AGENDA D-1(c)
APRIL 2003

MEMORANDUM

TO: Council and AP Members

FROM: Chris Oliver
Executive Director

DATE: March 24, 2003

SUBJECT: TAC-setting

ESTIMATED TIME
8 HOURS
all D items

ACTION REQUIRED

(c) Review status of TAC-setting plan amendments.

BACKGROUND

Since 1997, the Council and NMFS have recognized the need to revise the harvest specifications process to meet a number of objectives, including allowing for meaningful public review and comment on proposed specifications. Litigation in other regions regarding their harvest specifications process focused on the administrative process used to implement the specifications and compliance with the Magnuson-Stevens Act (MSA) and the Administrative Procedure Act (APA). The Alaska Region has reviewed the results of these court cases and advised the Council in the development of the analysis of alternatives. The latest version of the EA/RIR/IRFA for Amendments 48/48 was prepared for the October 2002 Council meeting at which the Marine Conservation Alliance (MCA) presented two additional alternatives for Council consideration. Action on the harvest specifications process was postponed until the appeal of the ruling of the 9th Circuit Court in NRDC v. Evans regarding public review and comment requirements for harvest specifications under the MSA and the APA was completed and analyzed by NOAA General Counsel (GC). The Court completed its decision in December 2002, and the Council was briefed by NOAA GC on the result in February 2003.

On February 24, 2003, NOAA GC received MCA's interpretation of the results of the appeal of NRDC v. Evans and the implications for the alternatives provided by MCA in October 2002 (Item D-1(c)(1)). MCA stated that, with minor modifications, its proposed alternatives should be considered viable for analysis and consideration for the harvest specifications process revision. NOAA GC will provide the Council advice on whether the MCA alternatives meet the statutory requirements and should be included in the revised EA/RIR/IRFA of harvest specifications process. A memo from Jonathan Pollard (NOAA GC) dated March 21, 2003, regarding this issue is attached as Item D-1(c)(2). If the MCA alternatives are added to the analysis, initial review could be scheduled in June and final action in October 2004. Final action on Amendments 48/48 could be scheduled as soon as June 2004, if those alternatives are not required to be analyzed. The executive summary of the October 2002 analysis is under Item D-1(c)(3)

February 24, 2003

VIA ELECTRONIC MAIL
AND ORIGINAL BY FEDERAL EXPRESS

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United States Department of Commerce
National Oceanic and Atmospheric Administration
Office of General Counsel
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Juneau, Alaska 99802-1109

Re: MCA's Proposed Alternatives for the Gulf of Alaska/Bering Sea Aleutian Islands ("GOA/BSAI") Harvest Specification Process in Light of the Ninth Circuit's Opinion in *Natural Resources Defense Council v. Evans*

Dear Ms. Lindeman:

As you know, we represent the Marine Conservation Alliance ("MCA")[1] with respect to the North Pacific Fishery Management Council's ("NPFMC" or "Council") consideration of if and how to alter the administrative processes for issuing GOA/BSAI groundfish fisheries annual specifications. We appreciate this opportunity to share with you our analysis of MCA's proposals in light of the Ninth Circuit's recent decision in *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003) ("*NRDC*"), and prevailing Ninth Circuit law as to the notice and comment issues under the Administrative Procedure Act ("APA").

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[1] The MCA is a broad-based coalition of Alaskan coastal communities, fisheries participants, vessel owners, processors, and many other stakeholders in Alaskan fisheries.

As your concise memorandum to the NPFMC (dated January 30, 2003) correctly identifies, *NRDC* reaffirmed Ninth Circuit APA precedent. More specifically, *NRDC* relied heavily on its decisions in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), and *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993), both of which the MCA specifically took into consideration and then addressed in developing and explaining its proposals.[2]

In summary, the Ninth Circuit in *NRDC* based its decision on deficiencies in NMFS's invocation of good cause under the APA to waive prior notice and comment on the annual Pacific groundfish specifications. The major weakness that the Ninth Circuit found with NMFS's use of the "good cause" exception was its reflexive nature, *i.e.*, that it was, by regulation, invoked as a matter of course each year without the "context-specific analysis of the circumstances giving rise to good cause." *NRDC*, 316 F.3d at 912.

Significantly, however, the Ninth Circuit vacated Magistrate Judge Larson's holding as to the Magnuson-Stevens Act ("MSA") notice and comment issue. *Id.* at 912, 913. Consistent with that holding, we direct your attention to District Court Judge Stearns' much more detailed (than Magistrate Judge Larson's decision below in *NRDC*) holding in *Conservation Law Foundation v. Evans* ("*CLF*"), 229 F. Supp.2d 29 (D. Mass. 2002), *appeal pending*,[3] as to the MSA notice and comment issue. As you are likely aware, Judge Stearns in *CLF* held that, by the terms of the MSA, the notice and comment provisions of 16 U.S.C. § 1854(b)(1)(A) do not apply to framework actions initiated under regulations that implement a fisheries management plan.

With this background in mind, we would like to explain why the MCA proposals, with only minor reworking as an insurance policy, fit comfortably within the current legal framework extant in the Ninth Circuit.

I. The MCA Proposals and the *NRDC* Decisions

The MCA proposed two options: the first worked within the current regulatory framework, providing for enhanced notice and opportunities for comment during the specification promulgation process, and the second proposed a new framework system

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[2] Throughout this letter we rely on the earlier work we have produced for MCA, specifically the September 25, 2002, comment letter to NPFMC Chairman David Benton and the "Memorandum of Law in Support of the Marine Conservation Alliance's Comments," which we have shared with Attorneys Pollard and Lepore in your office. We append these documents for your convenience.

[3] By way of background, we are counsel for the defendant-intervenors in this case.

which would set the annual total allowable catch ("TAC") and other specifications[4] on a 15- to 18-month cycle. *See* attached letter to Chairman Benton, Parts III-IV. These proposals included enhanced opportunities for public input and notice specifically with pre-existing Ninth Circuit caselaw, particularly *Riverbend Farms*, in mind. Further, if MCA's initial proposal did not make this clear, the enhanced notice option set forth in MCA Option 1 is includable in MCA Option 2.

More specifically, MCA's Option 1, designed to work under current regulations, provided for an enhanced proposed rule that identifies a range of potential TACs and other specifications based on the best information available from the completed trawl surveys and other sources.[5] This proposal was designed to make sure that the final rule was a "logical outgrowth" of the proposed rule and to reduce and minimize chances of public confusion about the proposed rule. As explained below, such notice also can and should be published as a notice of proposed rulemaking in the *Federal Register* as a component of MCA's Option 2.

In addition, as part of both of MCA's Options, the MCA proposed increasing the opportunities for public input by expanding the *Federal Register* notice for the NPFMC's October and December meetings, and the Plan Team's September and November meetings, to describe in greater depth the decisions to be made and soliciting input by those unable to attend. MCA further suggested that the decision documents considered at these meetings be posted on the Internet for prior public review to the extent practicable.

These features enhancing opportunities for notice and comment were developed, as explained in great depth in the Legal Memorandum, Part III.A, to meet three essential APA requirements the Ninth Circuit set out in *Riverbend Farms*. The first is that the APA "contemplates [*Federal Register*] notice to all members of the public," not just the regulated community. 958 F.2d at 1486. Second, the proposal must give some indication, even if imprecise so long as the imprecision is explained, of the rule being considered. *Id.* and *id.* n.5. And, finally, that the rule-recommending body (such as the NPFMC in this instance or the Navel Orange Advisory Committee in *Riverbend Farms*), should generally take written as well as oral comments on the proposed rule. *Id.*

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[4] Such as the overfishing levels ("OFLs"), acceptable biological catches ("ABCs"), prohibited species catch amounts, and seasonal apportionments, among others.

[5] In certain respects, the process the MCA proposed is similar to that employed by the Council and NMFS in setting this year's specifications where the proposed rule (in contrast with past recent years' practice, which simply "rolled-over" existing specifications), actually anticipated the final rule. *See, e.g.,* 67 Fed. Reg. 76362 (Dec. 12, 2002). NMFS's effort in this regard may be able to provide more precision in tailoring the notice of proposed rulemaking to the rule finally adopted.

None of these predicates are in any way challenged by the Ninth Circuit's *NRDC* decision, which focused on the deficiencies in NMFS's good cause finding for waiving prior notice and comment. The MCA's proposal is premised on prior notice and comment and has ample opportunities for public input both at the Council level, as spelled out above, and at the Secretarial level through allowance for additional comment on what MCA termed an "interim final rule." Such opportunities make this a completely different situation than existed under the Pacific groundfish FMP at issue in *NRDC*.

That said, we are aware that the appellate court's decision in *NRDC* could raise two potential issues as to the MCA proposals, and we address those issues below.

