UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
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THE DIRECTOR

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Memorandum

To: NMFS Regional Administrators and Council Coordination Committee

From: Samuel D. Rauch III, Deputy Assistant Administrator for Regulatory Programs, performing the functions and duties of the Assistant Administrator for Fisheries

Subject: National Environmental Policy Act Compliance for Council-initiated Fishery Management Actions under the Magnuson-Stevens Act

Date: February 19, 2013

I. Overview

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) establishes the basis for Federal management of United States fisheries and vests primary management responsibility with the Secretary of Commerce. The Secretary has delegated this responsibility to the National Marine Fisheries Service (NMFS) within the National Oceanic and Atmospheric Administration (NOAA). The MSA establishes eight regional fishery management councils (FMCs) and gives them special responsibilities for recommending management plans and regulations. Management plans and regulations must comply with all applicable law including the National Environmental Policy Act (NEPA). NOAA provides general guidance on agency compliance with NEPA in the NOAA Administrative Order (NAO) 216 – 6. (http://www.nepa.noaa.gov/NAO216_6.pdf)

In addition, NMFS provides detailed guidance on compliance with all applicable laws, including NEPA, in the context of MSA fishery management actions in Policy Directive 01-101-03, "Revised Operational Guidelines," May 1997. (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-03.pdf)

Section 304(i) of the Magnuson-Stevens Fishery Conservation and Management Act called on the Secretary to revise and update agency procedures for compliance with NEPA in context of fishery management actions developed pursuant to the MSA. On behalf of the Secretary, NMFS engaged in a lengthy and transparent public process including coordination with the Council on Environmental Quality (CEQ) and the Regional Fishery Management Councils to develop the scope of issues and concerns to be addressed by the procedures. During NMFS's work on this issue, the NOAA Office of Program Planning and Integration (PPI) began a process of revising and updating NAO 216-6. NMFS believes it is appropriate to incorporate the MSA-specific NEPA

procedures into the revised NAO and is working with PPI to ensure this happens. However, there is also a need to provide for national consistency on certain key issues during the interim.

Currently, NAO 216-6 provides agency-wide guidance on complying with NEPA and CEQ requirements pertaining to documentation; and the Policy Directive 01-101-03, "Revised Operational Guidelines," May 1997, provides guidance on timing and procedures for the FMC process. (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-03.pdf) This Interim Policy Directive supplements the NAO and Operational Guidelines by providing additional guidance on certain issues not addressed elsewhere and completes the procedures required by the MSA, Section 304(i).

With respect to compliance with NEPA during the development of fishery management actions pursuant to the MSA, this Interim Policy Directive:

- Clarifies Roles and Responsibilities
- Provides Guidance on timing of NEPA compliance, and establishes a procedural nexus to the MSA fishery management process
- Provides Guidance on certain issues pertaining to NEPA documentation, including the statement of purpose and need, identifying alternatives, and content of the Record of Decision (ROD)
- Provides guidance on techniques for improving partnerships and efficiencies
- Revises and Updates agency procedures as required by Section 304(i) of the MSA

II. Applicability

In compliance with MSA section 304(i), this policy directive has been developed specifically to address the unique timing and procedural requirements of the MSA. However, we recognize that NMFS and the FMCs may utilize FMC processes to develop and/or implement other fishery management measures, such as regulations promulgated pursuant to the Pacific Halibut Act, the WCPFC Implementation Act, or other such laws. To the extent that NEPA applies to these activities, the roles of NMFS and the FMCs with respect to NEPA are the same as described in this document, and early coordination and cooperation are likewise encouraged.

III. Roles and Responsibilities (fostering partnerships/retaining responsibility)

NMFS and the FMCs have different and important roles with respect to National Environmental Policy Act (NEPA) and MSA implementation. While the MSA and NEPA requirements for schedule, format, and public participation may be compatible and may be conducted jointly as long as all responsibilities are fulfilled, in some cases, it may

be necessary to separate the two statutes' procedures and documentation in order to ensure compliance with all requirements.

The chief purpose of NEPA is to declare a national environmental policy, which directs Federal agencies to use all practicable means to maintain conditions in which man and nature can live in productive harmony (i.e., fulfilling the social, economic, and other requirements of present and future generations of Americans). NEPA provides policy goals and creates a mandate for the Federal government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources in order to:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

In addition to these environmental policy goals, NEPA includes specific analytical and procedural requirements that interact with NMFS's decision-making process under the MSA. NEPA includes basic requirements for federal agencies to consider the effects of their actions on the environment, to consider alternatives during the decision-making process, and to provide opportunities for public involvement. This Policy Directive links NEPA's mandates on NMFS, as the Federal action agency, to the activities of the FMCs, in their role as advisory bodies. It does not preclude an FMC's development of NEPA documents as is the practice in some regions. However, it does clarify where ultimate legal responsibility for NEPA lies – and that is with NMFS. While NEPA does not specify at what point in the FMC process a NEPA document must be available, it is good practice to have as complete a NEPA document as possible available during FMC deliberations.

