



Regional Fishery Management Councils Coordination Committee



March 11, 2013



Mr. Sam Rauch
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910-3282



Dear Mr. Rauch:

At our recent Council Coordination Committee (CCC) meeting February 20-21, 2013 in Silver Spring, we discussed your February 19, 2013 memorandum regarding a policy directive (PD) on National Environmental Policy Act (NEPA) compliance for Council-initiated fisheries management actions under the Magnuson-Stevens Act (MSA). At that time, the Councils collectively expressed initial reactions and concerns with the PD, including the process by which it was issued, and it was agreed that we would re-engage the CCC NEPA subcommittee to work with your office on this issue and schedule the matter for additional discussion at our May 2013 CCC meeting. During our discussions on February 21 we also assigned CCC member (and NEPA CCC subcommittee member) Chris Oliver to work with the other Council Executive Directors to capture the various concerns in writing, prior to engaging your staff in discussions about the memorandum content. Those comments are captured below.



This letter will refer to specific provisions of the PD, which form the basis for our concerns. However, we first need to express two significant, overarching problems with this extremely important issue. The first is a substance problem, concerning the perspective that this PD accomplishes the Section 304(i)(1)(A) and (B) statutory intent of providing a more timely alignment of MSA and NEPA processes, reducing extraneous paperwork, providing more concise analysis, and generally streamlining the current status quo environmental review process. The second is a process problem: there has been a lack of proper consultation with the Councils as the PD was developed, as envisioned in Section 304(i)(1) and (4) of the MSA and as would normally occur under an operative partnership relationship between the entities primary responsible for implementation of the MSA in the broadest sense. Because of these two serious problems, we do not agree with the assertion in the memorandum that "...this PD satisfies the requirements



of section 304(i) of the MSA...”; it appears to us that the PD satisfies neither the letter nor the intent of section 304(i).

As a matter of substance, the procedures established in the PD seem tilted towards the MSA process complying with NEPA, as opposed to melding the two processes into a single, comprehensive, more concise, and more timely environmental review process, as envisioned in Section 304(i)(1)(A) and (B). We agree that “frontloading” should be our common goal, and much progress has been made in that regard. The PD appears to move towards the application of NEPA as the primary Act for fishery management actions, further subsuming the MSA within the NEPA construct, shifting the burden of NEPA process, analysis, and documentation more squarely on the regional Councils, and providing National Marine Fisheries Service (NMFS) further control of the Council process by expanding its oversight of the Council’s process under MSA. While the MSA legislative mandate does not contain the word ‘streamline’, it was clearly the intent of that legislation to accomplish this. We had hoped the next step in the refinement of a new environmental review procedure would accomplish the goals of 304(i)(1)(A) and(B): a “more timely” (faster), “more concise” (less process), procedure that conformed NEPA requirements to the fishery management action time lines in the MSA. However, it is unclear how the PD accomplishes these goals.

Our second primary concern is the assertion that the PD satisfies the consultation requirement as described in 304(i)(1) and (4). Section 304(i)(1) clearly requires the Secretary to work in consultation with the Councils to promulgate revised procedures. Certainly, receiving a newly-developed, complex PD on the evening prior to our CCC meeting does not constitute consultation. Further, the Section 304(i)(4) directs the Secretary, in cooperation with the Councils, “to involve the affected public in the development of revised procedures, including workshops or other means of public involvement.” In a normal Council process, the affected public are provided draft materials in advance of at least one public meeting where comment is considered, followed by a separately noticed meeting where all involved know final action can be taken. In this case, neither the Councils nor the affected public were involved in any genuine way before this PD came forward in memorandum form. Nor should any association with the previous involvement by our CCC NEPA subcommittee in 2008 be considered consultation. At that time, there was a brief process involving draft proposed regulations which were developed behind closed doors by the National Oceanic and Atmospheric Association (NOAA) and the Council on Environmental Quality (CEQ), and which have been considered either dropped or in abeyance for the past five years. It’s objectionable to now see a new PD, with different features developed without any consultation with the Councils whatsoever, be associated with assertions of compliance with Section 304(i). We do not believe that attempting to resolve an issue of such potential significance through a short-circuited policy directive¹, delivered with no notice at an interim CCC meeting, is good agency policy or representative of a healthy partnership relationship.