II. Proposals for Modifications to MCA's Proposals in Light of *NRDC*

After reviewing *NRDC*, we discern two potential issues regarding MCA's proposals: (1) whether the *dictum* in *NRDC* regarding the apparent necessity of commenting to NMFS[6] (as opposed to the Council) prior to the effective date of the specifications creates any serious issues, and (2) whether MCA's proposed use of what it termed an interim final rule ("IFR") approach – which shares the need for a good cause finding with the "final rule with comment" employed by the Pacific Council – would be inconsistent with *NRDC*. We believe that we can address any potential for concern (insurance, actually, as opposed to triage), with only modest adjustments to MCA's proposals. We will address these issues in turn:

a. Comment to the Council Meets APA Requirements

As an initial matter, it is evident that the Ninth Circuit's statement in *NRDC* about "formal opportunity to comment to NMFS" is *dictum*. In contrast, the court's holding actually and tersely stated, "[w]e simply hold that NMFS failed to make a sufficient showing that good cause existed for 2001 . . . ." *Id.* at 912. The sufficiency of comment to a Fishery Management Council under the APA was never briefed or argued. If it were, it is more than likely the Ninth Circuit would uphold it as meeting the requirements of the law, for the following reasons:

First, as explained above, the Ninth Circuit in *Riverbend Farms* explicitly sanctioned comment to the rule-recommending body. *See* Legal Memorandum at 15-16. Secondly, in the MSA, Congress itself has delegated to the fishery management councils the duty of taking public comment on behalf of the Secretary – arguably exclusively – for any measures less than full-blown FMPs or amendments to FMPs. In other words, the MSA itself makes councils the primary body for receiving public

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[6] "On the other hand, under the process that has been in place there is *no notice or formal opportunity to comment to NMFS*, which is the final decision-maker." 316 F.3d at 911-12 (emphasis added).

comment when developing framework actions. *See* Legal Memorandum at III.A.2. Finally, given that NMFS, in the form of the appropriate Regional Director, is statutorily a member of the councils, 16 U.S.C. § 1852(b)(1)(B), NMFS arguably "formally" receives public comment made to a fishery management council.

In conclusion, while we believe that were this issue put directly before a federal court in the Ninth Circuit, the prior direct precedent would be reaffirmed, the modifications suggested below obviate this issue for the purposes of MCA's proposal.

b. The Authority to Implement Specifications by IFR Should be Discretionary

As discussed in Part III.C of the MCA's Legal Memorandum, use of the IFR in MCA's proposal was designed as both an alternative to the current use of emergency MSA-based authority needed to insure that the fisheries opened each year and as a means by which NMFS could insure that the latest information was employed to govern the fishery at the earliest time possible in the fishing year. Because, generally speaking, use of an IFR requires a finding that waiving prior notice and comment is supported by a sufficient finding of good cause, however, the MCA thinks that its proposal (Option 2) can be adjusted modestly to better fit within the letter of the *NRDC* decision.

To step back first, though; routine good cause findings for waiver of prior notice and comment were not a linchpin for MCA's Option 2. Rather, MCA Option 2 was premised on the fact that there would be ample public input before this additional opportunity for post-publication notice and comment. The IFR was more discretely proposed as a way to, one, waive the 30-day "cooling off" period so that the newest information governs the fisheries sooner rather than later,[7] while, two, still allowing yet another level of comment, this time at the secretarial level. Viewed this way, *NRDC* technically provides no barrier to our plan.

We believe, however, that by making minor revisions to MCA's Option 2, the same benefits (explained below) can be achieved without any significant threat of successful legal challenge to the procedure. To start with, the "anticipated rule," *i.e.*, the preliminary specifications (either in ranges as we suggest or actual figures based on the best information before the Council as was done this year) discussed in MCA Option 1, could and should be published as a "notice of proposed rulemaking" ("NPRM") in the

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[7] As detailed in the Legal Memorandum, at III.C.1, the Ninth Circuit recognizes a different and less rigorous standard for waiving the 30-day cooling-off requirement of the APA.

Federal Register.[8] In fact, the suite of steps in MCA Option 1 designed to enhance notice and comment opportunities can be integrated into MCA Option 2.

The second change would be to specifically give the Secretary the flexibility to take the final recommendations for TACs and related measures coming from the NPFMC at its December meeting, and publish them *either* as an IFR for immediate effectiveness *or* as a second proposed rule, depending on the individual circumstances of each year. In either case, there would be a 15 to 30 day public comment period, and a final rule would issue.

It is the addition of this choice, *i.e.*, a choice between publication of either the IFR or a second proposed rule, which represents a modification of MCA's Option 2 (along with the use of the NPRM). The basis for making the choice between a second proposed rule and an IFR would be a particularized determination by the Secretary, made in light of: (1) the most recent scientific information (such as the status of the groundfish stocks as outlined in the SAFE document, of the prohibited species, and of protected species such as Steller sea lions); (2) the Council's ultimate recommendation in December, including if and how it diverged from the NPRM; and (3) consideration of the impact on the fishery of continuing to govern it using existing regulations (from, for instance, 15 months to 18 months) if implementation of the Council's decision were delayed because a second proposed rule was published. Further, the Secretary would be required to assess his or her duties under the MSA, the Endangered Species Act, and other applicable law such as the APA, the National Environmental Policy Act, and the Regulatory Flexibility Act, in making such a decision.

If this context-specific inquiry leads the Secretary to conclude that the rule should become immediately effective, then the rule could issue without additional advance notice and comment under *NRDC*, provided the Secretary's exercise of discretion in that regard met applicable legal standards. We note that this second choice point as to waiver of prior notice and comment does not appear to be legally compelled; as explained above, no matter what choice were made (IFR or second proposed rule), a NPRM would already have been published, and public comment taken, thereby distinguishing MCA's proposals from *NRDC*, even without addition of this second choice point.

However, even if NMFS does not want to rely on comment to the Council alone in fulfilling APA requirements (or, for that matter, if the Council's final recommended rule

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[8] Legally speaking, under the APA, there is really no difference between a notice of proposed rulemaking and a proposed rule. So long as it contains enough information to allow for public comment and is sufficiently detailed so that such comment is informed, a final rule may issue upon either so long as it is a logical outgrowth of the proposal.

diverges significantly from the anticipated rule), this type of analysis (IFR or second proposed rule set forth in ranges in the NPRM), by the Secretary is just the type of inquiry that the Ninth Circuit found in *NRDC* was contemplated by APA's good cause exception.

III. Conclusion

The MCA's proposal has many benefits, and any potential process-related issues are currently addressed, or can be addressed from year to year. For instance, considering MCA's Option 2 overall, a principal benefit is that stakeholders are not faced with the disruptions and uncertainties inherent in the need to rush a interim rule through by the beginning of the new fishing year (because the prior year's rule will be for 15 to18 months). Thus, NMFS can take more time to analyze the Council's proposals and prepare either the IFR or second proposed rule outside of the crunch of the end of year business. Even if the Secretary decides to issue those proposed specifications as a proposed rule, so long as (as should be possible) it is done by mid-January for a 15-day comment period, a final rule should be in place at or before the time the final rule is currently issued.

MCA's Option 2 also provides a routine and regular channel for public comment on the final specifications following the Council process, and also insures that the Secretary has a process in place that can accommodate the issuance of specifications that are outside the range anticipated in the NPRM if conditions so warrant.

Finally, MCA's Option 2, as refined, can accommodate a decision (if any) by a court with jurisdiction over the NPFMC that a framework action is subject to MSA notice and comment: In any given year, comment can either be made to NMFS directly via a second proposed rule or else MSA-specific procedures for post-publication notice and comment can be employed.[9]

We hope this letter addresses any concerns your office might have about MCA's proposals. Please do not hesitate to call either Shaun Gehan or me at (202) 662-9700, if you have any questions or require additional information. Thank you again for this opportunity to provide additional explanation and modest refinement of MCA's proposals regarding this important matter.

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[9] Instead of choosing to use an IFR in a particular year, as suggested above and which works for APA purposes, the Secretary could use his MSA-based emergency authority, 16 U.S.C. § 1855(c), to implement the new specifications, if conditions warrant.

Sincerely,

David E. Frulla

DEF/SMG;mlc

cc: Mr. Jonathan Pollard, Esquire (by electronic mail, w/ enclosures)
Mr. Dan Cohen, Esquire

UNITED STATES DEPARTMENT OF COMMERCE
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AGENDA D-1(c)(2)
APRIL 2003

RECEIVED
MAR 24 2003
N.P.F.M.C

March 21, 2003

MEMORANDUM FOR: David Benton
Chair, North Pacific Fishery Management Council

FROM: Jonathan Pollard
Attorney-Advisor

SUBJECT: Summary of rulemaking requirements applicable to the development and implementation of Alaska groundfish fishery specifications

This memorandum responds to the Council's request for a summary of the rulemaking requirements applicable to the procedure for development and implementation of Alaska groundfish fishery specifications. The memorandum reviews past and recent court decisions, with particular emphasis on decisions in the Ninth Circuit.

Conclusions and Recommendations:

In developing revisions to the Alaska groundfish fishery specification procedure, NOAA Fisheries and the North Pacific Fishery Management Council should consider the following issues:

(1) the possibility that the Magnuson-Stevens Act independently requires NOAA Fisheries to publish proposed fishery specifications in the Federal Register and receive public comment on them for a period of 15 to 60 days. This is an open question in the Ninth Circuit Court of Appeals, which includes Alaska (although the only district court in the Ninth Circuit to consider this issue held that the Magnuson-Stevens Act does require notice and comment on fishery specifications).

(2) proposed fishery specifications published for public comment pursuant to the Administrative Procedure Act (APA) should be based on the data and studies upon which NOAA Fisheries intends to rely in developing the final specifications. Final specifications that rely in significant part on data and studies that were not available when the proposed specifications were proffered for public comment may in some cases not be deemed "a logical outgrowth" of the proposed rule and may be invalid for that reason.

(3) the APA normally requires a notice of proposed rulemaking published in the Federal Register with an opportunity for public comment before the final rule is published in the Federal Register. The APA's "good cause" waiver of notice and opportunity for comment is an exception to be "narrowly construed and only reluctantly countenanced."

Fishery specifications implemented pursuant to a procedure that categorically requires waiver of this rulemaking requirement would be legally insufficient. Although a recent Ninth Circuit opinion states that "habitual invocation of the good cause exception" is not necessarily improper, generic concern over timing and complexity of fishery management is not a legally sufficient basis to waive notice and comment.

