



EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503

December 28, 2015

Department of Commerce  
National Oceanic and Atmospheric Administration  
Eileen Sobeck  
NOAA Assistant Administrator for Fisheries  
1315 East-West Highway  
Silver Spring MD 20910

Dear Ms Sobeck ,

Thank you for consulting with the Council on Environmental Quality (CEQ) on the National Environmental Policy Act (NEPA) implementing procedures for the Magnuson-Stevens Fishery Conservation and Management Act (MSA) Section 304(i) actions. The CEQ regulations provide that agencies review their NEPA policies and procedures and, in consultation with CEQ, establish and revise them as necessary to ensure full compliance with the purposes and provisions of NEPA (40 C.F.R. § 1507.3).

The consultation with CEQ on the MSA procedures implementing NEPA (attached) took into consideration comments and input received from the Fisheries Councils, the inter-agency, and the public. Specifically, the proposed MSA procedures were published in the Federal Register for public review and comment on June 30, 2014. These procedures supplement the Departmental and NOAA Administrative Orders that provide the implementing NEPA procedures applicable to the National Marine Fisheries Service and the National Oceanic and Atmospheric Administration.

Based on this consultation, CEQ concludes that establishing the new MSA NEPA implementing procedures is in conformity with NEPA and the CEQ regulations. The new regulation will be effective once it is published in final form in the Federal Register.

Thank you for your responsiveness to our comments and recommendations.

Sincerely,

Horst G. Greczmiel  
Associate Director for NEPA Oversight

Attachment

cc: Steve Leathery, National NEPA Coordinator, NMFS  
Samuel Rauch, Deputy Assistant Administrator for Regulatory Programs, NMFS

## Revised and Updated NEPA Procedures for Magnuson-Stevens Act Fishery Management Actions

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### 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](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 FMCs 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 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>)

These revised and updated NEPA procedures supplement the NAO and Operational Guidelines by providing additional guidance on certain issues not addressed elsewhere. NMFS anticipates further improvements to the NEPA process at NOAA in the form of revised and updated language in NAO 216-6, the document that provides NOAA-level policy and procedures for NEPA compliance, the NEPA manual, or otherwise. NMFS will work to ensure consistency between any NMFS-level and any future NOAA-level

NEPA policy and procedures. In addition, NMFS may further modify these revised and updated NEPA procedures to reflect future improvements and needs.

With respect to compliance with NEPA during the development of fishery management actions pursuant to the MSA, these revised and updated NEPA procedures:

- Clarify Roles and Responsibilities;
- Provide Guidance on timing of NEPA compliance, and establish a procedural nexus to the MSA fishery management process;
- Provide 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); and
- Provide guidance on techniques for improving partnerships and efficiencies

## **II. Applicability**

These revised and updated NEPA procedures have 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 Western and Central Pacific Fisheries Convention 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. It also requires Federal agencies to initiate and utilize ecological information in planning and developing resource-oriented projects. These revised and updated NEPA procedures link NEPA's mandates on NMFS, as the Federal action agency, to the activities of the FMCs, in their role as advisory bodies. The revised and updated NEPA procedures do not preclude an FMC's development of NEPA documents as is the practice in some regions. However, they 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 practicable available during FMC deliberations.

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

For MSA fishery management actions, NMFS's authority to modify FMC-recommended fishery management plans and plan amendments is restricted: 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, and the MSA and its national standards.

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. Completing as much of the NEPA process as practicable while at the Council level enhances good decisionmaking. 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. Consistent with NEPA's declaration that it is the continuing policy of the Federal government to use all practicable means to maintain conditions in which man and nature can live in productive harmony and utilize ecological information in planning and developing resource-oriented projects, the information presented in any particular NEPA analysis may also inform NMFS in its ongoing stewardship responsibilities under the MSA and other resource management authorities.

## *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 Annual Catch Limits;
- 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 the proposed plan or amendment in the Federal Register for a 60-day comment period; and
- 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 to determine 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 proposed regulations for a public comment period of 15 to 60 days; or
  - if that determination is negative, notify the FMC in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent.
- Consult with the FMC before making any revisions to the proposed regulations; and
- 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 FMCs*

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 NEPA (P.L. 91-190, 42 U.S.C. 4321-4347) and CEQ's regulations (40 CFR Parts 1500 – 1508) for implementing the procedural provisions of NEPA.<sup>1</sup> Fishery management actions, such as NMFS's 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.

These revised and updated NEPA procedures recognize that FMC staff are often responsible for drafting NEPA documents; however, it is NMFS's responsibility to ensure the resulting documents are adequate for purposes of initiating Secretarial review and are fully compliant with NEPA prior to approval or partial approval. NMFS is not required to make determinations about adequacy of draft Environmental Assessments (EAs) and Categorical Exclusions (CEs) during FMC deliberations or about the adequacy of early drafts of EISs used to inform the FMC process. However, NMFS is required to ensure the adequacy of a draft EIS (DEIS) that will be filed with EPA and published for the formal comment period required by 40 CFR 1503.1 and 1506.10. In addition, NMFS must ensure the adequacy of EA/FONSI's and CE's used to support NMFS's decisionmaking. If NMFS, through early coordination with an FMC, identifies concerns with early versions of draft NEPA documents, NMFS should discuss these with the appropriate FMC as early as possible. 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 necessary for initiation of Secretarial review and for final Secretarial action,<sup>2</sup> i.e., an Environmental Impact

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<sup>1</sup> Additional information about NEPA may be found at CEQ's website: <http://ceq.doe.gov>.