A. Special Issues Relevant to FMC-initiated Fishery Management Actions

For MSA fishery management actions, the scope of NMFS's authority to modify FMC-recommended fishery management plans and plan amendments is narrow: NMFS may approve, disapprove, or partially approve a proposed FMP or FMP amendment

recommended by the FMC, and the sole basis for disapproval of any such recommendation is that it is not consistent with applicable law, including NEPA, the MSA and its national standards. Applying NEPA solely to NMFS's limited discretion during the review period does not foster the type of informed consideration of the effects of the action in light of reasonable alternatives that NEPA envisions.

Because policy recommendations are developed and alternatives may be created and narrowed through the public forum of FMC meetings, the purposes of NEPA are best served by integrating the NEPA analysis of alternatives and impacts with the FMCs' development of recommended management measures and actions when possible. It is also important to bear in mind the ongoing and iterative nature of fishery management under the MSA. While NMFS reviews each FMC recommendation on an individual basis, these recommendations are typically pieces of a more complex management regime taking place in an ongoing management continuum that must address continually evolving information and needs. While the information contained within a NEPA analysis must inform NMFS's decisions on each individual management recommendation, it may also inform NMFS in its ongoing oversight and management role that allows NMFS to take action when there is a conservation and management need and the FMC fails to act. (MSA 304(c)(1)).

B. Roles and Responsibilities

1. NMFS-initiated Actions

For MSA actions prepared by NMFS, such as management of highly migratory species and Secretarial actions pursuant to MSA section 304(c) or 305(c), NMFS is responsible for compliance with both NEPA and the MSA. NMFS will, to the extent practicable, conduct NEPA concurrently with the development of fishery management actions.

2. FMC-initiated actions

For FMC-initiated fishery management actions developed pursuant to the MSA, NMFS and the FMCs have different and important roles with respect to NEPA and the MSA as described below.

a. MSA Role of the FMCs

As set forth in sections 302(h), 303, and 304 of the MSA (see also the policy directives entitled "Procedures for Initiating Secretarial Review of FMPs and Amendments (3/01/91) (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-01.pdf) and "Revised Operational Guidelines," May 1997, (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-03.pdf), FMCs are responsible for:

- Conducting public hearings to allow for public input into the development of FMPs and amendments,
- Reviewing pertinent information,
- Preparing fishery management plans and amendments for fisheries requiring conservation and management
- Drafting or deeming regulations to implement the plans or amendments
- Developing ACLs,
- Identifying research priorities, and
- Transmitting complete packages containing documentation necessary for NMFS to initiate a review of compliance with all applicable laws including NEPA.

b. MSA Role of NMFS

As set forth in section 304(a) of the MSA, the role of NMFS with respect to fishery management plans and plan amendments developed by the FMCs is to review – and approve, disapprove, or partially approve – those plans and amendments in accordance with specified procedures, including:

- Immediately upon transmittal of the FMP or FMP amendment publish a plan or amendment in the Federal Register for a 60-day comment period.
- Approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period on the plan or amendment. Disapproval must be based on inconsistency with the MSA or other applicable law. In addition, disapprovals must provide guidance on what was inconsistent and how to remedy the situation, if possible (see MSA section 304(a)(3)(A)-(C)).

In addition, as set forth in section 304(b) the role of NMFS with respect to FMC-recommended draft regulations is to:

- Immediately upon transmittal of the proposed regulations initiate an evaluation of whether they are consistent with the fishery management plan, plan amendment, the MSA, and other applicable law.
- Within 15 days make a determination of consistency, and—
  - if that determination is affirmative, publish the regulations for a public comment period of 15 to 60 days; or,
  - if that determination is negative, notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent.
- Consult with the Council before making any revisions to the proposed regulations,
- Promulgate final regulations within 30 days after the end of the comment period and publish in the Federal Register an explanation of any differences between the proposed and final regulations.

The MSA, at section 304(c), also authorizes NMFS to prepare a fishery management plan or amendment if:

> (a) the appropriate FMC fails to develop and submit to NMFS, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;
> (b) NMFS disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the FMC involved fails to submit a revised or further revised plan or amendment; or
> (c) NMFS is given authority to prepare such plan or amendment under the MSA.

NMFS may also develop regulations to implement Secretarial plans and amendments. (MSA section 304(c)(6), (7)).

c. NEPA Roles for NMFS and FMC

NEPA requires Federal agencies to create an environmental impact statement (EIS) when proposing major federal actions significantly affecting the quality of the human environment. An EIS must comply with Section 102(2)(c) of the NEPA statute (P.L. 91-190, 42 U.S.C. 4321-4347) and the CEQ's regulations (40 CFR Parts 1500 – 1508) for implementing the procedural provisions of NEPA.[1] Fishery management actions, such as approval of fishery management plans and amendments, are typically considered "major Federal actions" requiring some level of NEPA review. NMFS is the Federal action agency for fishery management actions. Because of the close relationship between NMFS's actions and the FMC's recommendations, compliance with NEPA will be most effective if NMFS and the FMCs coordinate their NEPA and MSA activities closely. This directive recognizes that FMC staff are often responsible for drafting NEPA documents; however, it is NMFS's responsibility to ensure the resulting documents fully comply with NEPA. In this context the NEPA analyses inform two aspects of NMFS's fishery management decision making activities: they inform NMFS's review of fishery management actions developed through the FMC process and NMFS's decision as to whether to approve, partially approve, or disapprove a fishery management recommendation; and they inform NMFS's ongoing oversight responsibilities with respect to whether a Secretarial action is necessary pursuant to section 304(c) of the MSA.