(4) publication of annual interim specifications without notice and comment as required by current regulations raises serious legal concerns under the APA. Interim specifications would serve no purpose in a revised specification procedure that results in 15-month or 18-month fishery specifications.

(5) NOAA Fisheries needs a sufficient amount of time between Council action and approval of fishery specifications to document their compliance with applicable laws, such as the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

The Alaska Groundfish Fishery Specification Procedure:

The current Alaska groundfish annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the North Pacific Fishery Management Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). NOAA Fisheries typically publishes its notice of proposed specifications in the Federal Register in December after consultation with the Council at its October meeting.[1] The regulations also provide that "interim specifications" will become effective on January 1 without any opportunity for public comment and will remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). NOAA Fisheries typically publishes its annual notice of interim specifications in December or January.[2] NOAA Fisheries is required to consider public comments on the proposed specifications received during the comment period and, after another consultation with the Council which typically occurs in December, publish final specifications in the Federal Register. 50 C.F.R. § 679.20(c)(3)(i). The final specifications supersede the interim specifications and are effective for the remainder of that fishing year only. NOAA Fisheries typically publishes its annual notice of final specifications in

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[1] *See Notice of Proposed Specifications for 2003*, 67 Fed. Reg. 76362 (December 12, 2002); *Notice of Proposed Specifications for 2000*, 64 Fed. Reg. 69464 (December 13, 1999); *Notice of Proposed Specifications for 1998*, 63 Fed. Reg. 71867 (December 30, 1998).

[2] *See Notice of Interim Specifications for 2003*, 67 Fed. Reg. 78739 (December 26, 2002); *Notice of Interim Specifications for 2000*, 65 Fed. Reg. 60 (January 3, 2000); *Notice of Interim Specifications for 1999*, 64 Fed. Reg. 50 (January 4, 1999).

February or March, ensuring that the first months of the fishing year are managed pursuant to the interim specifications.[3]

The Rulemaking Requirements of the Magnuson-Stevens Act:

Two recent cases have addressed whether the notice and comment requirement of Magnuson-Stevens Act section 304(b)(1)(A) applies to fishery specifications and other framework actions implemented pursuant to fishery management plans.[4] In 2001, the District Court for the Northern District of California held that the 2001 Pacific coast groundfish fishery specifications and annual management measures were regulations for which section 304(b)(1)(A) required a prior notice and comment period of 15 to 60 days. *Natural Resources Defense Council v. Evans*, 168 F. Supp. 2d 1149 (N.D.Cal. 2001). Alternatively, the court held that NOAA Fisheries had not justified its waiver of prior notice and opportunity for public comment under the Administrative Procedure Act. NOAA Fisheries appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's holding that NOAA Fisheries had violated the Administrative Procedure Act. However, the Ninth Circuit Court of Appeals did not address the question whether NOAA Fisheries also violated the Magnuson-Stevens Act's notice and comment requirement and vacated (rescinded) this portion of the district court's order. *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003).

In an opinion at odds with the *Natural Resources Defense Council* district court opinion, the District Court for the District of Massachusetts distinguished between "regulations" and "actions" and held that the notice and comment requirement of section 304(b)(1)(A) applies only to regulations, not to actions taken by NOAA Fisheries pursuant to regulations. *Conservation Law Foundation v. U.S. Department of Commerce*, 229 F. Supp. 2d 29 (D. Mass. 2002) (*on appeal*).

Because the Court of Appeals declined to reach the question in *Natural Resources Defense Council*, the applicability of the notice and comment requirement of section 304(b)(1)(A) remains an open question in the Ninth Circuit.

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[3] *See Notice of Final Specifications for 2000*, 65 Fed. Reg. 8282 (February 18, 2000); *Notice of Final Specifications for 2000*, 64 Fed. Reg. 12103 (March 11, 1999); *Notice of Final Specifications for 1998*, 63 Fed. Reg. 12689 (March 16, 1998).

[4] Section 304(b)(1)(A) provides in part that "[u]pon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c), the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and . . . if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days . . . ."

The Administrative Procedure Act:

In addition to any procedural requirements imposed by the Magnuson-Stevens Act, NOAA Fisheries must also comply with the rulemaking requirements of the APA when implementing fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 907. Section 553 of the APA specifies general requirements for informal rulemaking by federal agencies. Unless one of the APA's exemptions applies, agency rulemaking must comply with the following minimum procedural requirements:

> (1) a notice of proposed rulemaking must be published in the Federal Register, such notice to include a statement of the time, place and nature of the public rulemaking proceeding; a reference to the legal authority under which the rule is proposed; and either the terms or a description of the subjects and issues to be addressed by the proposed rule;
>
> (2) interested persons must be given an opportunity to submit written data, views or arguments on the proposed rule; and
>
> (3) publication of the final rule must occur not less than 30 days before its effective date.

In order to evaluate the current Alaska groundfish annual fishery specification procedure and its alternatives, NOAA Fisheries and the Council must address two main issues presented by APA section 553: (1) the adequacy of notices of proposed rulemaking prepared for the annual fishery specifications; and (2) the availability of "good cause" waiver in particular circumstances.

Adequacy of Notices of Proposed Rulemaking:

The notice and comment provisions of the APA are intended to encourage public participation in the rulemaking, to help educate the agency and to produce more informed agency decisions. *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990); *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981). To further these goals, courts have consistently held that a notice of proposed rulemaking must fairly notify interested persons of the issues involved in the rulemaking. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1103 (D.C. Cir. 1980). Unless an exemption applies, failure to publish a proposed rule in the Federal Register may result in a court setting aside the final rule. The rule may also be set aside when the notice of proposed rulemaking published in the Federal Register was inadequate to afford the public a meaningful opportunity to comment on the issues involved in the rulemaking; in this type of case the test is whether the final rule is a "logical outgrowth"of the proposed rule such that the public could reasonably have anticipated the final rulemaking from the proposed rule. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1402-04 (9th Cir. 1995).

A number of courts have applied the "logical outgrowth" test to rulemakings in which agencies base final rules on studies or data that were not made available when the notice of proposed rulemaking was published. In a leading early case of this type, the Environmental Protection

Agency based cement production air emission standards on test results that existed when the agency published the proposed rule but that had not been made available for public comment. The court found "a critical defect in the decision-making process in the initial inability of the petitioners to obtain - in timely fashion - the test results and procedures used on existing [cement] plants which formed a partial basis for the emission control level adopted . . . ." *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). The court further stated that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on inadequate data or data that, critical degree, [sic] is known only to the agency." *Portland Cement Association*, 486 F.2d at 393.

The Court of Appeals for the District of Columbia restated the legal requirement as follows:

> The APA requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and that the agency "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." Integral to the notice requirement is the agency's duty "to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules . . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

Solite Corp. v. EPA, 952 F.2d 473, 484 (D.C. Cir. 1991) (*citations omitted*).

Agencies may, however, consider supplementary data unavailable at the time of publication of the proposed rule that "expands upon and confirms" information contained in the notice of proposed rulemaking and addresses alleged deficiencies in the preexisting data, "so long as no prejudice is shown." *Idaho Farm Bureau Federation*, 58 F.3d at 1402 (*quoting Solite Corp.*, 952 F.2d at 484). In such a case, the final rule will likely be deemed a "logical outgrowth" of the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 706 F.2d 506, 547 (D.C. Cir. 1983); *Solite Corp.*, 952 F.2d at 485. In practice, this means that an agency may rely on supplementary data and studies to corroborate or explain apparent discrepancies in material that was available for comment when the notice of proposed rulemaking was published, particularly when the new data or studies are not in dispute. *Ober v. EPA*, 84 F.3d 304, 314 (9th Cir. 1996). Courts frequently find procedural error when an agency relies on new data or studies to publish a final rule that significantly departs from its proposed rule. *Air Transport Association of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (FAA should have published supplementary data for additional public comment when data provided sole justification for FAA's action); *Ober v. EPA*, 84 F.3d at 314 (EPA should have published supplementary information for additional public comment when information was critical to EPA's decision and accuracy of the information was open to serious question); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d at 1402-04 (FWS should have published supplementary USGS report for additional public comment when report "was central" to the FWS' decision to list the Springs Snail as an endangered species, when report provided the

only information relating to the decline in spring flow, and when report's accuracy was in question).

These "logical outgrowth" cases pose an obvious legal problem for the current Alaska groundfish annual fishery specification procedure and for any other alternative that requires publication of the proposed specifications prior to the development of the annual groundfish stock assessments. The current annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). In practice, NOAA Fisheries publishes a notice of proposed specifications for public comment shortly after consultation with the Council at its annual October meeting. However, the stock assessments that fully inform the next year's fishery specifications are not available until the second week of November. The Council considers these new stock assessments and public comment at the December Council meeting and then recommends its final fishery specifications to NOAA Fisheries. This schedule allows the Council to base its final recommendations on the November stock assessments each year, but it ensures that NOAA Fisheries' published notice of proposed specifications cannot take those November stock assessments into consideration.