<sup>2</sup> Information in the NEPA document contributes to the factual basis on which NMFS relies when determining whether a Council-recommended action complies with applicable laws. Thus, in some cases

- Statement (EIS), Environmental Assessment (EA), a Categorical Exclusion (CE), and/or determining whether an existing NEPA analysis adequately supports the action for initiation of Secretarial review and for final Secretarial action;<sup>3</sup>
- 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 to approve, disapprove, or partially approve a fishery management action (and/or whether to initiate Secretarial action under MSA section 304(c)); and
    - 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 EA and FONSI are made available to the public;<sup>4</sup> and
  - If a Categorical Exclusion (CE) applies, documenting the applicability of the CE.<sup>5</sup>

### *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.

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an EA or EIS may provide the factual basis for a disapproval. This situation is discussed further in section V.C. below.

<sup>3</sup>NMFS should advise the Councils regarding these determinations as early as possible during their deliberations for greatest effectiveness.

<sup>4</sup> 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.

<sup>5</sup> 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 each Region/FMC pair frequently works as a team to achieve the fishery management mission with available resources, these revised and updated NEPA procedures are designed to foster continued cooperation and joint prioritization between NMFS and the FMCs. The revised and updated NEPA procedures emphasize 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 (directing 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 recognizing that FMCs are not Federal action agencies for the purposes of NEPA, the revised and updated NEPA procedures also acknowledge 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 FMCs, 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 revised and updated NEPA procedures encourage NMFS and the FMCs to prepare and make available as much NEPA documentation as practicable (given timelines and resource needs) during the FMC's development of its management recommendation, recognizing that the FMC-proposed alternative and thus final development of the NEPA analysis may not occur until after an FMC takes final action on its management recommendation. The specific FMC proposed alternative is often identified only at final action. This includes providing opportunities for public participation as early in the process as possible while accommodating fishery resource management needs.

Thus, the FMCs serve an important role in the development of NEPA documentation through partnership and cooperation with NMFS. However, NMFS remains responsible for the scope, objectivity, and content of the NEPA documents when determining adequacy for transmittal, and NEPA compliance for purposes of final Secretarial action.

#### **IV. Timing**

The revised and updated NEPA procedures encourage 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 revised and updated NEPA procedures also recognize that there will be variations regarding the extent to which this can happen, and establish 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. These revised and updated NEPA procedures promote completing as much of the NEPA process as practicable 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, and sometimes in a single meeting. The intent of these revised and updated NEPA procedures 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. These revised and updated NEPA procedures promote 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 decision making, 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.<sup>6</sup> NEPA requires a 45 day comment period on a DEIS, followed by preparation of an FEIS that responds to comments received on the DEIS, followed by a 30 day cooling off period, which in limited circumstances may be reduced or waived by EPA, 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 practicable 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 conform to 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, each FMC, in coordination with NMFS, will clearly identify the purpose and need for the MSA fishery management 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 ensure a conforming NEPA statement of purpose and need consistent with achieving NMFS’s statutory, regulatory, and policy requirements.

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<sup>6</sup> 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>



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, as identified by the FMC, or not meet NMFS's statutory, regulatory and policy requirements, 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,<sup>7</sup> 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 sun-setting 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, and "no action" means that current management measures will remain in place, 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.

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<sup>7</sup> 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

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 (i.e., absence of management) as an additional alternative in the NEPA document.

### *C. “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 adequate at the points where the documentation is being used to comply with the CEQ regulations pertaining to when the DEIS/FEIS is filed with EPA, circulated and released for the comment and cooling off periods required by 40 CFR 1503.1; and 1506.10, as well as any additional requirements of NEPA and agency implementing guidance. NMFS will also ensure the NEPA analysis is sufficient when evaluating whether the action is adequate for initiation of Secretarial review, and whether it is adequate to support Secretarial decision-making. Thus, NMFS has the responsibility to ensure the NEPA analysis is reasonable and adequate, and that the proposed action and alternatives are clearly identified. NMFS will also advise the FMCs as to sufficiency at earlier stages in the (FMC) process as appropriate. 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 FMC recommendation and informing future actions in the management continuum.

### *D. 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. Information in the NEPA document contributes to the factual basis on which NMFS relies when determining whether a Council-recommended action complies with applicable laws. Thus, in some cases an EA or EIS may provide the factual basis for a disapproval. In these cases, NMFS may provide recommendations concerning the actions that could be taken by the FMC to conform its actions to the requirements of applicable law. Consistent with NEPA’s declaration that it is the continuing policy of the Federal

government to use all practicable means to maintain conditions in which man and nature can live in productive harmony and utilize ecological information in planning and developing resource-oriented projects, the information presented in any particular NEPA analysis may also inform NMFS in its ongoing stewardship responsibilities under the MSA and other resource management authorities.

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 the MSA and other applicable laws. 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.

NEPA Advanced Planning Procedure. 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 NAPP 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 NAPP.

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 a 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 NAPP. 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 NAPP;
- Identify new information, if any, relevant to the impacts of the fishery management action proposed to be taken pursuant to a NAPP; and
- Evaluate whether the fishery management action proposed to be taken pursuant to a NAPP falls within the scope of the prior NEPA analyses and whether new information, if any, requires supplementation.

If the NCE 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 NCE 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 page) document that briefly summarizes the fishery management action taken pursuant to a NAPP, 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 and need;
- Background;
- Scope of SIR;

- Evaluation of new information;
- Conclusions/Decision; and
- 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. These revised and updated NEPA procedures encourage 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;
- Whenever possible, 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; and
- Convening an interdisciplinary team early in the process.

NMFS Regional Offices and each 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 these revised and updated NEPA procedures are consistent with the Operational Guidelines of 1997, those guidelines remain in effect. However, where inconsistencies exist, the revised and updated NEPA procedures control.

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

These revised and updated NEPA procedures do not affect the applicability of the CEQ regulations, 40 CFR Parts 1500-1508, DAO 216-6, or of any pertinent Departmental or agency-level guidance.