NMFS's duties with respect to NEPA compliance include:

- Determining whether NEPA applies
- Determining which level of NEPA analysis is appropriate, i.e., an Environmental Impact Statement (EIS), Environmental Assessment (EA) or a Categorical Exclusion (CE); and/or whether an existing NEPA analysis adequately supports the action.

[1] Additional information about NEPA may be found at CEQ's website: http://ceq.hss.doe.gov/ .

- If an EIS will be prepared, NMFS is responsible for ensuring that the following tasks are completed, bearing in mind that cooperation and utilization of existing MSA processes and venues is encouraged:
    - Ensuring that NEPA scoping is conducted (including publication of the Notice of Intent and solicitation and consideration of scoping comments)
    - Ensuring that a draft EIS (DEIS) adequate for filing with EPA is prepared
    - Ensuring that opportunity for public comment on the DEIS is provided
    - Ensuring that a final EIS (FEIS) adequate for filing with EPA is prepared
    - Providing for a 30 day cooling off period prior to making or recording a decision. (approve, disapprove, or partially approve a fishery management action and/or whether to initiate Secretarial action under MSA section 304(c))
    - Preparing a Record of Decision (ROD).
- If an Environmental Assessment (EA) will be prepared, ensuring the EA is sufficient, determining whether to issue a Finding of No Significant Impact (FONSI), and ensuring that the FONSI is made available to the public.[2]
- If a Categorical Exclusion (CE) applies, documenting the applicability of the CE.[3]

C. Fostering Partnership and Cooperation while Retaining Oversight and Legal Responsibility

The MSA and NEPA requirements for schedule, format, and public participation are compatible and may be conducted jointly as long as all responsibilities are fulfilled. For example, if an FMC meeting will be used to satisfy any requirement of NEPA for a public meeting, then NMFS must ensure that the procedures required by NEPA are satisfied (such as public notice requirements in 40 CFR 1506.6). In some cases, it may be necessary to separate MSA and NEPA procedures and documentation in order to ensure compliance with all requirements.

Recognizing that each Region/FMC pair frequently works as a team to achieve the fishery management mission with available resources, this policy is designed to foster continued cooperation and joint prioritization between NMFS and the FMCs. This policy emphasizes the development of timely, useful analyses, building on the approaches set forth in 42 USC 4332(2)(d)) (pertaining to documents prepared by States), 40 CFR 1501.2 (agencies to integrate the NEPA process with other planning at the earliest possible time and coordinate early with private or non-Federal entities) and 40 CFR 1506.5 (pertaining to preparation of documents by applicants and contractors). While

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[2] NOAA provides guidance on the preparation of EAs in NAO 216-6, section 5.03. That guidance is attached in Appendix B of this Policy Directive.

[3] NOAA provides guidance on the use of CE's in NAO 216-6, section 6.03.d.4. That guidance is attached in Appendix C of this Policy Directive.

recognizing that FMCs are not Federal action agencies for the purposes of NEPA, this policy also acknowledges that the FMCs are indispensable elements in the MSA statutory scheme and as such, are an integral part of the Department of Commerce team. Given the unique relationship between NMFS and the FMC, either NMFS or FMC staff may draft the NEPA document as long as NMFS participates early, provides information or advice as needed, conducts appropriate outreach with other agencies and constituents, and independently evaluates each NEPA document's adequacy prior to using it in some fashion to satisfy its NEPA responsibilities.

The guidance encourages NMFS and the FMCs to prepare and make available as much NEPA documentation as possible (given timelines and resource needs) during the FMC's development of its management recommendation. This includes providing opportunities for public participation as early in the process as possible while accommodating fishery resource management needs.

However, NMFS remains responsible for the scope, objectivity, and content of the NEPA documents and for ensuring overall compliance with NEPA.

IV. Timing

This Directive encourages conducting as much of the NEPA process as practicable at the FMC level so that the FMCs and the public are informed during the development of a management recommendation of potential environmental impacts and alternatives. This means that NMFS and the FMCs should engage the public as early as practicable in the development of EAs and EISs and, when practicable, actively involve the public in scoping and identifying alternatives for both EAs and EISs. However, the directive also recognizes that there will be variations regarding the extent to which this can happen, and establishes minimum requirements and a procedural nexus to the MSA process.

A. Factors to Consider

In light of the minimum timelines set forth in the CEQ regulations, the statutory timelines of the MSA, the practical issues surrounding scheduling of FMC meetings, and the logistics of completing the necessary steps to develop a fishery management recommendation, NMFS recognizes that there will be variations in the extent to which NEPA procedures can be completed in advance of an FMC's vote on a management recommendation. This directive promotes completing as much of the NEPA process as possible in advance of the FMC's vote so that the FMC can benefit from that process in consideration of the following factors:

- the urgency of the management need,
- the need for the FMC recommendation to move forward through Secretarial review to an ultimate decision in order to respond to real-time fishery management needs,
- the timing of the availability of fishery statistics,

- the timing of the opening of the fishing season,
- judicially-imposed deadlines, and
- the schedule of FMC meetings.