As explained above, Ninth Circuit caselaw would not flatly prohibit NOAA Fisheries from publishing final fishery specifications that rely in significant part on data and studies that were not available when the proposed rule was published for public comment. Although the notice of proposed specifications published under the current fishery specification procedure may be written in anticipation of the new data and studies that will be available later in November, the legal problem is presented when the new data and studies contradict, rather than expand upon and confirm, information contained in the notice of proposed specifications. In this case a notice of final specifications that departs from the proposed specifications in reliance on these new data and studies would not be "a logical outgrowth" of the proposed specifications and would be legally insufficient for that reason.[5] *Idaho Farm Bureau Federation*, 58 F.3d at 1402. The risk of legal insufficiency is greatest when the accuracy of the new data and studies is in dispute, as is often the case in fishery conservation and management. Basing the initial notice of proposed specifications on consideration of the November stock assessments or conducting a second cycle of notice and comment rulemaking would obviate this risk.[6]

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[5] In this situation the Administrative Conference of the United States has recommended a second cycle of notice and comment rulemaking in consideration of new data or studies developed after publication of the proposed rule. *Administrative Conference of the United States Recommendation 76-3*, ¶¶ 1(a) and (b) (1976).

[6] It has been argued that publication of proposed specifications after the November stock assessments are developed would prevent NOAA Fisheries from using the most recent survey information in management of the fisheries in the early part of the year. It is worth noting, however, that fisheries are now managed as late as mid-March under the interim fishery specifications, which themselves do not take into account the November stock assessments.

Waiver of APA Notice and Comment Rulemaking Requirements:

The current Alaska groundfish annual fishery specification procedure requires that "interim specifications" become effective on January 1 without any opportunity for public comment and remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). Each year NOAA Fisheries invariably waives for "good cause" the opportunity for notice and comment and delayed effectiveness for the notice of interim specifications, determining that compliance with these rulemaking requirements is "impracticable" and "contrary to the public interest" under section 553(b)(B) of the APA.[7] The question is whether the APA authorizes this habitual waiver under the current Alaska groundfish annual fishery specification procedure or any other alternative that routinizes waiver of notice and comment rulemaking requirements

The good cause waiver for prior notice and comment is to be "narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group, et al., v. EPA*, 236 F.3d 749 (D.C. Cir. 2001); *Independent Guard Ass'n of Nevada Local No. 1 v. O'Leary*, 57 F.3d 786 (9th Cir. 1995); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Courts apply this exception narrowly to prevent it from swallowing the notice and comment requirement. *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983). "Emergencies, though not the only situations constituting good cause, are the most common." *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479, 1484 n. 2 (9th Cir. 1992); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982). The Ninth Circuit's inquiry into whether an agency properly invoked the good cause waiver "proceeds case-by-case, sensitive to the totality of the factors at play . . . . " *Natural Resources Defense Council*, 316 F.3d at 911. The Ninth Circuit Court of Appeals has stated that the good cause exception "authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission.," *Cal-Almond*, 14 F.3d 429, 441 (9th Cir. 1993) (*quoting Riverbend Farms*, 958 F.2d at 1485), or when "delay would do real harm." *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

In *Riverbend Farms*, the Secretary of Agriculture set orange volume restrictions by convening public meetings each Tuesday to make initial calculations, then publishing a final rule each Friday in the Federal Register for the next week. The weekly rules stated the Secretary's finding that it was impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register. However, the *Riverbend Farms* court concluded that the Secretary lacked good cause for failing to give notice in the Federal Register of the weekly meetings and failing to solicit written public comments and that actual notice of the weekly meetings to the affected industry did not satisfy APA's requirement of notice to the general public. *Riverbend Farms*, 958 F.2d at 1486-87. In addition, the court found that the Secretary failed to demonstrate that "it would be impracticable to publish a notice in the Federal Register a few days before the . . . meeting, advising the public

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[7] *See Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).

of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions." *Riverbend Farms*, 958 F.2d at 1486.

The Ninth Circuit has confirmed the *Riverbend Farms* analysis in subsequent cases. In *Cal-Almond*, the U.S. Department of Agriculture established budget estimates and annual assessment rates for almonds from 1980 to 1986, each year asserting that the rate could not be formulated with prior notice and comment and a delayed effective date. To formulate the rate, a government-appointed California Almond Board held meetings each July to gather crop projection information for that year and receive comments from interested parties. After deciding on its recommendations, the Board gave each almond handler notice of the proposed rate, then submitted the rate to the Secretary of Agriculture, who issued final rules without first publishing a proposed rule and requesting public comment. The Secretary of Agriculture apparently contended that "since the Board's annual harvest forecast and proposed budget depended on the crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA." *Cal-Almond*, 14 F.3d at 441. The court disagreed based on its opinion in *Riverbend Farms*. The court stated that it could find no good cause to waive notice and comment for "*annual* meetings and rules" in the instant case where it had "found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for *weekly* meetings and rules." *Cal-Almond*, 14 F.3d at 441-442.

In *Natural Resources Defense Council*, the Ninth Circuit found that NOAA Fisheries failed to "engage in any context-specific analysis of the circumstances giving rise to good cause" when it promulgated its 2001 Pacific Coast groundfish fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 912. In its Federal Register notice at 66 Fed. Reg. 2372 (January 11, 2001), NOAA Fisheries asserted the following "good cause" justification for waiving the APA requirement for prior notice and opportunity for comment on the specifications:

> This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by

> which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

The court ultimately found the waiver language merely repeated generic concerns about timing and the complexity of fishery management. The court concluded that

> [i]f there were no good cause in *Riverbend Farms* for failure to publish notice of *weekly* meetings advising the public of proposed volume restrictions on the marketing of oranges, despite the fact that the committee responsible for recommending to the Secretary of Agriculture weekly volume restrictions was constantly revising projections right up until, and occasionally even during, the week in question, then, as we said in *Cal-Almond*, the timeliness of rulemaking on an annual basis cannot constitute good cause.

Natural Resources Defense Council, 316 F.3d at 912 (*citations omitted*) (*emphasis in original*). The court reasoned directly from its holding in *Cal-Almond*, noting in each case the decisionmaker issued a final rule without first publishing a proposed rule for public comment, asserting that the timing of key studies did not allow for publication of a proposed rule before the scheduled effective date of the final rule. Although the court held that NOAA Fisheries failed to make a sufficient showing that "good cause" existed for the 2001 Pacific Coast groundfish fishery specifications and management measures, the court observed that "habitual invocation of the good cause exception" is not necessarily improper. However, in this case, NOAA Fisheries needed to show that some "exigency apart from generic data collection and timing constraints interfered with its ability to promulgate [the] specifications and management measures." *Natural Resources Defense Council*, 316 F.3d at 912.

The current Alaska groundfish fishery specification procedure does not meet the legal standards articulated in *Natural Resources Defense Council.* The interim specifications are the subject of consultation with the Council in October each year; however, NOAA Fisheries typically publishes the final interim specifications at the end of December or beginning of January - more than two months later - without any additional opportunity for public comment. NOAA Fisheries invariably waives the APA requirements for prior notice and comment and delay in effectiveness date for reasons that are very similar to those invalidated in *Natural Resources Defense Council.*[8] The Ninth Circuit Court of Appeals likely would reject this generic assertion of good cause for the

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[8] For example, see NOAA Fisheries' notice of Bering Sea and Aleutian Islands 2003 interim fishery specifications at 67 Fed. Reg. 78749-50 (December 26, 2002).

same reasons it rejected the good cause findings in *Riverbend Farms, Cal-Almond* and *Natural Resources Defense Council*. Although the *Natural Resources Defense Council* court stated that habitual invocation of the good cause exception is not necessarily improper, any Alaska groundfish fishery specification procedure that by design prospectively *compels* annual waiver of notice and comment would not meet the legal standards articulated in that case; that is, such a fishery specification procedure would generally *require* findings of good cause rather than *permit* individual findings based on the requisite "context-specific analysis of the circumstances."[9] *Natural Resources Defense Council*, 316 F.3d at 912.

NOAA Fisheries is the final decisionmaker for approval and implementation of fishery specifications. Although the public is afforded opportunities to comment on the Council's recommended specifications, it is clear that at least in the Ninth Circuit opportunities to comment to the Council on its recommendations do not satisfy NOAA Fisheries' APA notice and comment responsibility in subsequent rulemaking to approve and implement the recommendations. NOAA Fisheries has based waivers of APA notice and comment requirements in part on prior opportunities for extensive public participation at regional fishery council meetings.[10] However, this argument has not met with success in the Ninth Circuit; indeed, the waiver rejected by the *Natural Resources Defense Council* court was based in part on the opportunities for public participation at the Pacific Fishery Management Council's meetings during development of the Council's recommendations on the 2001 Pacific Coast groundfish fishery specifications. 66 Fed. Reg. 2372 (January 11, 2001). Although the court recognized the opportunity for public participation at Pacific Council meetings, the court finally observed that "under the [fishery specification] process that has been in place there is no notice or formal opportunity to comment to NMFS, which is the final decisionmaker." *Natural Resources Defense Council*, 316 F.3d at 911.

Moreover, Ninth Circuit caselaw makes it clear that the APA's notice and comment requirement is not satisfied by the mere publication of a proposed rule and acceptance of public comment; for the process to be meaningful, the agency must consider comments submitted on the proposed rule and respond to significant ones in the published final rule. *Safari Aviation, Inc. v. Garvey*,

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[9] The utility of notices of interim specifications is questionable anyway; separate interim specification notices might easily be eliminated in a revised specification procedure that results in 15-month or 18-month fishery specifications. Under such a procedure the groundfish fisheries in the first months of a year could be managed pursuant to specifications that had been published the preceding year. This procedure would not differ greatly from the current practice of managing the first months of the fishing year pursuant to the interim specifications.

[10] Although the *Conservation Law Foundation* court held that NOAA Fisheries' compliance with an abbreviated framework rulemaking procedure that included public participation at New England Fishery Management Council meetings constituted "good cause" under the APA for waiving notice and comment rulemaking, courts in the Ninth Circuit are not constrained to follow this holding. *Conservation Law Foundation*, 229 F. Supp.2d at 34, n. 10.

