA

Year	Report/Project Title	Description
1999	Letter from Council Exec Dirs	Requests assistance, guidance, and revision to OG to make decision documents more timely; less complex.
1999	Administrative Order 216-6	Revises procedures for implementing NEPA
2000	Kammer Report	Describes problems with NEPA compliance; makes recommendations for improvement
2000	Special Appropriation	Congress appropriates funding for NEPA litigation
2001	Congressional report language	Congress directs agency to improve regulatory process

[5] Kammer, Ray. An Independent Assessment of the Resource Requirements for the National Marine Fisheries Service. National Oceanic and Atmospheric Administration (NOAA) internal report. Executive Summary. June 2000.

[6] *Id.*

2001	Internal Assessment/Decision Process	NMFS and NOAA GC conduct internal assessment, workshops as response to directive; multiple action plans and options developed with DOC, NOAA, NMFS, and Councils. The results of this process were reported to Congress, but not publicly available.
2002	NAPA Report	"Courts, Congress and Constituencies." Outlines needed improvements for agency decision-making and compliance with requirements of NEPA and other laws.
2002	Senate Commerce Hearing	Subcommittee on Oceans, Atmosphere, and Fisheries oversight hearing on management issues in the National Marine Fisheries Service, particularly NEPA compliance
2002	Final Report on Regulatory Streamlining Project (RSP)	NMFS sends Congress final report on regulatory streamlining in response to the NAPA review.
2003	RSP Implementation	"Building additional NEPA expertise within the agency, along with front-loading the consideration of complex legal and policy issues earlier in the rulemaking process are key components of RSP." (Response to constituents)
2004	Briefing to RFMC Workshop	Presentation describes RSP to council workshop session
2005	Follow up to NAPA Report	Nat'l Academy of Public Admin reports on progress in improvements to regulatory and management issues
2005	House Resources Hearing	Subcommittee on Fisheries Conservation, Wildlife and Oceans, oversight hearing on the relationship between MSA and NEPA.
2005	Managing Our Nation's Fisheries	Session on "reconciling conflicting statutes" discusses problems with NEPA/MSA integration; report recommends amending MSA to make it "functionally equivalent" to NEPA
2005	Draft Revised Operational Guidelines	Details of "front loading" the process set out in Draft Ops Guidelines (never finalized)
2005	NEPA Handbook	NOAA publishes updated handbook for line agencies
2006	H.R. 5018	Bill introduced that would waive NEPA for FMP process
2006	MSA Reauthorization	Final legislation includes provision to revise NEPA compliance procedures

Revisions to the Operational Guidelines, promised to Congress in 2002, remain in a draft that was finished in 2005. Agency officials presented the Regulatory Streamlining Project (which would have been implemented formally with the Draft Revised Operational Guidelines) in many

forums as the solution to delays in decision-making and compliance with NEPA and other statutory obligations.[7]

In addition to the investments at NMFS, NOAA overall has a comprehensive NEPA handbook, NEPA compliance officers at departmental, NOAA and service levels, and significant training and investment in compliance. The other services within NOAA appear to be able to apply the CEQ regulations to resource management issues such as ocean and coastal management and designation of marine protected areas. How will these special rules for fishery management affect the process in the rest of NOAA? Even within NMFS, will federal actions related to protection of habitat or endangered species have a different process than fishery management? How will NOAA and NMFS deal with managing two processes in the same house? Will separate guidance, staff, training and supervision draw more scarce resources away from stewardship? At some point, decisions go up to the Department of Commerce level for approval. Will the Department have to promulgate duplicate review processes and standards to accommodate the outliers in the fisheries service?

4. The proposed process significantly limits public participation without eliminating sources of delay

Public comment and participation in the environmental assessment and fishery management planning process have always had time limitations. With one exception, the proposed new time limitations on the process are at the expense of public participation. Ironically, the proposed procedures make no changes in the open ended fishery management planning steps that cause delays. For example, there is no change in the time allowed for internal planning by either the agency or council. Neither NEPA nor the CEQ regulations specifies any timing for this activity. MSA requires planning action within a period following designation of an overfished stock, but does not specify timing for other actions until transmittal of the regulatory package by the council.

The CEQ regulations and NAO 216-6 call for a notice of intent that environmental documents are to be prepared "as soon as possible" after the agency begins planning an action. There is a 30-day period in which the public may comment on the notice of intent 40 C.F.R. §1508.22. This notice is absent from the proposed rule, which calls for drafting the IFEMS soon after developing fishery management measures and actions, but no notice is given until the FMC scoping/meeting agenda notice (700.203(a)), and the comment period is eliminated.