The typical FMC process for development of a management recommendation usually involves an iterative process with the public in which one or more early versions of a draft fishery management measure and environmental analysis (i.e., draft EIS or draft EA) are shared, commented on, and modified over the course of several FMC meetings prior to a final FMC vote. However, for a small subset of fishery management recommendations, various factors (such as the timing of the availability of fishery statistics, the timing of the opening of the fishing season, judicially-imposed deadlines, and the schedule of FMC meetings) can interact to constrain the available time between identification of a management need and the date when a management measure needs to be effective. In some circumstances, an FMC may need to complete development and selection of a recommendation in as few as two FMC-meetings. The intent of this directive is to infuse NEPA into the iterative and deliberative processes of the FMCs as much as possible while allowing enough flexibility so that the fishery management system can respond effectively in time-constrained situations and still comply with NEPA.

B. Procedural Nexus

In order to initiate Secretarial Review of an FMC-recommended fishery management measure, an FMC must provide complete documentation of compliance with the MSA and other applicable law. In terms of NEPA, this means that, for actions requiring an EIS, at a minimum a notice of availability of the Final EIS must be published 30 days before NMFS's decision on the fishery management action. This directive promotes completing as much of the NEPA process as possible during the FMC's development of a fishery management action. To the extent that the NEPA process and documents can be completed early in the FMC process, FMC-recommended fishery management actions will benefit from better information, more robust consideration of alternatives, improved decisionmaking, more timely implementation and review, a higher likelihood of approval, and decreased risk of litigation.

To the extent that the NEPA process and documents are completed later, likelihood of logistical challenges increase and with them the potential for disapproval. For example, while it is technically possible to allow FMC transmittal to occur at the point at which a complete DEIS adequate for filing with the EPA is submitted, this scenario would place serious burdens on staff to complete all requisite steps in time for an approval decision, bearing in mind the statutory and regulatory time requirements of NEPA and the MSA. The MSA requires NMFS to make a decision on FMC-recommended fishery management plans and amendments within 95 days of transmittal of that plan or amendment.[4] NEPA requires a 45 day comment period on a DEIS, followed by

[4] NMFS's guidance on determining the date of transmittal is posted at http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-01.pdf

preparation of an FEIS that responds to comments received on the DEIS, followed by a 30 day cooling off period prior to making a final decision. These minimum times begin on the dates on which EPA publishes notices of availability of the NEPA documents in the Federal Register. EPA publishes these notices on the Fridays of the week following receipt of the documents. Thus, it would be challenging to produce a well-written FEIS within the necessary time period to allow NMFS to determine the recommendation complies with NEPA by day 95 (i.e., MSA "decision day").

In determining what amount of NEPA process must be completed prior to transmission, NMFS and the relevant FMC will consider these factors and strive to complete as much of the NEPA process as possible during the FMC's development stage.

V. Guidance on Documentation

A. Identification of the Purpose and Need

The identification of purpose and need for the NEPA analysis should be linked and consistent with the fishery management need an FMC is addressing. Pursuant to the MSA, NMFS and the FMCs continually review incoming information and monitor the status of the fisheries to identify the need for conservation and management.

For NEPA compliance, NMFS, in coordination with the relevant FMC if applicable, will clearly identify the purpose and need for the action. For FMC-initiated actions as well as for NMFS-initiated actions, the purpose and need articulated for the NEPA process should be the same as the need for conservation and management identified pursuant to the MSA. If the FMC identifies its conservation and management needs in broad terms, NMFS should work with the FMC to refine a problem statement for the MSA activities sufficiently to derive a consistent NEPA statement of purpose and need.

The description of the purpose and need should be comprehensive enough to inform the development of the proposed action and the alternatives that will be analyzed during the NEPA process and include information and specifics for meeting other environmental requirements as applicable. With the exception of the no action alternative, an alternative will be considered reasonable, and thus suitable for full consideration, only if it meets the purpose and need for action.

B. Alternatives

NEPA requires the consideration of alternatives to a proposed action. CEQ's regulations specify that for an EIS, all of the reasonable alternatives that meet the purpose and need must be identified, as well as the no-action alternative. 40 CFR 1502.14. NMFS will apply this standard consistent with relevant case law which provides for a rule of reason.

1. "Reasonable"

For fishery management actions, "reasonable alternatives" are those derived from the statement of purpose and need of the action, in context of the MSA's National Standards and requirements of other applicable laws, and which satisfy, in whole or substantial part, the objectives of the proposed federal action. Alternatives that are impractical or would not achieve stated purposes and needs are not "reasonable alternatives."

There is no set number of alternatives that is considered reasonable. This is a determination based on the facts of each scenario, and the statement of purpose and need. However, in cases where there would be only two alternatives, the proposed action and the "no action" alternative, if the "no action" alternative would be inconsistent with applicable requirements, it is recommended that an additional alternative or alternatives be considered.