300 F.3d 1144, 1150-51 (9th Cir. 2002); *Idaho Farm Bureau Federation*, 58 F.3d at 1404-05; *American Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). NOAA Fisheries, not the Council, is the federal agency responsible for compliance with these APA rulemaking requirements.

Courts may vacate a final rule unlawfully promulgated without prior notice and opportunity for comment. Section 706 of the APA states that courts shall "set aside agency action . . . found to be . . . without observance of procedure required by law;" however, this provision is qualified by the rule of harmless error codified in section 706. A court that rejects an agency waiver of notice and comment rulemaking must take "due account" of the harmless error rule in fashioning a remedy. *Riverbend Farms*, 958 F.2d at 1487. Courts finding harmless error may allow a rule unlawfully promulgated without observance of APA procedural requirements to remain in effect pending completion of new proceedings complying with the APA. *Western Oil & Gas v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). Ninth Circuit courts have held that "the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of the decision reached.'" *Cal-Almond*, 14 F.3d at 442 (*quoting Riverbend Farms*, 958 F.2d at 1487 (*quoting Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986))). In *Riverbend Farms* and *Cal-Almond*, failure to comply with the APA's notice and comment requirements was harmless error in large part because the public was afforded alternate opportunities for public comment. *Cal-Almond*, 14 F.3d at 442; *Riverbend Farms*, 958 F.2d at 1488. Opportunities for public participation at Council meetings during development of Council recommendations may be relevant in determining whether NOAA Fisheries commits harmless error by approving and implementing them without observance of APA notice and comment requirements; however, NOAA Fisheries must not commit procedural error anticipating that a court will find the error harmless and the imposed remedy painless.

Waiver of APA Delayed Effectiveness for Good Cause:

Section 553(d)(3) provides a waiver of the APA requirement of a 30-day delay in effectiveness which courts have held is an easier burden to meet. The delay in effectiveness is "intended to give affected parties time to adjust their behavior before the final rule takes effect," whereas prior notice and comment ensures public participation in rulemaking. *Riverbend Farms*, 958 F.2d at 1485. *See also U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-290 (7th Cir. 1979); *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (noting that sections 553(b) and (d) provide notice so affected parties can adjust to new rules but 553(b) serves the "even more significant purpose" of public participation in rulemaking). Courts have found good cause to waive the cooling off period where agencies showed "inescapable or unavoidable limitations of time," "demonstrable urgency," and prior participation of affected parties, whereas prior notice and comment can only be waived if it is unnecessary, impracticable or contrary to the public interest. In *Riverbend Farms*, the Ninth Circuit upheld the determination of good cause to waive the delay in effective date because requiring the waiting period would "cause great harm" and "throw the entire regulatory program out of kilter" and because the public knows that the rules are effective each Friday and has advance notice of what they are likely to contain. *Riverbend*

Farms, 958 F.2d at 1485. Although waiver of the APA requirement of a 30-day delay in effectiveness may be easier to justify than waiver of prior notice and opportunity to comment, the waiver still must be based on context-specific analysis of the circumstances giving rise to good cause.[11]

Compliance With Other Applicable Laws:

Finally, the current procedure established for publishing the interim specifications allows NOAA Fisheries very little time to document their compliance with other applicable laws, such as NEPA and the ESA. Publication of the 2003 interim specifications was delayed until late December 2002 until the necessary NEPA and ESA analyses of fishing pursuant to the interim specifications were completed.[12] Any revisions to the procedure should take into account the time necessary to complete this documentation.

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[11] Section 706 of the APA also requires courts to take due account of the harmless error rule for unlawful waiver of the 30-day delay in effectiveness.

[12] *See Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).

EXECUTIVE SUMMARY

Each year, normally in October, proposed groundfish harvest specifications for the Bering Sea and Aleutian Islands area (BSAI) and Gulf of Alaska (GOA) are published in the Federal Register. These proposed specifications are based upon total allowable catch (TAC), acceptable biological catch (ABC) and prohibited species catch (PSC) amounts, and apportionments thereof, which have been recommended by the North Pacific Fishery Management Council (Council) for the current year. Based on public comment on the proposed specifications and information made available at the December Council meeting, final specifications are published in the Federal Register during February or early March. So that fishing may begin January 1, regulations authorize the release of one-fourth of each proposed TAC and apportionment thereof, one-fourth of each PSC and apportionment thereof and the first seasonal allowance of pollock and Atka mackerel. These interim specifications are based upon the proposed specifications and published in the Federal Register in December and are superceded by the final specifications.

The existing harvest specification process is problematic for several reasons. The public is notified and given opportunity to comment on proposed specifications that often are outdated by the time they are published. The publication of proposed specifications each year can confuse the public, because incomplete and outdated information is provided due to the need to adhere to a strict time line in order to comply with all relevant regulations. Because the interim specifications are based on the proposed specifications, they do not take into account the recommendations contained in the Groundfish Plan Teams' final SAFE documents, or the recommendations coming from public testimony, the Science and Statistical Committee, Advisory Panel, and Council at its December meeting. One fourth of the initial TAC and PSC amounts have been found to be an inadequate amount for those fisheries that attract the greatest amount of effort at the beginning of the fishing year. As fisheries are seasonally apportioned to meet other management needs, (i.e., Steller sea lion protection measures) interim TACs based on one fourth of the annual TAC increasingly compromise other management objectives. Under the current process, administrative inefficiency exists in taking the regulatory actions necessary to set interim, proposed and final specifications. For these reasons, NMFS seeks to revise the harvest specification process.

The objectives of modifying the harvest specifications process are to manage fisheries based on best scientific information available, provide for adequate prior public review and comment to the Secretary on Council recommendations, provide for additional opportunity for Secretarial review, minimize unnecessary disruption to fisheries and public confusion, and promote administrative efficiency.

The management alternatives for amending this process are:

Alternative 1. Status quo. (Publish proposed specifications, followed by interim and final specifications)

Alternative 2: Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year. Option of biennial harvest specification for BSAI and GOA target species on biennial survey schedule.

Alternative 3: Issue Proposed and Final Harvest Specifications based on an alternate fishing year schedule (July 1 to June 30).

Option 1: Set sablefish TAC on a January through December schedule.

Option 2: Reschedule the December Council meeting to January.

Alternative 4: Use Stock Assessment Projections for biennial harvest specifications. For the BSAI and GOA set the annual harvest specifications based on the most recent stock assessment and set harvest specifications for the following year based on projected OFL and ABC values. For setting PSC there are two options:

Option 1: Set PSC limits annually
Option 2: Set PSC limits every two years based on regulations and projected values

Option A: Abolish TAC Reserves
Option B: Update FMPs to reflect current fishing participants and harvest specifications process.

Section 4.12 gives the environmental summary and conclusions. The environmental components that may be affected by the proposed action are the target groundfish species (including the State groundfish fisheries), prohibited species, and Steller sea lions. Results from simulation model and retrospective analysis indicated that under Alternatives 2, 3 and 4 groundfish harvests would be less and several target species biomasses would be more than under the Status Quo. This was primarily due to uncertainty resulting from projecting harvest amounts further into the future than under Alternative 1. Alternative 3 is likely to provides less biomass variability and more likelihood of setting TAC below the OFL compared to alternatives 2 and 4. Alternatives 1 and 3 have potential effects on the temporal dispersion of harvest of Steller sea lion prey species because of the lag between the biomass information used to set harvest specifications and the commencement of the fisheries.

The harvesting effects on groundfish from Alternatives 2, 3 and 4 are unknown due to a number of factors that are not part of the retrospective analysis and simulation model, including the full Council process which can have a substantial effect on the final TAC and has historically been more conservative than the analysis predicted. Potential overfishing identified in the analysis is likely to be mitigated through the Council process and may also be mitigated by additional regulatory action if new information becomes available during the current fishing year that indicates that the level of fishing is inappropriate. Because the effects on groundfish species are unknown, the effects on availability of prey for Steller sea lions are also unknown.

Alternative 3 may also have temporal effects on the groundfish fisheries and potentially conflict with Steller sea lion protection measures. These measures require the temporal dispersion of harvest and current seasons may need to be adjusted for BSAI pollock and Pacific cod trawl fisheries to meet Steller sea lion protection measures and to coincide with the July 1 through June 30 fishing year. During years of high pollock TAC, the BSAI pollock fishery may be conducted into October as the industry attempts to fully harvest the B season allocations, encountering potentially more salmon bycatch and worse weather. Alternative 3 also has the potential for higher levels of harvest in the A season during times of falling biomass than what would occur under the status quo. Because it is not possible to predict if the fishing behavior may change or to predict actions that may be taken by the Council or the State Board of Fish, and because of Steller sea lion protection measures, it is unknown if Alternative 3 could have an effect on target groundfish or Steller sea lions. Option 1 to Alternative 3 to set the sablefish TAC on a January through December schedule would allow the sablefish IFQ program to be managed concurrently with the halibut IFQ program, eliminating any potential effects on these programs from shifting the fishing year.

The Regulatory Impact Review (RIR) meets the requirements of Presidential Executive Order (E.O.) 12866 for a benefit-cost analysis of the proposed action and its alternatives. A complete benefit-cost analysis was

not possible. The information is not available to estimate dollar values for many of the benefits and costs. Moreover, the proposed action affects the conditions under which the Council and Secretary will make decisions about future TAC specifications. The actual benefits and costs will depend on the decisions made by the Council and Secretary, and those decisions cannot be predicted at this time. The RIR does examine a set of outcomes from this action that may affect the benefits and costs. Three general categories of outcomes are identified: (1) impacts on the TAC setting process itself, (2) changes in the fishing year under Alternative 3, and (3) changes in harvests and biomass size under Alternatives 2, 3, and 4.

