

Review of 1997 Operational Guidelines and 2005 draft Operational Guidelines and Survey Questions - March 26, 2013

I. Summary

This paper provides a high-level overview of the 1997 Operational Guidelines and the 2005 draft revisions, which proposed new concepts some of which have been implemented to various degrees.

II. Background

The Operational Guidelines explain how NMFS and the Councils should work together to integrate the many statutory requirements that apply to the development of fishery management actions. The guidelines currently in effect were last updated in 1997. The 1997 Operational Guidelines take a prescriptive approach, describing roles and responsibilities, identifying five phases of the process, and setting forth schedules of events and assigning tasks for each phase.

In 2002, as part of the Regulatory Streamlining Project (RSP), NMFS committed to revising the Operational Guidelines in a way that would better promote the quality and efficiency of regulatory decisions; increase the likelihood of success in litigation; increase transparency and predictability; and prevent unnecessary delays. To initiate the revisions, NMFS convened a team of regulatory experts from regional offices and headquarters to map the process for development and implementation of fishery management actions, identify key points in the process where challenges could occur, and design mechanisms to ensure those key milestones were appropriately addressed. The result of this effort was the 2005 draft Operational Guidelines which proposed a fundamentally different approach to the guidance. The 2005 draft Operational Guidelines were outcome-oriented and based on principles of cooperation and shared responsibility with Councils, frontloading of review, and use of the MSA and NEPA processes as a framework for necessary analyses. The 2005 draft identified standards to assess the adequacy of fishery management actions and provided a model process that could be followed to ensure effective communication and reconciliation of statutory timelines.

NMFS circulated the 2005 draft and requested regions and councils to implement the provisions on a test basis. While the 2005 draft has never been fully implemented, some of the features have proven useful and are being applied to various degrees in different regions.

The 2007 MSRA amended the MSA to require NMFS to revise and update its procedures for complying with NEPA. Because NEPA is a critical element of the fishery management process, additional work on Operational Guidelines was suspended pending completion of the NEPA Guidance. In February 2013, NMFS issued a Policy Directive revising and updating its NEPA procedures. In addition, in January 2013, the Office of the Inspector General recommended that NMFS finalize its Operational Guidelines. NMFS is now initiating this effort to finalize revised Operational Guidelines. As a starting point, NMFS will review and assess the experiences of

Regions, Councils, and the NOAA Office of the General Counsel under both sets of Operational Guidelines in order to identify best practices as well as additional opportunities for increasing streamlining. The long-term target dates for this project are:

- Provide draft assessment and options for revisions to Council Coordinating Committee - February 2014
- Provide new draft Operational Guidelines for review by Council Coordinating Committee - February 2015
- Issue final operational guidelines - September 30, 2015

III. Description of 1997 and 2005 Operational Guideline Materials

A. 1997 Operational Guidelines

1. Overview and Approach

The “1997 Operational Guidelines: Fishery Management Plan Process” (1997 OGs) is an 82-page document that provides an overview of applicable laws and their effects on the FMP process; describes 5 key phases of the fishery management process; provides a phase-by-phase description of events and requirements associated with the other applicable laws; specifies roles for Councils and NMFS during each phase for each law; includes detailed descriptions of each phase and all the events, requirements, and responsibilities associated with all applicable laws during each phase; and provides a sample table of contents and template for organizing integrated documentation of compliance with MSA and other applicable laws.

The five phases described in the 1997 OGs are:

- Phase I – Planning
- Phase II – Preparation of Draft Documents
- Phase III – Public Review and Council Adoption
- Phase IV – Final FMP/Amendment Review and Approval; and
- Phase V - Continuing and Contingency Fishery Management

Phase I is the “Planning Phase.” The guidelines indicate that during this phase, the Council identifies the management unit in need of management, conducts NEPA scoping if applicable, and begins initial consideration of potential impacts including social impacts and other impacts relevant to NEPA, ESA, CZMA, and MMPA.

Phase II is the “Drafting Phase.” For Phase II, the 1997 OGs:

- Identify linkages among the required analyses and describes the need for informed council recommendations;
- List of relevant guidance documents;
- Include a sample table of contents and template for an integrated analysis and encourages use of integrated documentation;
- Provide checklists for documentation.

Phase III is described as “Public Review and Council Adoption.” During this phase, NMFS and the public review the drafts of necessary analytical documents that the Council prepared. This phase involves the review of the draft FMP and other related documents (draft NEPA documents, draft RIR, IRFA, including ESA analysis) by the public and NOAA/NMFS, the transformation of the draft FMP to a final FMP, and the adoption of the FMP by the Council. This phase sets forth a structured process for NMFS regions and HQ to coordinate and provide formal letters of comment to councils on draft documents prior to initiating Secretarial review under the MSA. This section also specifies how many copies of draft documents must be provided.

Phase IV, is the Review and Approval stage. The guidelines explain the statutory timelines set forth in the MSA, explain the significance of “transmittal,” and state how many copies of documents must be provided. They also encourage consultation among Regional and HQ fishery management and legal staffs prior to the declaration of the transmittal date, such that there is general agreement on the completeness and adequacy of the Council's FMP/amendment to make the statutory evaluation and determinations under the Magnuson-Stevens Act and other applicable laws.