2. "No Action"

Every EIS and EA must include an analysis of the "no action" alternative. Consistent with CEQ's discussion of the "no action" alternative in the 40 Most-Asked Questions, there are two distinct interpretations of "no action" that may be utilized, depending on the nature of the proposal being evaluated. If the "no action" alternative will literally result in the sunsetting of a management measure, it may be reasonable to consider the "no action" alternative to be the fishery absent the management measure that would sunset. If, on the other hand, the underlying management will not sunset, it is reasonable to use a continuation of the status quo, or baseline, as the "no action" rather than the hypothetical scenario of no federal management. This determination depends on the circumstances. The key is to provide a meaningful analysis of anticipated results of the proposed action relative to the status-quo fishery management regime.

Finally, in circumstances where there is significant uncertainty or controversy as to what the appropriate "no action" alternative is, the NEPA document should explain why the agency chose the "no action" alternative it did, state that it had considered a different "no action" alternative, and ask the public to comment on the issue of the appropriate "no action" alternative. It might also be prudent to analyze the other approach as an additional alternative in the NEPA document.

3. "Consolidated" or "Integrated" Analyses

FMPs and FMP Amendments may be combined with the EIS or EA into one document called a "consolidated" or "integrated" document. This may be a reasonable approach to promote short, clear, analytical EISs that also satisfy the requirements of our other multiple legal mandates. While it is important to reduce duplication and paperwork, it is equally important for consolidated documents to meet the objectives of being concise, clear, and to the point. If the resulting "consolidated" or "integrated" document does not meet these objectives, then it could be counterproductive to fostering informed action.

NMFS has the responsibility to ensure the NEPA analysis is reasonable, identifiable, and sufficient at both the draft and final stages of development. In situations where "consolidated" or "integrated" documents are developed, it is important that the FMCs and NMFS work in close cooperation to ensure the NEPA component is adequate before the FMC transmits the document for Secretarial review bearing in mind the dual purposes of informing approval of the Council recommendation and informing future actions in the management continuum. NMFS must ensure the adequacy of the NEPA analysis when the documents are consolidated

4. Contents of the ROD

For FMC-initiated fishery management actions, NMFS's decision is whether to approve, partially approve, or disapprove an FMC-recommended measure. If appropriate, the ROD may include a determination as to whether there is a need for additional conservation and management in the fishery. In light of NMFS's oversight responsibilities and its ability to develop Secretarial actions where necessary, each EIS provides important information pertinent to determining whether such a need exists. Thus a ROD may serve the dual purposes of documenting a decision on a specific FMC recommendation as well as providing useful information to assist NMFS in its management and oversight roles consistent with MSA section 304. CEQ's requirements for contents of the ROD are set forth at 40 CFR 1505.2.

VI. Improvements and Efficiencies

This section describes a non-exclusive, non-mandatory, set of approaches that may be used to increase efficiency and utility of the NEPA process.

A. NEPA Advanced Planning Procedure (NAPP)

CEQ's guidance on NEPA promotes the use of tiering as described in 40 CFR 1502.20. This section describes a model process for utilizing tiering in a fishery management context. The model is based on the concept of tiering and using advanced planning to promote greater efficiencies in conducting NEPA analyses. Its use is optional, and it does not represent the only approach to tiering or NEPA efficiencies.

<u>NEPA Advanced Planning Procedure</u>. Under this approach, an FMP or an EIS could establish a NEPA Advanced Planning Procedure (NAPP), which would be a mechanism for allowing actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis. Such a procedure would:

- allow for an evaluation of whether a fishery management action taken pursuant to a NEPA Advanced Planning Procedure falls within the scope of a prior environmental document; and

- specify criteria that would trigger a requirement to supplement the prior analysis or would require development of a new EIS or EA for the fishery management action taken pursuant to a NEPA Advanced Planning Procedure.

The NAPP could also specify criteria that would permit certain management actions under revision or review to continue during supplementation or revision of the prior NEPA document, and, if so, establish criteria for determining when this is appropriate.

A fishery management action taken pursuant to an NAPP would not require additional action-specific analysis if NMFS determines that the management measures in the action and their environmental effects fall within the scope of a prior analysis. This determination would be documented in a "NEPA Compliance Evaluation" document.

NEPA Compliance Evaluation (NCE). An NCE is documentation to determine whether an existing NEPA document remains adequate to support a fishery management action undertaken pursuant to a NEPA Advanced Planning Procedure. The NCE would culminate in either a determination that the existing NEPA analysis must be supplemented or preparation of a Memorandum of NEPA Compliance for the file.

A NEPA Compliance Evaluation (NCE) must:

- Identify the prior EIS or EA that analyzed the impacts of the fishery management action proposed to be taken pursuant to the NEPA Advanced Planning Procedure;

- Identify new information, if any, relevant to the impacts of the fishery management action proposed to be taken pursuant to a NEPA Advanced Planning Procedure; and

- Evaluate whether the fishery management action proposed to be taken pursuant to a NEPA Advanced Planning Procedure falls within the scope of the prior NEPA analyses and whether new information, if any, requires supplementation.