Alternatives 2, 3 and 4, by extending the time within which the TAC setting should take place, will provide additional opportunities for scientific analysis, for peer review of scientific work, for public notice and comment on the proposed specifications regulations, and for consideration by the Council and the Secretary of Commerce. Since these alternatives will provide for public notice and comment on the specifications actually anticipated for the coming fishing year, comments received from the public will be more useful. Alternatives 2 and 4 provide the most time for this process; Alternative 3 increases the amount of time available, but not to the same extent. It may be difficult, moreover, to complete the entire rulemaking process in the time allotted under Alternative 3, especially with Option 2. Option 2 to Alternative 3 would provide additional time for stock assessment scientists to complete analysis but it may be administratively difficult to reschedule the December Council meeting to January.

Alternative 3 changes the fishing year to begin on July 1. A comparison of fishing seasons for different species with the proposed July 1 start date suggests that a shift from a January 1 to a July 1 start date would cause little disruption to many fisheries. The sablefish IFQ fishery in the GOA and BSAI is an important exception to this. A change in fishing year, and associated change in TAC, would be extremely disruptive in the middle of this fishing season, which currently runs from March 15 to November 15. It might be possible to delay the season, so that it started on July 1 with the start of the new fishing year. However, the administration of the individual quotas in this fishery requires a long closed period between the end of one fishing season and the start of the next. Currently the fishery is closed from November 15 to March 15. This closed period is best in the winter time since fishing conditions aren't as good, and there is less potential for bycatch conflicts with the related halibut fishery. However, a July 1 start for the year would mandate a closed period from March through June. Option 1 to Alternative 3, setting sablefish TAC on a January through December schedule, would eliminate this potential problem.

Alternatives 2, 3, and 4 lengthen the time between biomass surveys and the year in which specifications based on the surveys (specifications year) become effective. Under Alternative 1, the time between the survey information and implementation of the annual fishery based on that information is approximately 7 months, because the first three month of the year are managed under interim specification (which are based on the previous years TACs). Alternative 3 increases the period by three months, Alternative 2 increases the period by nine months, and Alternative 4 increases it by an average of 15 months per year (nine months for the first year of the biennial specifications, and 21 months for the second year). As the length of time between the biomass surveys and the specifications year increases, there is some evidence that biomass levels may vary more, ABCs and harvests may become smaller since lower harvest rates are triggered more often by the harvest control rule, mean spawning biomass levels become larger, and harvest variability increases. These results are extremely tentative.

If the harvest levels do decline as suggested by some modeling results, revenues to industry may also decline. Moreover, an increase in the year-to-year variability of harvest, also suggested by some model results, may impose increased interest and inventory carrying costs on industry.

The Initial Regulatory Flexibility Analysis (IRFA) identifies the numbers of small entities that may be regulated by the action, describes the adverse impacts that may be imposed on these small entities, and describes alternatives to the preferred alternative that may minimize the adverse impacts on the small entities and the reasons they weren't chosen. In this case a preferred action has not yet been identified. This IRFA addresses the statutory requirements imposed under the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Fairness Enforcement Act (SBREFA) of1996.

The IRFA used the Small Business Administration (SBA) definitions of small entities. Small fishing entities were those that grossed less than $3.5 million, small shoreside processing entities were those employing fewer than 500 persons. Non-profit entities were also considered small. The SBA also requires that an entity's affiliations be considered in determining its size. Large numbers of small entities may be regulated by this action. These include an estimated 1,353 small groundfish catcher vessel entities, 33 small groundfish catcher/processors, 36 shoreside groundfish processors, and six CDQ groups. The total numbers of entities regulated by this action include 1, 366 groundfish catcher vessels, 79 groundfish catcher/processors, three groundfish motherships, 49 shoreside groundfish processors, and six CDQ groups.

There is some evidence that all alternatives compared to Alternative 1 would lead to somewhat reduced revenues, cash flow, and profits for the small entities, although this result is very uncertain. It was not possible to estimate the size of the impact on the small entities, although it was believed to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. Increased year-to-year fluctuations in gross revenues may occur, and these also were expected to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. The analysis was unable to determine whether or not there would be a disproportionate impact on small entities (compared to large entities). The analysis did identify additional impacts that were not adverse. Alternatives 2 and 4, and to a lesser extent Alternative 3, provide better opportunities for small business input into decision making about specifications since they provide for more informed public notice and comment.

An important component of an IRFA is a review of the alternatives that have not been chosen, but that minimize the burden of the rule on regulated small entities, and an explanation of why each of these has not been chosen. In this case, a preferred alternative has not yet been chosen. Therefore it has not yet been possible to complete this portion of the IRFA.

Environmental impacts and socioeconomic impacts resulting from changing fishing patterns as a result of the preferred alternative would be assessed annually in the EA/RIR/IRFA that accompanies the final harvest specifications.

At this time, a preferred alternative has not been identified. The Council seeks public comments on these alternatives and on the potential impacts on fishery participants and the environment. Alternative 1 appears to have the least potential for environmental effects but does not meet the objectives of this action. Considering administrative procedural aspects, Alternatives 2 is more desirable than Alternatives 1, 3, or 4. More time is provided under Alternative 2 to perform stock assessments, to develop Council recommendations and to allow NMFS to implement proposed and final rule making before the beginning of the fishing year. Alternative 4 for demersal shelf rockfish and option 1 for PSC limits, requires annual rulemaking, reducing the administrative efficiencies that could have been realized with a biennial harvest specifications process. Alternative 3 has the disadvantage of requiring changes to the Sablefish IFQ program to accommodate a new fishing year, potentially affecting the State fisheries, and providing less time for the stock assessment and rulemaking processes compared to Alternatives 2 and 4. Option 1 to Alternative 3 would eliminate the potential problems with the sablefish fisheries.

AGENDA D-1(c)
APRIL 2003
Supplemental

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March 27, 2003

FEDERAL EXPRESS

Mr. David Benton, Chairman
North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

Re: Refinements to the MCA's Proposed Alternatives for the Gulf of Alaska/Aleutian Islands ("GOA/BSAI") Harvest Specification Process

Dear Mr. Benton:

As you know, we represent the Marine Conservation Alliance. On September 25, 2002, we submitted two proposals for modifying the Alaska groundfish TAC-setting process.

Since that time, the U.S. Court of Appeals for the Ninth Circuit decided *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003). We understand, as well, that NOAA Fisheries has also been considering the appellate decision and the various TAC-setting proposals, including MCA's. On February 24, 2003, we submitted refinements to MCA's proposal to Lisa Lindeman of the NOAA fisheries Alaska Region's General Counsel's Office. Our February 24 letter to Ms. Lindeman is attached to this letter.

We would respectfully ask that the Council incorporate the refinements identified in our February 24 letter to Ms. Lindeman into MCA's proposals of September 25. In brief summary, our refinement for Option Two confirms that the enhanced notice and comment opportunities set forth in Option One can be included in Option Two. In addition, our refined Option Two would introduce a procedural choice point into the TAC-setting process following completion of the Council development and recommendation process for a given year's TACs. Specifically, NOAA Fisheries could have the choice of issuing the Council's recommendation as a proposed rule (actually, a second proposed rule, in light of our Option One) or else publish the recommendation as an interim final rule, as originally Option Two proposed. We believe these refinements provide extra insurance that Administrative Procedure Act requirements, along with substantive fisheries management requirements, can be met.

We appreciate your consideration of these refinements to MCA's proposals. We look forward to continuing to work with the Council on this important issue. Please do not hesitate to contact us if you have any questions or require additional information.

Sincerely,

David E. Frulla MLC

David E. Frulla
Shaun M. Gehan

Enclosure

Attachment

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February 24, 2003

VIA ELECTRONIC MAIL
AND ORIGINAL BY FEDERAL EXPRESS

Lisa L. Lindeman, Esquire
Alaska Regional Counsel
United States Department of Commerce
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
709 West 9th Street, Room 909-A
Juneau, Alaska 99802-1109

Re: MCA's Proposed Alternatives for the Gulf of Alaska/Bering Sea Aleutian Islands ("GOA/BSAI") Harvest Specification Process in Light of the Ninth Circuit's Opinion in *Natural Resources Defense Council v. Evans*

Dear Ms. Lindeman:

As you know, we represent the Marine Conservation Alliance ("MCA")[1] with respect to the North Pacific Fishery Management Council's ("NPFMC" or "Council") consideration of if and how to alter the administrative processes for issuing GOA/BSAI groundfish fisheries annual specifications. We appreciate this opportunity to share with you our analysis of MCA's proposals in light of the Ninth Circuit's recent decision in *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003) ("*NRDC*"), and prevailing Ninth Circuit law as to the notice and comment issues under the Administrative Procedure Act ("APA").

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[1] The MCA is a broad-based coalition of Alaskan coastal communities, fisheries participants, vessel owners, processors, and many other stakeholders in Alaskan fisheries.

As your concise memorandum to the NPFMC (dated January 30, 2003) correctly identifies, *NRDC* reaffirmed Ninth Circuit APA precedent. More specifically, *NRDC* relied heavily on its decisions in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), and *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993), both of which the MCA specifically took into consideration and then addressed in developing and explaining its proposals.[2]

In summary, the Ninth Circuit in *NRDC* based its decision on deficiencies in NMFS's invocation of good cause under the APA to waive prior notice and comment on the annual Pacific groundfish specifications. The major weakness that the Ninth Circuit found with NMFS's use of the "good cause" exception was its reflexive nature, *i.e.*, that it was, by regulation, invoked as a matter of course each year without the "context-specific analysis of the circumstances giving rise to good cause." *NRDC*, 316 F.3d at 912.