Phase V is the Continuing and Contingency Management Phase. This phase is not so much part of the series of tasks in development of a management recommendation as it is the activities associated with ongoing management under an existing FMP. It provides guidance on use of the framework concept, types of amendments to regulations, the use of the emergency provisions of the MSA, and Secretarial FMP/Amendments. Guidance in this section pertains to:

- Continuing management after the FMP (or amendment) is in place through use of frameworks, regulatory amendments, corrections, and technical changes
- Emergency provisions of the Magnuson-Stevens Act
- Disapproval/partial approval of an FMP/amendment
- Secretarial FMP/amendment, and
- Rebuilding overfished fisheries.

2. Additional Guidance on Transmittal Date

NMFS has provided additional guidance on determining the transmittal date in Policy Directive – 01-101-01, “Procedures for Initiating Secretarial Review of FMPs and Amendments March 1, 1991.” This document sets forth additional procedures and actions necessary to initiate Secretarial review. Among other things, it specifies that the following documents are required in order to initiate Secretarial review:

1. FMP/amendment if any
2. Proposed Regulations if any
3. RIR
4. RFA analysis if applicable
5. Applicable NEPA document
6. An ESA section BO or signed informal consultation
7. PRA package if applicable.
8. Source documents, if any (4).

B. Overview of 2005 Draft

1. Overview and Approach

The “2005 Draft Operational Guidelines” (2005 Draft) proposed a different approach to procedural guidance. In contrast to the 82-page step-by-step approach set forth in the 1997 OGs, the 2005 Draft is a 23-page document consisting of 13 pages of text and a 10-page table. The 2005 Draft strengthens the emphasis on early communication, cooperation, and coordination between NMFS and Councils, and introduces the term “frontloading,” which means that all relevant reviewing parties participate early in the process to ensure that all significant legal and policy issues are identified to the extent practicable, and which requires that draft documents are circulated to all relevant NMFS and Council staff in advance for review and comment. Instead of prescribing a specific set of schedules, tasks, and roles, the 2005 Draft proposes an outcome-oriented, quality-based approach. Like the 1997 OGs, it identifies standards and guidance documents, but then moved the templates and examples to the web.

The 2005 Draft begins with a statement of the philosophy of cooperation and shared responsibility with Councils, frontloading review, and use of the Magnuson-Stevens Fishery Conservation and Management Act and National Environmental Policy Act (NEPA) processes as a framework for necessary analyses. It provides general descriptions of the roles of various parties and identifies standards for assessing the adequacy of fishery management actions and a model is described for ensuring effective communication and reconciliation of statutory timelines. However, specific tasking and scheduling assignments are left to NMFS and the Councils to work out through individual agreements.

The 2005 Draft calls for Councils and NMFS Regional Staffs to undertake a joint planning process that occurs at least once annually and provides for a 12- to 24-month planning horizon and to develop written ROAs that specify responsibilities and steps that will be taken to prepare documentation for fisheries conservation and management decisions.

It sets forth guiding principles which include:

- Use of the open and public processes required by the MSA and the National Environmental Policy Act (NEPA) as the basis for incorporating all relevant factors into fisheries conservation and management decisions and providing for appropriate review and effective public participation.
- Use of Frontloading.
- NMFS/Council collaboration in the preparation of documents (note the contrast to the 1997 specification of roles).
- Regional Operating Agreements with Councils.
- Coordination with NMFS Headquarters.
- Identification of 4 Critical Feedback Points (CFPs) and use of Advisory Statements. When the model is followed, at CFPs the Regional Administrator will provide written feedback that the process and documentation are adequate and complete. (Compare to this to the 1997 approach of specifying a review process during Phase III and encouraging coordination among parties before declaring a transmittal date in Phase IV.

- Expedited approval and implementation process.
- Concurrent Reviews. These reviews are encouraged throughout the process of developing documentation. Sequential reviews delay the decisions from moving forward in a timely manner.
- Use of a model process, which if followed, should lead to expedited review and implementation process at the end, with better litigation results and improved decision-making.

Finally, the 2005 Draft describes the model process that identifies key points where critical errors may occur and requires feedback at those key steps, leaving room for discretion and flexibility in terms of working out particular staffing questions and approaches for complying with stated standards. The narrative defines new terminology used in the model, provides an overview of the key steps in the process, and describes the four key phases of rulemaking, which are similar to the first four described in the 1997 OGs.

A fundamental feature of the model is the requirement at four steps for an affirmative statement from the Regional Administrator (RA) that documentation and process are adequate and complete to proceed with the action. Barring the issuance of such a statement, actions being developed pursuant to the model should not move forward until deficiencies are corrected. Details regarding how each Council and NMFS Regional Office would implement procedures to achieve this sufficiency would be left to them to develop collaboratively through Regional Operating Agreements (ROAs).

The 2005 Draft concludes with a ten page table, which is the heart of the model. It sets forth 16 steps and 3 substeps that potentially apply to any fishery management action, and for each step specifies who needs to be involved, what standards apply, what timing factors must be considered, and what, if any, documentation is necessary, along with additional commentary where applicable. Depending on the type of action being prepared (Fishery Management Plan vs. regulatory amendment), the type of NEPA analysis necessary, and the potential for effects on protected species or essential fish habitat, the number of steps that would be applicable could be less than 16. Steps that apply in only limited circumstances are identified.