If the NEPA Compliance Evaluation results in a determination that supplementation is not required, a Memorandum of NEPA Compliance (MNC) must be prepared for the file and both documents should be made a part of the administrative record. If the NEPA Compliance Evaluation results in a determination that NEPA supplementation is required, appropriate supplemental analyses must be conducted and both documents should be made a part of the administrative record.

Memorandum of NEPA Compliance (MNC). A Memorandum of NEPA Compliance is a concise (ordinarily 2 pages) document that briefly summarizes the fishery management action taken pursuant to a NEPA Advanced Planning Procedure, identifies the prior analyses that addressed the impacts of the action, and incorporates any other relevant discussion or analysis for the record.

B. Supplemental Information Report (SIR).

In the event that an NAPP is not in use, on a case-by-case basis, an SIR may be used to document why further NEPA analysis is not necessary. The SIR is a concise document that contains the rationale for determining if new information, changed circumstances, or changes to the action are not significant and thus why an SEIS is not required. There is no standard format for the SIR, but generally the SIR will have the following parts, or their equivalent:

- Title page with date
- Introduction
- Purpose
- Background
- Scope of SIR
- Evaluation of new information
- Conclusions/Decision
- Approval authority signature block and date

C. Incorporation by Reference.

NMFS and the FMCs should incorporate material into an EIS or EA by reference when the effect will be to reduce the length or complexity of the EIS or EA without impeding agency and public review of the action. The incorporated material must be cited in the EIS or EA, its content briefly described, and instructions on how the public can access the incorporated material must be provided in the EIS or EA (e.g., via a website link). Material that is incorporated by reference must be maintained in locations and in a format that is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data that is itself not available for review and comment may not be incorporated by reference.

D. Improving Partnerships with FMCs

NMFS Regions are encouraged to work cooperatively with their FMC partners to identify additional opportunities for coordination and cooperation. Strategies that may be beneficial include: using new technologies; real-time sharing of documents; and "frontloading."

1. Using Technology and Document Sharing

Sharing documents throughout the fishery management process facilitates frontloading. This Directive encourages the sharing of documents between relevant NMFS and FMC staff, with time for review and comment, before circulating for public review and again before FMC final action. Documents should be shared using the best available technology to facilitate real-time review and maintain version control.

Wiki tools and software can be used to enable multiple authors to simultaneously work on documents and have shared file space.

2. Frontloading

Frontloading means working together early in the process to identify alternatives and issues and conduct analyses so that that information is available at each stage of decision-making. Frontloading helps prevent important information from only coming to light during Secretarial review.

Effective frontloading involves coordination and communication between NMFS and the FMC early in the process to ensure that all relevant issues are addressed in the document. Key tools for frontloading include:

- Strategic planning early in the development of documents to identify the purpose and need, the scope of the analysis, the range of alternatives, the information needed, and the plan to accomplish the analysis.
- Identifying an FMC's Preliminary Preferred Alternative for its MSA recommendation prior to its final vote, particularly on larger actions, to facilitate focused review of potential impacts.
- Providing adequate time for internal review of the document before it is released to the public, and effectively responding to relevant internal comments in the document.
- Convening an interdisciplinary team early in the process.

NMFS Regional Offices and each regional FMC should consider developing processes to achieve frontloading and clarify overall roles and responsibilities in general and on a project-specific basis.

VII. Relationship to Other Guidance Materials

A. 1997 Operational Guidelines

Efforts are underway to prepare new Operational Guidelines consistent with this directive. To the extent that this directive is consistent with the Operational Guidelines of 1997, those guidelines remain in effect. However, where inconsistencies exist, this Policy Directive controls.

B. Council on Environmental Quality (CEQ) Regulations and Department and NOAA Administrative Orders

This Policy Directive does not affect the applicability of the CEQ regulations, 40 CFR Parts 1500-1508, DAO 216-6, or NAO 216-6, now or as amended, to any activity undertaken by NOAA Fisheries. Consistent with Section 304(i) of the Magnuson

Stevens Act, this directive establishes NOAA NEPA policy and procedures specific to fishery management actions undertaken pursuant to MSA.

Appendix A: Scoping

NAO 216-6, section 5.02 states:

Scoping and Public Involvement.

a. Purpose. The purpose of scoping is to identify the concerns of the affected public and Federal agencies, states, and Indian tribes, involve the public early in the decisionmaking process, facilitate an efficient EA/EIS preparation process, define the issues and alternatives that will be examined in detail, and save time by ensuring that draft documents adequately address relevant issues. The scoping process reduces paperwork and delay by ensuring that important issues are addressed early.

b. Public Involvement. Public involvement is essential to implementing NEPA. Public involvement helps the agency understand the concerns of the public regarding the proposed action and its environmental impacts, identify controversies, and obtain the necessary information for conducting the environmental analysis. RPMs must make every effort to encourage the participation of affected Federal, state, and local agencies, affected Indian tribes, and other interested persons throughout the development of a proposed action and to ensure that public concerns are adequately considered in NOAA's environmental analyses of a proposed action and in its decisionmaking process regarding that action.