Significantly, however, the Ninth Circuit vacated Magistrate Judge Larson's holding as to the Magnuson-Stevens Act ("MSA") notice and comment issue. *Id.* at 912, 913. Consistent with that holding, we direct your attention to District Court Judge Stearns' much more detailed (than Magistrate Judge Larson's decision below in *NRDC*) holding in *Conservation Law Foundation v. Evans* ("*CLF*"), 229 F. Supp.2d 29 (D. Mass. 2002), *appeal pending*,[3] as to the MSA notice and comment issue. As you are likely aware, Judge Stearns in *CLF* held that, by the terms of the MSA, the notice and comment provisions of 16 U.S.C. § 1854(b)(1)(A) do not apply to framework actions initiated under regulations that implement a fisheries management plan.

With this background in mind, we would like to explain why the MCA proposals, with only minor reworking as an insurance policy, fit comfortably within the current legal framework extant in the Ninth Circuit.

I. The MCA Proposals and the *NRDC* Decisions

The MCA proposed two options: the first worked within the current regulatory framework, providing for enhanced notice and opportunities for comment during the specification promulgation process, and the second proposed a new framework system

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2 Throughout this letter we rely on the earlier work we have produced for MCA, specifically the September 25, 2002, comment letter to NPFMC Chairman David Benton and the "Memorandum of Law in Support of the Marine Conservation Alliance's Comments," which we have shared with Attorneys Pollard and Lepore in your office. We append these documents for your convenience.

3 By way of background, we are counsel for the defendant-intervenors in this case.

which would set the annual total allowable catch ("TAC") and other specifications[4] on a 15- to 18-month cycle. *See* attached letter to Chairman Benton, Parts III-IV. These proposals included enhanced opportunities for public input and notice specifically with pre-existing Ninth Circuit caselaw, particularly *Riverbend Farms*, in mind. Further, if MCA's initial proposal did not make this clear, the enhanced notice option set forth in MCA Option 1 is includable in MCA Option 2.

More specifically, MCA's Option 1, designed to work under current regulations, provided for an enhanced proposed rule that identifies a range of potential TACs and other specifications based on the best information available from the completed trawl surveys and other sources.[5] This proposal was designed to make sure that the final rule was a "logical outgrowth" of the proposed rule and to reduce and minimize chances of public confusion about the proposed rule. As explained below, such notice also can and should be published as a notice of proposed rulemaking in the *Federal Register* as a component of MCA's Option 2.

In addition, as part of both of MCA's Options, the MCA proposed increasing the opportunities for public input by expanding the *Federal Register* notice for the NPFMC's October and December meetings, and the Plan Team's September and November meetings, to describe in greater depth the decisions to be made and soliciting input by those unable to attend. MCA further suggested that the decision documents considered at these meetings be posted on the Internet for prior public review to the extent practicable.

These features enhancing opportunities for notice and comment were developed, as explained in great depth in the Legal Memorandum, Part III.A, to meet three essential APA requirements the Ninth Circuit set out in *Riverbend Farms*. The first is that the APA "contemplates [*Federal Register*] notice to all members of the public," not just the regulated community. 958 F.2d at 1486. Second, the proposal must give some indication, even if imprecise so long as the imprecision is explained, of the rule being considered. *Id.* and *id.* n.5. And, finally, that the rule-recommending body (such as the NPFMC in this instance or the Navel Orange Advisory Committee in *Riverbend Farms*), should generally take written as well as oral comments on the proposed rule. *Id.*

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4 Such as the overfishing levels ("OFLs"), acceptable biological catches ("ABCs"), prohibited species catch amounts, and seasonal apportionments, among others.

5 In certain respects, the process the MCA proposed is similar to that employed by the Council and NMFS in setting this year's specifications where the proposed rule (in contrast with past recent years' practice, which simply "rolled-over" existing specifications), actually anticipated the final rule. *See, e.g.,* 67 Fed. Reg. 76362 (Dec. 12, 2002). NMFS's effort in this regard may be able to provide more precision in tailoring the notice of proposed rulemaking to the rule finally adopted.

None of these predicates are in any way challenged by the Ninth Circuit's *NRDC* decision, which focused on the deficiencies in NMFS's good cause finding for waiving prior notice and comment. The MCA's proposal is premised on prior notice and comment and has ample opportunities for public input both at the Council level, as spelled out above, and at the Secretarial level through allowance for additional comment on what MCA termed an "interim final rule." Such opportunities make this a completely different situation than existed under the Pacific groundfish FMP at issue in *NRDC*.

That said, we are aware that the appellate court's decision in *NRDC* could raise two potential issues as to the MCA proposals, and we address those issues below.

II. Proposals for Modifications to MCA's Proposals in Light of *NRDC*

After reviewing *NRDC*, we discern two potential issues regarding MCA's proposals: (1) whether the *dictum* in *NRDC* regarding the apparent necessity of commenting to NMFS[6] (as opposed to the Council) prior to the effective date of the specifications creates any serious issues, and (2) whether MCA's proposed use of what it termed an interim final rule ("IFR") approach – which shares the need for a good cause finding with the "final rule with comment" employed by the Pacific Council – would be inconsistent with *NRDC*. We believe that we can address any potential for concern (insurance, actually, as opposed to triage), with only modest adjustments to MCA's proposals. We will address these issues in turn:

a. Comment to the Council Meets APA Requirements

As an initial matter, it is evident that the Ninth Circuit's statement in *NRDC* about "formal opportunity to comment to NMFS" is *dictum*. In contrast, the court's holding actually and tersely stated, "[w]e simply hold that NMFS failed to make a sufficient showing that good cause existed for 2001 . . . ." *Id.* at 912. The sufficiency of comment to a Fishery Management Council under the APA was never briefed or argued. If it were, it is more than likely the Ninth Circuit would uphold it as meeting the requirements of the law, for the following reasons:

First, as explained above, the Ninth Circuit in *Riverbend Farms* explicitly sanctioned comment to the rule-recommending body. *See* Legal Memorandum at 15-16. Secondly, in the MSA, Congress itself has delegated to the fishery management councils the duty of taking public comment on behalf of the Secretary – arguably exclusively – for any measures less than full-blown FMPs or amendments to FMPs. In other words, the MSA itself makes councils the primary body for receiving public

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6 "On the other hand, under the process that has been in place there is *no notice or formal opportunity to comment to NMFS*, which is the final decision-maker." 316 F.3d at 911-12 (emphasis added).

comment when developing framework actions. See Legal Memorandum at III.A.2. Finally, given that NMFS, in the form of the appropriate Regional Director, is statutorily a member of the councils, 16 U.S.C. § 1852(b)(1)(B), NMFS arguably "formally" receives public comment made to a fishery management council.

In conclusion, while we believe that were this issue put directly before a federal court in the Ninth Circuit, the prior direct precedent would be reaffirmed, the modifications suggested below obviate this issue for the purposes of MCA's proposal.

b. The Authority to Implement Specifications by IFR Should be Discretionary

As discussed in Part III.C of the MCA's Legal Memorandum, use of the IFR in MCA's proposal was designed as both an alternative to the current use of emergency MSA-based authority needed to insure that the fisheries opened each year and as a means by which NMFS could insure that the latest information was employed to govern the fishery at the earliest time possible in the fishing year. Because, generally speaking, use of an IFR requires a finding that waiving prior notice and comment is supported by a sufficient finding of good cause, however, the MCA thinks that its proposal (Option 2) can be adjusted modestly to better fit within the letter of the *NRDC* decision.

To step back first, though; routine good cause findings for waiver of prior notice and comment were not a linchpin for MCA's Option 2. Rather, MCA Option 2 was premised on the fact that there would be ample public input before this additional opportunity for post-publication notice and comment. The IFR was more discretely proposed as a way to, one, waive the 30-day "cooling off" period so that the newest information governs the fisheries sooner rather than later,[7] while, two, still allowing yet another level of comment, this time at the secretarial level. Viewed this way, *NRDC* technically provides no barrier to our plan.

We believe, however, that by making minor revisions to MCA's Option 2, the same benefits (explained below) can be achieved without any significant threat of successful legal challenge to the procedure. To start with, the "anticipated rule," *i.e.*, the preliminary specifications (either in ranges as we suggest or actual figures based on the best information before the Council as was done this year) discussed in MCA Option 1, could and should be published as a "notice of proposed rulemaking" ("NPRM") in the

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[7] As detailed in the Legal Memorandum, at III.C.1, the Ninth Circuit recognizes a different and less rigorous standard for waiving the 30-day cooling-off requirement of the APA.

Federal Register.[8] In fact, the suite of steps in MCA Option 1 designed to enhance notice and comment opportunities can be integrated into MCA Option 2.

The second change would be to specifically give the Secretary the flexibility to take the final recommendations for TACs and related measures coming from the NPFMC at its December meeting, and publish them *either* as an IFR for immediate effectiveness *or* as a second proposed rule, depending on the individual circumstances of each year. In either case, there would be a 15 to 30 day public comment period, and a final rule would issue.