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7 The following description of RSP was provided in a report to constituents in 2003: "The Regulatory Streamlining Project (RSP) is a coordinated effort by NOAA Fisheries to institute innovations and reforms to improve the process for developing fishery management actions. The RSP, as presented to Congress, entails the following key components in various stages of implementation: revising the documented process for complying with all applicable law and integrating mandatory timelines (the Operational Guidelines); using the National Environmental Policy Act (NEPA) process to ensure timely and public input from all interested parties; establishing a national training program; delegating decision making authority to appropriate levels; and undertaking initiatives to use technology (such as e-rulemaking). The Regulatory Streamlining Program (RSP) is new development within NOAA Fisheries that promises to improve the fishery management process over the next several years. Building additional NEPA expertise within the agency, along with front-loading the consideration of complex legal and policy issues earlier in the rulemaking process, are key components of RSP. The program is designed to improve performance and efficiency. Electronic rulemaking initiatives, including a new database to track the progress of regulatory actions, and several pilot projects that will be accepting public comments on proposed rules via email, should also help to streamline the regulatory process and improve the connection to our constituents."

There is no time period specified for drafting of the IFEMS, though preparation is to commence "as close as possible to the time that NMFS or an FMC is developing fishery conservation and management measures and actions and considering alternatives." §700.203(a). This is comparable to existing procedure described at 40 C.F.R. §1501.7. The change from existing procedure is that the drafting would not be informed by suggested alternatives from the public.

In the proposed rule, publication of a notice of availability of the Draft IFEMS is to occur no later than publication of the FMC's meeting agenda notice, at least 45 days in advance of the meeting. §700.203(b). However, the notice period may be as little as 14 days before the meeting at which the council may take action. The CEQ regulation at 40 C.F.R. §1506.(c)(2) requires availability 15 days before a hearing.

The proposed rule provides authority to unilaterally limit comment periods. See §700.604(c)(1). If a supplemental IFEMS has been published and there is not time to receive comment, complete the final IFEMS and provide the cooling off period, the agency may reduce the cooling off period by 15 days. §700.604(c)(2)(ii) without CEQ-required approval by EPA; see 40 C.F.R. §1506.10(c).

If the council votes to recommend an alternative, or parts or combinations of alternatives that have been analyzed in the draft IFEMS, it prepares a final IFEMS in which it must address public comments and modifications of the recommended action. As noted above, this is in contrast to CEQ regulations which require the federal agency to respond to comments. This final IFEMS is submitted with the proposed action. 50 C.F.R. §700.203(b)(5). In addition to the lead agency problems identified in Section 2 above, this provision limits comments to issues raised during the initial comment period. This will eliminate the public's right to express their concerns regarding newly raised issues or problems and allows fishery management councils to adopt last-minute alternatives that can avoid public scrutiny.

This is not an unlikely scenario. Indeed, the proposed rule itself acknowledges that "the FMCs rarely have a preferred alternative fully fleshed out prior to their vote," and "an FMC may vote to recommend an action that is a modification of alternatives or combinations of alternatives." (C. Timing and Process, 5. Supplemental IFEMS, 73 Fed. Reg. 28007). At this point stakeholders have not had a chance to comment on the council's choice, and will not have a chance later because comments are precluded following the FMC meeting: "the commenting public would need to raise comments pertinent to the FMC's analysis, such as the scope of the analysis, the alternatives considered, and the expected environmental impacts, to the FMC prior to its vote. The proposed regulations state that NMFS is not obligated to respond to comments . . .raised for the first time during Secretarial review." (50 C.F.R. §700.305(d), C. Timing and Process, 3. Public Comment, 73 Fed. Reg. 28006). It is possible a council could modify an alternative to a degree that does not qualify for a supplemental IFEMS, thereby providing another opportunity for public comment,(§700.207(c)) yet substantially enough modified that stakeholders would not be able to comment on the scope of analysis or alternatives considered. Moreover, the question of what is "substantial" (50 C.F.R. §700.207(c) (i) or "significant" 50 C.F.R. §700.207(c)(ii) provides more litigation fodder on whether a council should have supplemented an IFEMS or whether the agency should respond to comments at the Secretarial review stage.

If the council modifies a proposed action and votes to recommend an alternative not within the range of alternatives analyzed in the draft IFEMS, the amended portions have to be analyzed and

a supplemental IFEMS prepared, noticed, and provided for public comment in the same manner as the draft IFEMS. 50 C.F.R. §700.207(c)(4), (6).

The proposed rule permits the agency unilaterally to reduce the comment period from 45 days to 14 days if NMFS finds reduction to be "in the public interest." (50 C.F.R. §700.604(b)) This is not consistent with the CEQ regulation at 40 C.F.R. §1506.10(c) and (d) which require the lead agency to make a showing to the EPA justifying the reduction or extension of time, and notification to CEQ by EPA if a reduction or extension is granted. The CEQ regulations do allow for four circumstances for reduction of time periods (supplemental EISs, 40 C.F.R. §1502.9(c); "compelling reasons of national policy"; "protecting public health and safety" in context of rulemaking, 40 C.F.R. §1506.10(b)(2); 40 C.F.R. §1506.10(d); and emergencies, 40 C.F.R. §1506.11. In the case of emergency rulemaking, the proposed rule enables the agency to waive the comment period. 50 C.F.R. §700.604(c)(2)(i). This measure adds another reduction of time period not provided for in CEQ regulation.