Following is more specific identification of concerns with the PD. They are not listed in priority order; rather they reflect somewhat the order of how fishery management action might typically be taken up in a Council forum. Taken individually, some of these concerns may appear

¹ This memorandum raises a more general issue of the use of policy directives relative to any number of fishery management issues, and whether and to what extent such policy directives are legally binding on the regional Councils.

innocuous, but taken cumulatively the overall result is to place a greater burden of NEPA compliance on the Councils, with greater control of the Council process by NMFS.

Purpose and Need Statement (page 10). By stating that NMFS determines the purpose and need statement for the NEPA document, the meaning of the phrase "...in coordination with the FMC if appropriate" is unclear, particularly given the consultation concerns expressed above. The "NEPA document" is now actually the integrated document containing the necessary analyses and documentation to satisfy all applicable laws, including the MSA and national standards, as well as NEPA. The purpose and need statement (often referred to as the problem statement) has typically been the purview of the Council process. Purpose and need for the action contains both explicit and implicit policy determinations, and importantly, forms the basis for the appropriate range of alternatives. Thus, one can read this section of the PD as an example of a shift towards greater control by NMFS, and a role of the Councils that is less autonomous than intended in the MSA.

Range of Alternatives (pg 4, second paragraph). It is unclear if this section calls for a proliferation of alternatives and a lengthening of the environmental review process. In some Council arenas, this would be the case, particularly if NMFS makes final determination of the necessary range of alternatives. In this regard, the PD does not appear to streamline the process.

Consolidated Documents (pg. 11, paragraph 5). In most cases the Council prepares nearly all the fishery management action analytical documents through consolidated documents that incorporate NEPA and all other applicable laws under the MSA umbrella process. This is a practice that is encouraged in NOA 216-6. The Directive encourages NMFS and Fishery Management Councils to work together early on process, for which there is nothing wrong in concept. However, the statement on page 8 that "NMFS remains responsible for the scope, objectivity, and content of NEPA documents" in effect provides control oversight on all documentation, not just the NEPA document, thus compromising the autonomous role of the Councils as prescribed in the MSA. While a case can be made that frontloading standardizes timelines, it remains unclear how this proposal streamlines the MSA and NEPA processes.

Determination of NEPA Document Status (page 6). The PD asserts that NMFS determines which level of analysis and which NEPA document is required (Categorical Exclusion, Environmental Assessment, or Environment Impact Statement). In some regions this has typically been a Council determination, based on input and advice from NMFS, while in other regions it has been determined by NMFS. We believe that this decision should, at a minimum, be a joint decision by the Council and the respective regional office of NMFS. Asserting that this decision is solely NMFS' decision is a subtle, but potentially significant, shift in control of the overall fishery management actions process, and is objectionable.

Determination of Adequacy (page 8 and page 12). The early determination of adequacy feature of this new proposal is a very troubling aspect of the PD, if the language is taken literally. The PD asserts that NMFS has the responsibility to ensure adequacy of the NEPA analysis (hence all applicable law because it is a consolidated document) at both the draft and final stages of development. While we recognize that NMFS must determine adequacy of the Secretarial review document prior to Secretarial approval consideration, asserting that NMFS determines adequacy at early draft stages in the Council process is a significant shift in control of the content and timing of Council actions. Attempting to achieve 'perfection' in NEPA documents (i.e.,

bulletproof against litigation), and allowing NMFS to make that determination prior to the document becoming a Secretarial action, has the potential to allow NMFS to completely control the Council process, and concomitantly determine Council priorities. This has been a subject of much discussion at the regional levels, and has been a major factor inhibiting the development of regional operating agreements. In fact, this assertion in the PD would effectively “amend” the process prescribed in the MSA for development of Council actions. Further, it remains unclear if requiring “NEPA completeness” in the early stages of the Council process may actually exacerbate the potential for litigation, and delay implementation of actions, based on the expectations created by this PD.