It is the addition of this choice, *i.e.*, a choice between publication of either the IFR or a second proposed rule, which represents a modification of MCA's Option 2 (along with the use of the NPRM). The basis for making the choice between a second proposed rule and an IFR would be a particularized determination by the Secretary, made in light of: (1) the most recent scientific information (such as the status of the groundfish stocks as outlined in the SAFE document, of the prohibited species, and of protected species such as Steller sea lions); (2) the Council's ultimate recommendation in December, including if and how it diverged from the NPRM; and (3) consideration of the impact on the fishery of continuing to govern it using existing regulations (from, for instance, 15 months to 18 months) if implementation of the Council's decision were delayed because a second proposed rule was published. Further, the Secretary would be required to assess his or her duties under the MSA, the Endangered Species Act, and other applicable law such as the APA, the National Environmental Policy Act, and the Regulatory Flexibility Act, in making such a decision.

If this context-specific inquiry leads the Secretary to conclude that the rule should become immediately effective, then the rule could issue without additional advance notice and comment under *NRDC*, provided the Secretary's exercise of discretion in that regard met applicable legal standards. We note that this second choice point as to waiver of prior notice and comment does not appear to be legally compelled; as explained above, no matter what choice were made (IFR or second proposed rule), a NPRM would already have been published, and public comment taken, thereby distinguishing MCA's proposals from *NRDC*, even without addition of this second choice point.

However, even if NMFS does not want to rely on comment to the Council alone in fulfilling APA requirements (or, for that matter, if the Council's final recommended rule

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[8] Legally speaking, under the APA, there is really no difference between a notice of proposed rulemaking and a proposed rule. So long as it contains enough information to allow for public comment and is sufficiently detailed so that such comment is informed, a final rule may issue upon either so long as it is a logical outgrowth of the proposal.

diverges significantly from the anticipated rule), this type of analysis (IFR or second proposed rule set forth in ranges in the NPRM), by the Secretary is just the type of inquiry that the Ninth Circuit found in *NRDC* was contemplated by APA's good cause exception.

III. Conclusion

The MCA's proposal has many benefits, and any potential process-related issues are currently addressed, or can be addressed from year to year. For instance, considering MCA's Option 2 overall, a principal benefit is that stakeholders are not faced with the disruptions and uncertainties inherent in the need to rush a interim rule through by the beginning of the new fishing year (because the prior year's rule will be for 15 to18 months). Thus, NMFS can take more time to analyze the Council's proposals and prepare either the IFR or second proposed rule outside of the crunch of the end of year business. Even if the Secretary decides to issue those proposed specifications as a proposed rule; so long as (as should be possible) it is done by mid-January for a 15-day comment period, a final rule should be in place at or before the time the final rule is currently issued.

MCA's Option 2 also provides a routine and regular channel for public comment on the final specifications following the Council process, and also insures that the Secretary has a process in place that can accommodate the issuance of specifications that are outside the range anticipated in the NPRM if conditions so warrant.

Finally, MCA's Option 2, as refined, can accommodate a decision (if any) by a court with jurisdiction over the NPFMC that a framework action is subject to MSA notice and comment: In any given year, comment can either be made to NMFS directly via a second proposed rule or else MSA-specific procedures for post-publication notice and comment can be employed.[9]

We hope this letter addresses any concerns your office might have about MCA's proposals. Please do not hesitate to call either Shaun Gehan or me at (202) 662-9700, if you have any questions or require additional information. Thank you again for this opportunity to provide additional explanation and modest refinement of MCA's proposals regarding this important matter.

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[9] Instead of choosing to use an IFR in a particular year, as suggested above and which works for APA purposes, the Secretary could use his MSA-based emergency authority, 16 U.S.C. § 1855(c), to implement the new specifications, if conditions warrant.

Sincerely,

David E. Frulla

DEF/SMG;mlc

cc: Mr. Jonathan Pollard, Esquire (by electronic mail, w/ enclosures)
Mr. Dan Cohen, Esquire

UNITED STATES DEPARTMENT OF COMMERCE
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AGENDA D-1(c)
APRIL 2003
Supplemental

March 28, 2003

MEMORANDUM FOR: David Benton
Chair, North Pacific Fishery Management Council

FROM: Jonathan Pollard
Attorney-Advisor

SUBJECT: Review of the Marine Conservation Alliance's options for revisions to the Alaska groundfish annual fishery specification procedure

This memorandum presents NOAA General Counsel's review of the Marine Conservation Alliance's ("MCA") options for revisions to the Alaska groundfish annual fishery specification procedure. The MCA, through legal counsel, initially presented the Council with two options in a letter dated September 25, 2002. In light of the Ninth Circuit's recent decision in *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003), the MCA presented a modification of its Option 2 ("Modified Option 2") to Lisa Lindeman, Alaska Regional Counsel, in a letter dated February 24, 2003.

For the reasons described in NOAA General Counsel's March 21, 2003, memorandum[1] to Council Chair David Benton, we conclude that the options presented by MCA on September 25, 2002, are legally insufficient under the Administrative Procedure Act ("APA") as interpreted and applied by the Ninth Circuit Court of Appeals. However, we conclude that MCA's Modified Option 2 presents a fishery specification procedure that could result in Alaska groundfish fishery specifications that comply with the APA.

Summary of MCA's Modified Option 2:

Under MCA's Modified Option 2, Alaska groundfish fishery specifications would authorize fishing in the year in which they are specified and for the first three or six months of the next year. NOAA Fisheries would prepare the annual notice of proposed rulemaking to implement fishery specifications ("proposed specifications") after the October Council meeting based upon the best scientific information then available and in consideration of the Council's October recommendations. NOAA Fisheries would publish this notice of proposed specifications in the Federal Register as soon as practicable after the October Council meeting and solicit public comment for some period of time. Upon the close of the public comment period and in consideration of the recommendations made by the Council at its December meeting and any new information that has become available after the publication of the notice of proposed specifications, NOAA Fisheries either may (1) publish a final rule implementing the fishery specifications ("final specifications") in the Federal Register; or (2) if the desired notice of final

[1] Jonathan Pollard, *Summary of rulemaking requirements applicable to the development and implementation of Alaska groundfish fishery specifications* (March 21, 2003).

specifications would not be "a logical outgrowth" of the notice of proposed specifications, begin a second cycle of rulemaking to implement fishery specifications because in retrospect the notice of proposed specifications was inadequate to afford the public a meaningful opportunity to comment on the issues involved (for example, the desired final specifications diverge significantly from the notice of proposed specifications). In the event a second cycle of rulemaking is necessary, NOAA Fisheries could either (1) publish a second notice of proposed specifications in the Federal Register and solicit public comment, or (2) waive the requirement for notice and comment for "good cause" pursuant to the APA and directly publish final specifications with a post-effectiveness public comment period of 15 to 30 days.

Discussion:

MCA's Modified Option 2 contemplates fishery specifications that are effective for the first three or six months of the next year, thereby dispensing with the need for annual publication without APA notice and comment of interim specifications. This extension of the annual fishery specifications allows the groundfish fisheries to resume on January 1 of the next year without implementation of new annual interim specifications. Therefore, the APA problems associated with the current procedure's mandatory waivers of notice and comment for the interim specifications are eliminated.[2]

As with the current fishery specification procedure, MCA's Modified Option 2 still contemplates that NOAA Fisheries would prepare the notice of proposed specifications after the October Council meeting based upon the best scientific information then available and in consideration of the Council's October recommendations. However, the stock assessments that fully inform the next year's fishery specifications are not available until the second week of November. This schedule ensures that NOAA Fisheries' published notice of proposed specifications cannot take those November stock assessments into consideration, thereby perpetuating the risk that final specifications based on those November stock assessments might not be deemed "a logical outgrowth" of the proposed specifications.[3] NOAA General Counsel has advised that basing the initial notice of proposed specifications on consideration of the November stock assessments would obviate this risk.[4] However, MCA's Modified Option 2 addresses this potential legal insufficiency by requiring that the notices of proposed specifications identify ranges of harvest quotas and other specifications in order to notify interested persons of the issues involved in the rulemaking and afford the public a meaningful opportunity to comment on those issues. In addition, MCA's Modified Option 2 explicitly provides that NOAA Fisheries may either (1) implement final specifications after the December Council meeting without a second cycle of rulemaking, or (2) if the desired notice of final specifications would not be "a logical outgrowth"

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[2] *Id.*, at pages 9-10.

[3] *Id.*, at pages 4-6.

[4] *Id.*, at page 6.

of the notice of proposed specifications, begin a second cycle of rulemaking to implement the specifications. This opportunity for NOAA Fisheries to consider the context-specific circumstances and, when necessary, begin a second cycle of rulemaking instead of directly implementing the final specifications is another way to address the "logical outgrowth" problem.

In the event a second cycle of rulemaking to implement the fishery specifications is required, MCA's Modified Option 2 also provides that NOAA Fisheries may either (1) commence notice-and-comment rulemaking with the publication of a revised notice of proposed specifications in the Federal Register for public comment, or (2) publish a notice of final specifications, waiving the requirements for notice and comment and delayed effectiveness for "good cause" pursuant to the APA. MCA's Modified Option 2 would not by design prospectively *compel* waiver of notice and comment and delayed effectiveness; instead, it would *permit* NOAA Fisheries to invoke the exception on a case-by-case basis only when analysis of the context-specific circumstances supports it. A fishery specification procedure that allows invocation of the "good cause" exception only when circumstances warrant obviously would not violate the APA; however, as discussed more fully in the memorandum dated March 21, 2003, the APA would not permit NOAA Fisheries to base a waiver on generic concerns about timing and the complexity of fishery management.[5]

cc: James Balsiger
Susan Salveson
Jane Chalmers
Mariam McCall
Lisa Lindeman
Eileen Cooney
Elizabeth Mitchell

[5] *Id.*, at pages 7-10.

PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM D-1(c) TAC - SETTING

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	NAME	*AFFILIATION*
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