

Comments from the North Pacific Fishery Management Council

### **Council Motion for B-1 'Revised NEPA procedure':**

The NPFMC received an overview of NOAA's request for comments on a revised NEPA procedure, and an overview of a 'strawman' revised procedure developed by the subcommittee of the Council Coordination Committee (CCC), and offers the following comments:

#### General Comments:

The NPFMC believes that section 107 of the MSA provides not only a great opportunity for revising and improving the current regulatory process, but the mandate to do so. We also believe that this can be done in a manner that provides more meaningful public input and more relevant analytical documents, and which does not compromise the underlying environmental protections of NEPA. We believe that an appropriate procedure cannot be accomplished by minor revisions to the existing procedure, but will require a significant change in overall perspective, and recognition of the existing MSA process as an appropriate vehicle in which to incorporate environmental analyses to comply with the provisions of NEPA.

#### Specific comments relative to the 10 questions posed by NOAA:

- (1) In the context of fishery management actions, how should NOAA Fisheries, in consultation with the Councils and CEQ, revise and update agency procedures for compliance with NEPA?*

The NPFMC believes that the MSA provides nearly all the mechanisms and provisions to allow for compliance with the provisions of NEPA, and that the current application of CEQ regulations and Administrative Order 216-6 create a largely redundant and over-burdensome application of NEPA intent. A new Administrative Order, and new CEQ regulations if necessary, should be developed which would recognize the processes already existing under the MSA, and which would apply to development of fishery management actions under MSA.

- (2) What opportunities exist to improve efficiencies in NEPA process that have not been applied in the past?*

The NPFMC believes that the current regulatory, analytical, and review processes applied to fisheries actions under MSA greatly exceed the actual provisions of NEPA, and to some extent associated CEQ regulations. Development of a revised procedure that more accurately reflects the actual NEPA requirements, and recognizes the existing MSA provisions and processes, can greatly improve our ability to manage fisheries in an effective and timely manner.

- (3) How should the Councils and NOAA fisheries ensure that analysis is conducted at an appropriate scale for various types of fishery management actions? What criteria should be developed and applied to ensure that the level of analysis is commensurate with the scope of the action?*

The NPFMC believes that the level of analysis will necessarily vary depending upon the nature of the action and the available information. This is how analyses are currently conducted (whether labeled as an EA or an EIS), and this approach would not necessarily change under a revised procedure. Great caution should be exercised in attempting to create differential criteria,

or categories of actions, as these can be very subjective and the information available can vary greatly.

- (4) *Should NOAA Fisheries consider eliminating the distinction between an EA and an EIS and instead rely solely on an integrated environmental impact analysis?*

Yes. The current distinction between an EA and an EIS is relatively moot with regard to content, and only significantly affects process and timing. Categorical exclusions should still be allowed under the revised process.

- (5) *How should a 'reasonable' range of alternatives be defined for purposes of the new procedures?*

One of the greatest difficulties with the current application of NEPA is the effect of requiring the Councils to often consider unreasonable, unrealistic, and often contrived alternatives, merely for the sake of having some number of alternatives. A reasonable range of reasonable alternatives should be the primary goal, and this could be accomplished by considering whether alternatives are consistent with the National Standards contained in the MSA, whether they are consistent with the purpose and need statement, and whether a recent programmatic review has identified an overall policy for an FMP, and whether the alternatives are consistent with that policy. The Councils have the knowledge and expertise to determine a reasonable range of alternatives, depending on the problem being addressed, and are granted that authority under the MSA. In certain circumstances, only one alternative to the status quo may well be appropriate. In most circumstances, the 'No Action' alternative as required by CEQ regulations should be defined as the status quo situation (for example, No Action for determination of annual catch limits would be the status quo situation, rather than no fishing at all).

- (6) *What opportunities exist to develop a more effective scoping process? Should scoping occur at Council meetings and should Council meeting agenda notices serve as a traditional Notice of Intent to prepare and environmental analysis?*

The process under MSA provides for ample public notice and scoping processes. In fact, scoping does currently occur through Council meetings and agenda notices. This is a prime example of where NEPA provisions are redundant to Council process under MSA.

- (7) *Should the environmental analysis for different types of fishery management actions be developed on a different scale based on the action's duration or effect?*

The effect of an action cannot be known prior to an analysis being conducted. In many cases, the duration of an action may be indeterminate. Relative to scaling of analyses, see response to question 3 above.

- (8) *What key features of the current NOAA NEPA process or of CEQ's regulations should be modified in the new procedures?*

A meaningful revised procedure will require modification of numerous provisions of the current CEQ regulations and NOAA's Administrative Order for NEPA compliance. Primary among the areas requiring modification are defining reasonable alternatives, utilizing the Council process

under MSA to accommodate scoping and public input, and integrating the environmental analyses within the MSA process.

(9) *How should emergency actions be treated under the new procedures?*

Emergency actions should be promulgated under the existing MSA process for such actions, while incorporating relevant environmental analysis within that framework.

(10) *To what extent does the public feel that shorter comment periods (e.g. a minimum of 30 days) could affect your ability to participate effectively in the NEPA process?*

This question appears to be relevant to a proposal to make the current Council process a substitute for the traditional NEPA scoping/comment period, and would shorten that from 45 to 30 days (based on current Council practice relative to approving documents for public comment prior to final action).

#### Comments relative to 'strawman' proposal from CCC subcommittee

Generally the NPFMC believes that the MSA process is and should be the primary Act guiding development of fishery management actions, and that NEPA application in recent years has subsumed the MSA in that regard, resulting in an extremely cumbersome regulatory process and to some degree, erosion of Council authority provided under the MSA. We believe that the 'strawman' proposal developed by the CCC subcommittee is a definite step in the right direction, and appropriately reinstates the MSA as the primary vehicle for fishery management actions. A revised procedure such as outlined could result in meaningful regulatory streamlining. We support the concept of a single environmental review procedure, which eliminates the distinction between an EA and an EIS, and which incorporates the environmental analysis within the MSA process. To the extent this revised process is reflected in a new Administrative Order, and/or CEQ regulations pertaining to fishery management actions, this process would effectively establish a revised process and a revised baseline for NEPA compliance, and thereby also potentially reduce the use of litigation as a fishery management tool.

The NPFMC fully supports the development of a new and separate NOAA Administrative Order for fisheries management actions which reflects the procedure outlined in the CCC subcommittee draft. We fully support the intent of the 'strawman' procedure to instill reason in the development of reasonable management alternatives, and fully support the concept that it is not necessary to advance all alternatives for detailed study. We fully support the use of the current Council process to effect the requirements for scoping and public input, recognizing the additional opportunities for public input at the Secretarial level, following Council final action. While we recognize the potential desire of NOAA to create differential tiers of management actions under this new procedure (and thereby define some differential levels of analysis) we generally believe the level of environmental analysis will be determined by the scope of the action and the information available, rather than by a potentially subjective, up-front label. If such tiers are developed, the criteria and expectations for analysis should be made very clear in the draft procedure published in July, so that further comment on such tiers can be provided prior to finalizing the revised procedure.