Record of Decision (page 12 and elsewhere). The PD asserts that in the record of decision (ROD), NMFS may go beyond the MSA provisions to either approve, disapprove, or partially approve a Council recommendation: “...*the ROD may also include a determination as to whether there is a need for additional conservation and management in the fishery.*” This asserted (and open-ended) authority appears to go well beyond what is specified in the MSA relative to NMFS authority over Council decisions, and appears to constitute a very significant change relative to the NMFS’ authority to substitute their policy perspectives for the Councils’ policy decisions. It is unclear whether this PD claims that Secretarial approval can occur on an additional conservation and management alternative added by NMFS to the consolidated analytical document, which the Council has never seen or considered.

Additional NEPA Processes. The PD establishes three new additional processes, with the stated intent that they may be used to increase efficiency and utility of the NEPA process: (1) a NEPA advanced planning procedure (NAPP); (2) a NEPA compliance evaluation (NCE); and (3) a Memorandum of NEPA compliance (MNC). While these processes ostensibly would allow for tiering in fishery management plan/amendment processes (and therefore could potentially reduce the need for additional NEPA analysis), it is unclear from the PD how these three additional processes would result in streamlining, or more importantly, who (NMFS or the Council) makes the relevant determinations of compliance. The addition of new defined processes since the 2008 process, together with the five-year closure of further consideration of the 2008 proposal, clearly break any tie with the 2008 process or any claim that there has been a continuous process.

NMFS Office of Program Planning and Integration Process to Revise AO-216 (page 2 of the cover memo introducing the PD). While not mentioned in the PD itself, this is a critically important aspect relative to the overall end result of the process to align NEPA and MSA. The cover memo references the ongoing efforts (since 2008) of the Office of Program Planning and Integration (PPI) to revise and update NOAA’s policy guidance on NEPA compliance (i.e., revise Administrative Order 216). The memo further states that “*NMFS determined that the NOA revision process would be an appropriate mechanism for addressing the MSA mandate.*” This is disappointing, because since 2008 the Councils have been repeatedly assured that the PPI process to revise AO-216 would not affect fisheries actions under the MSA, as there was a separate legislative mandate relative to that issue. This reversal of position leaves confusion as to the relationship between the PD and the pending revisions of AO-216 by the Office of PPI. The revisions to AO-216 will apparently be subject to a formal public comment period prior to being finalized. Presumably CEQ will be involved in that process, but nowhere is there any provision for “consultation with the Councils,” as is prescribed by section 304(i)(1)and(4) of the MSA. Because the final AO-216 revisions appear to now define NEPA compliance, this leaves

the Councils in the untenable position of not even knowing how the provisions of the PD will be incorporated into those revisions. Whether intentional or not, keeping the Councils in the dark as to the ultimate resolution of this issue seems to be the result of these concurrent activities.

In summary, we have great concerns about the provisions of this PD. We appreciate your introductory remarks during initial discussions at the CCC meeting regarding the status of the PD, in terms of its otherwise appearance as final, particularly since this PD is now posted on the NMFS PD website. We look forward to further discussions with your staff regarding the PD content, and to further discussions at our May CCC meeting regarding a genuine consultation process prior to implementation of this PD.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan L. Wolford". The signature is written in a cursive style with some loops and flourishes.

Dan Wolford

2013 CCC Chairman

C: Council Chairs, Vice Chairs, and EDs
Dr. Paul Doremus
Mr. Alan Risenhoover
Mr. Steve Leathery
Ms. Emily Menashes
Mr. William Chappell