1. Public involvement may be solicited through: public hearings or public meetings, as appropriate; solicitation of comments on draft and final NEPA and other relevant documents; and regular contacts, as appropriate. The RPM should encourage the RFMCs to include the NEPA document with the RFMC's public hearing documents to solicit early public review and involvement. The RPM must provide public notice of NEPA-related hearings, public meetings, and the availability of NEPA documents so as to inform interested or affected parties (40 CFR 1506.6). Interested parties may obtain information and status reports on EAs, EISs, and other elements of the environmental analysis process from the RPM or the NEPA Coordinator. Public involvement is encouraged in the review of EAs, which may not otherwise get adequate public input. To the extent possible, EAs should be published or made available in conjunction with proposed rules and plans subject to public review and comment.

2. RPMs will be guided by 40 CFR 1506.6 in providing adequate public involvement in the environmental review process. In particular, RPMs should use state "single points of contact" designated under E.O. 12372. A current list of these contacts may be obtained from the NEPA Coordinator.

c. Scoping Process. Scoping is usually conducted shortly after a decision is made to prepare an EIS. However, scoping is also encouraged during the EA process when the need for an EIS is undetermined. As part of the requirements of the scoping process, the actions described in 40 CFR 1501.7(a), must be fulfilled when appropriate.

1. Formal scoping officially begins with publication in the Federal Register of a NOI to prepare an EIS (40 CFR 1501.7), but may in practice begin in the early stages of project development (Section 5.02d of this Order).

2. To the maximum extent practicable, comprehensive public involvement and interagency and Indian tribal consultation should be sought to ensure the early identification of significant environmental issues related to a proposed action. Early consultation is an important opportunity to identify planning efforts and environmental reviews done by others (e.g., other agencies, applicants, RFMCs) that may provide important information for NOAA's environmental review process.

3. The scoping process should include, where relevant, consideration of the impact of the proposed action on:

(a) floodplains and sites included in the National Trails and Nationwide Inventory of Rivers, as required by Presidential Directive, August 2, 1979;

(b) sites nominated or designated by the Advisory Council on Historic Preservation, as required by 36 CFR 800;

(c) any national marine sanctuary or national estuarine research reserve;

(d) habitat as described in: 1) the National Marine Fisheries Service's 1983 habitat conservation policy; and 2) the National Habitat Plan, "A Plan to Strengthen the National Marine Fisheries Service National Habitat Program", August 30, 1
996;

(e) affected state Coastal Zone Management Plans;

(f) the environmental and health impact on low-income and minority populations as required by E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations;

(g) the American Indian Religious Freedom Act;

(h) ESA Section 7 (16 U.S.C. 1531 et seq.);

(i) Section 305(b) of the MSFCMA (16 U.S.C. 1855 et seq.) regarding adverse effects on essential fish habitat; and other appropriate laws and policies; and

(j) nonindigenous species, including any direct impacts on living resources.

4. Scoping may be satisfied by many mechanisms, including: planning meetings and public hearings; requests for public comment on public hearing documents; discussion papers, and other versions of decision and background environmental documents. Scoping meetings should inform interested parties of the proposed action and alternatives and solicit their comments. If the proposed action has already been subject to a lengthy development process that has included early and meaningful opportunity for public participation in the development of the proposed action, those prior activities can be substituted for the scoping meeting component in NOAA's environmental review procedures.

d. Notice of Intent. The NOI to prepare an EIS or to hold a scoping meeting should be published in the Federal Register as soon as practicable after the need for an EIS has been determined.

1. The notice must include (40 CFR 1508.22):

(a) the proposed action and possible alternatives;

(b) a summary of NOAA's proposed scoping process, including logistics for any meetings to be held; and

(c) the name and address of the RPM for further information about the proposed action and the EIS.

2. Written and verbal comments must be accepted during the identified comment period after publication of the NOI and must be considered in the environmental analysis process. This period should be at least thirty (30) days to provide an adequate opportunity for the public to comment.

3. When there is likely to be a lengthy period between the decision to prepare an EIS and actual preparation of the DEIS, publication of the NOI may be delayed until a reasonable time in advance of preparation of that DEIS.

4. If an RPM decides not to pursue a proposed action after an NOI has been published, a second NOI must be published to inform the public of the change.

5. The NOI may be combined with similar notices required for preparation of other documents (e.g., RFMC meeting notices; Exhibit 4 of this Order). This will minimize redundancy while still notifying the public of proposed actions.

6. Multi-agency NOIs must be coordinated among the involved agencies. Each agency must clear the NOI prior to publication.