CEQ has cooperated with NOAA in the past to accommodate emergencies and reduced comment periods, so it is unclear why the agency proposes to arrogate this authority to itself.

MSA existing process calls for a 60-day comment period, CEQ regulations call for a minimum 30-day comment period. 40 C.F.R. §1506.10 The proposed process specifies the earliest time the agency can make a decision, but does not specify the length of the comment period. 50 C.F.R. §700.302(b); §700.604(c). But though the proposal cuts the time for public review and comment, the agency's window for consideration is flexible and time periods for final decision may be reduced or enlarged commensurate with the comment period. 50 C.F.R. §700.604(c)(3).

5. The proposed process does not foster consideration of the ecosystem impacts of fishery management proposals

In the proposed new procedures, the industry dominated councils control scoping, alternative development and analysis. In addition to the problems with delegating this authority to the councils, which are not federal agencies, it perpetuates the practice of putting fishing first at the expense of consideration of non-target species, protected resources, and the ecosystem.

The proposal provides for council action to be informed by the IFEMS and public comment, which is to be provided at the meeting at which the council votes, or in writing to the council. 50 C.F.R. §700.203(b)(2). Details on how the council will review environmental documents, take public comment on them, consider public comment and take an informed vote are yet to be developed. 50 C.F.R. §700.501.

By limiting comment to council meetings, the proposed rule constrains participation to a very narrow public—stakeholders in the fishery management process. 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.

This concern is exacerbated because the proposed rule provides no clear guidance on scoping, development of alternatives or other key elements of NEPA process and the CEQ regulations. Scoping in the existing process incorporated both CEQ and MSA scoping. NAO 216-6 and NMFS procedures provided an integrated means of applying both processes. The proposed rule moves away from the type of scoping called for in the CEQ regulations, and goes with an exclusively MSA-council based process. 50 C.F.R. §700.108. Any "public" meeting may include scoping. 50 C.F.R. §700.108(a(1). No time limit is set on this process in existing or proposed procedure.

This is troublesome for several reasons. First, the councils are political bodies composed of members appointed to represent particular points of view. While the views of council members differ, the majority view is generally focused on extractive use and fishery mandates of the MSA. The regional knowledge and practical experience of council members provide valuable input to fishery management decision-making and help to minimize unintended collateral and unnecessary impacts on the fishing industry. However, this does not allow for adequate consideration of the effects of fishery regulations on non-target species and the larger ecosystem and, sometimes, on the collective long-term interests of industry itself. Council representation and process are not structured to provide full and objective consideration of environmental and human impacts, being focused primarily on resource extraction and fishery mandates of MSA. 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. Fishing effects on corals, seamounts, turtles, birds, marine mammals and other protected resources historically have been raised by stakeholders who are not fishery resource users.

Second, even if the councils were structured to support a full and objective consideration of environmental and human factors, they have not the training, expertise or resources needed to develop such analyses. NMFS staff is involved in preparing these analyses through attendance at council meetings, and membership on plan development teams and on scientific and statistical and other advisory committees. However, the extent to which they are involved varies from region to region.

Another problem with delegating the development of important analyses to the councils is that the councils are not accountable for the analyses they create. NMFS, not the councils, is ultimately responsible for complying with legal mandates. NMFS, not the councils, will be sued for compliance failures.

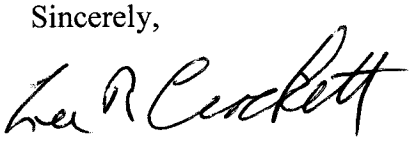
Conclusion

The proposed revised procedures abandon decades of case law, regulations, guidance, experience and practice. They substitute a confusing and untested process for one that has worked to protect the oceans. The proposal puts at risk a considerable investments of money, advice, time and training that have improved NEPA compliance since 2000. It will likely engender litigation over terminology, standards, definitions and delegation of authority. It will lie askew from department-wide practice and guidance that govern every other agency under the Department of Commerce. It will not improve decision-making, nor will it streamline the timing of fishery management planning, except to the degree that it cuts the public out of the management of public resources.

It appears that NMFS has ignored all the performance problems in its own house, and focused instead on rewriting CEQ's time-tested and court recognized rules. The Draft Operational Guidelines the agency produced as part of its regulatory streamlining project are a good start on integrating NEPA and MSA procedures. The March 2007 policy directive also provides steps in the right direction.[8] Efficiency would be improved considerably if the agency implemented its own current guidance, or *any* consistent guidance and focused on improving compliance on the part of its own NEPA practitioners.

In conclusion, we urge the agency to withdraw the procedures described in the proposed rule because they do not meet the intent of Congress in the MSA reauthorization, they are not consistent with the NEPA and the CEQ regulations and they miss the point of a revision and update to procedures by creating more burdensome documentation and making the agency even more vulnerable to litigation.

Sincerely,



Lee R. Crockett
Director
Federal Fisheries Policy

[8] NMFS Policy Directive 30-131, Administration and Management, Delegation of Authorities for Completing NEPA Documents. March 5, 2007.