Appendix B: Environmental Assessments

NAO 216-6, section 5.03 states:

General Requirements for Environmental Assessments.

a. Purpose. The purpose of an EA is to determine whether significant environmental impacts could result from a proposed action. An EA is appropriate where environmental impacts from the proposed action are expected, but it is uncertain that those impacts will be significant. An EA is also appropriate as an initial step of the environmental review, where the impacts of the proposed action may or may not be significant. The EA (defined at Section 4.01g. of this Order) is the most common type of NEPA document. For guidance in determining the environmental significance of a proposed action, consult Sections 4.01w., and 6.01 of this Order. If the action is determined to be not significant, the EA and resulting FONSI will be the final NEPA documents required. If the EA concludes that significant environmental impacts may be reasonably expected to occur, then an EIS must be prepared.

b. Contents. Because the environmental review in the EA provides the basis for determining whether or not the proposed action is expected to have a significant impact on the quality of the human environment, the EA must address the appropriate factors as outlined in Section 6.01 of this Order. Additionally, an EA must analyze the proposed action with respect to the laws and policies regarding scoping issues listed under the discussion of scoping under Section 5.02c.3. of this Order. An EA must consider all reasonable alternatives, including the preferred action and the no action alternative. Even the most straightforward actions may have alternatives, often considered and rejected in early stages of project development that should be discussed. In addition, the EA and FONSI must clearly state whether they rely on, or tier off, a previous NEPA document. As discussed in 40 CFR 1508.9, an EA must contain:

1.sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI, and to facilitate preparation of any needed EIS;
2.a brief discussion of the need for the action;
3.alternatives as required by Section 102(2)(E) of NEPA;
4.a brief discussion of the environmental impacts of the proposed action and alternatives;
5.a listing of agencies and persons consulted;
6.a FONSI, if appropriate.

c. FONSI Determination. An EA that results in a FONSI completes NEPA analysis for that action. When an EA results in a determination that there may be potential significant impacts to the quality of the human environment, a FONSI determination, by definition, is an impossibility and shall not be proposed. Rather, the RPM may proceed directly with preparation of an EIS without submitting the EA for the NEPA Coordinator's approval. Early review of draft environmental review documents by the NEPA Coordinator may

help avoid problems and expedite subsequent review of the EA with a FONSI determination or initiation of an EIS.

d. Mitigation. Mitigation measures used in determining a FONSI for an EA may be relied upon only if they are imposed by statute or regulation or submitted by an applicant or the agency as part of the original proposed action. As a general rule, agencies should not rely on the possibility of mitigation as a means of avoiding preparation of an EIS.

e. NOAA Review and Clearance.

1. The RPM must submit, through their AA/SO/PO Director to the NEPA Coordinator, one copy of the EA, FONSI and original letter To All Interested Government Agencies and Public Groups (Section 5.07 and Exhibit 6 of this Order) for review, clearance and signature prior to public availability. The FONSI, which must be attached to or incorporated into the final EA, notifies governmental agencies and the public that the environmental impacts of the proposed action have been determined by the RPM to be non-significant on the quality of the human environment under NEPA, and thus an EIS will not be prepared. The RPM should solicit input from other NOAA offices with expertise or jurisdiction prior to submitting the EA for final NEPA Coordinator clearance. Although some EAs are not generally distributed to the public, a cover letter must be prepared in case a copy is requested.

2. In cases where the RPM has adequate time and where the EA would benefit from greater public participation, a thirty (30) calendar day public review and comment period is encouraged prior to a FONSI determination. If such review and comment is utilized, the RPM may issue the EA in draft for public comment, and later finalize it with the action. The RPM may consult with the NEPA Coordinator to arrange alternative procedures for providing public involvement, including various combinations of notices and mailings (40 CFR 1506.6).

3. EAs should be submitted to the NEPA Coordinator at least three (3) working days prior to the requested clearance date; less time may be sufficient when the NEPA Coordinator has reviewed previous versions of the EA. After NOAA's clearance by the NEPA Coordinator, the RPM may publish a NOA in the Federal Register for those EAs with national implications or with broad interest to the public. In certain circumstances the NEPA Coordinator, in consultation with the RPM, may require that the proposed action not be taken until thirty (30) calendar days after the NOA has been published. This may include circumstances where consulting agencies or the public have expressed significant reservations, based on environmental concerns. EAs need not be transmitted to EPA for filing.

Appendix C: Categorical Exclusions

NAO 216-6, section 6.03.d.4 states:

Categorical Exclusions for Fisheries Management Actions.

Fisheries management actions may qualify for a CE pursuant to this Order if the actions individually and cumulatively do not have the potential to pose significant effects to the quality of the human environment. These determinations must be documented by a memorandum to the record which states the specific rationale behind why the action qualified for a categorical exclusion. In determining whether the effects of the fisheries management action are significant, the factors identified in Section 5.05b. of this Order for the appropriateness of a CE relevant to the activity should be considered along with the specific guidance on significance provided in Section 6.02 of this Order. If an action is determined to be CE under Section 5.05b. of this Order, a brief statement so indicating shall be included within an appropriate decision memorandum and submitted to the NEPA Coordinator. Actions that may receive a categorical exclusion may include:

(a) ongoing or recurring fisheries actions of a routine administrative nature when the action will not have any impacts not already assessed or the RPM finds they do not have the potential to pose significant effects to the quality of the human environment such as: reallocations of yield within the scope of a previously published FMP or fishery regulation, combining management units in related FMP, and extension or change of the period of effectiveness of an FMP or regulation; and

(b) minor technical additions, corrections, or changes to an FMP.