Introduction to NMFS Policy Directive: National Environmental Policy Act Compliance for Fishery Management Actions under the Magnuson-Stevens Act

I. Overview

The National Marine Fisheries Service (NMFS) is issuing this Policy Directive (PD) to revise and update its policies and procedures for complying with the National Environmental Policy Act (NEPA) in the context of Magnuson-Stevens Act (MSA) fishery management actions. This PD clarifies roles and responsibilities of NMFS and the Regional Fishery Management Councils (Council or FMCs), explains timing and procedural linkages, provides guidance on documentation needs, and fosters partnerships and cooperation between NMFS and FMCs on NEPA compliance. This PD satisfies the requirements of section 304(i) of the MSA and features the following key components:

- Roles and Responsibilities: The PD sets forth the statutory roles and responsibilities for NMFS and the Councils as dictated by NEPA and the MSA. While providing clarity on ultimate responsibilities, it encourages collaboration and early integration of processes. For Atlantic Highly Migratory Species (HMS), NMFS retains responsibility over all aspects of compliance.

- Timing: The PD encourages completing as much of the NEPA process as possible at the Council level, while recognizing the logistical demands of the fishery management process. It establishes a procedural nexus linking NEPA's requirements with MSA's. The nexus highlights the requirement for the Regional Administrator to determine a package "complete" to initiate MSA review; sets forth the timing requirements of the MSA and NEPA, and includes risk-based considerations for determining the NEPA schedule.

- Documentation: This section clarifies that the statement of purpose and need in the NEPA analysis should be linked to the fishery management need the Council is addressing. It also addresses the alternatives to be considered and what "reasonable" alternatives should be, and it provides guidance, derived from CEQ's 40 Most-Asked Questions, on defining the "no action" alternative in a fishery management context. It also specifies that, based on information in the NEPA analysis, it may be appropriate for a ROD to go beyond the question of approving or disapproving the recommendation at hand, and may include an identification of additional conservation and management needs, as appropriate.

- Improvements/Efficiencies: This section includes instructions for optional use of NEPA's tiering, and incorporation by reference, provisions in a fisheries context. It also identifies best practices for early collaboration using technology and early communication.

- Relationship to other Documents: This section describes the PD's relationship to other existing documents and policies including the NMFS and Council1997 Operational Guidelines, the NOAA NEPA Administrative Order (NAO 21-6), and CEQ's NEPA regulations.

II. Background

The 2007 Magnuson-Stevens Reauthorization Act (MSRA) required NMFS to "revise and update" agency procedures to comply with the National Environmental Policy Act (NEPA) for fisheries actions. The MSRA set forth an aggressive schedule, requiring proposed procedures by July 12, 2007, a 90-day public comment period, and final procedures by January 12, 2008.

In developing a proposed approach, NMFS conducted extensive public outreach which included the following:

- Consulted with CEQ and the FMCs
- Posted Trigger questions and CCC Strawman proposal for 60-day public comment
- NMFS made presentations at each FMC meeting on Trigger Questions and Strawman during the 60-day period; NMFS received over 1600 comments
- NMFS published proposed rule May 2008 with a 90-day comment period; conducted 3 NMFS-sponsored public hearings and a public workshop; conducted presentations at meetings of all eight FMCs; and received over 150,000 public comments.

NMFS's initial approach was to propose a rule creating new regulatory requirements aligning the decision-making processes of the councils and NMFS under the MSA with the analytical and procedural requirements of NEPA. The proposed rule would have required Council consideration of draft NEPA documents prior to recommending measures, and NMFS consideration of a second NEPA document during Secretarial review of the measures. These comment periods could be less than 45 days each in limited circumstances, but in no case could the combined total of days be less than 45, which is the minimum comment period established by CEQ's regulations. The proposed rule would have included regulatory provisions pertaining to inadequate and incomplete information, a new categorical exclusion (CE) for exempted fishing permits (EFPs), and it would have changed the name of the NEPA compliance document for fisheries to reflect the integration of fisheries management and environmental considerations. It also would have established a new tiering mechanism modeled on FMP "frameworks." These provisions were highly controversial.

NMFS prepared a draft final rule and submitted it to OMB for review in October 2008. At OMB's request, NMFS withdrew the rule from OMB review in December 2008. Shortly thereafter, NOAA's Office of Program Planning and Integration (PPI) initiated a NOAA-wide process to "revise and update" NOAA's policy guidance on NEPA compliance. NMFS determined that the NAO revision process would be an appropriate mechanism for addressing the MSRA's mandate. NMFS is currently working with PPI to ensure that the revised draft NAO addresses the unique requirements of the MSA fishery management process. However, because the PPI process has moved slowly, the Congressional deadline for addressing these

requirements was 2008, other important NMFS internal policy documents are on hold pending resolution of the NEPA/MSA issue (such as much-needed update to the Operational Guidelines, and the need to address regional inconsistencies), NMFS has determined that it is appropriate to implement a PD providing guidance to NMFS and Councils on aligning NEPA and the MSA. This guidance is based on the extensive public input already received through the proposed rule process. The PD is intended to be consistent with the revised and update NOAA NEPA procedures that would be set forth in the revised NAO. An additional opportunity for formal public comment will be provided when the draft revised NAO is complete.

III. Addressing Key Issues and Concerns

NMFS published the proposed rule on May 14, 2005, and provided for a 90-day public comment period. During the public comment period, NMFS delivered presentations at 8 FMC meetings and conducted three NMFS-sponsored public listening sessions: one in Washington, D.C. metro area, one in St. Petersburg, FL, and one in Seattle, WA. In addition, NMFS, Council representatives and CEQ held an interactive public workshop in the Washington D.C. area. By the close of the public comment period, NMFS had received over 150,000 comment letters, many of which were form letters urging NMFS to withdraw the proposed rule and start over.

The main issues raised in the form letters included the following perceived objections: negative substantive impacts on various aspects of ocean health, noncompliance with law, delegations of NEPA authority to the FMCs, restrictions on public participation, and negative effects of the use of new terminology. A subset of approximately 25 letters included highly detailed comments on different aspects of the proposed rule. Some FMCs submitted individual letters of comment. In addition six of the FMCs co-signed a jointly submitted letter expressing opinions ranging from a recommendation to retain the status quo to a recommendation that NMFS finalize the proposed rule, but with several important adjustments.

NMFS analyzed all of these comments and identified approximately 30 general topics containing a total of over 300 different individual points being made, some in favor and others against various individual aspects of the proposed rule. The main sources of controversy related to different features of the proposed new process including: roles and responsibilities of NMFS and Councils under NEPA and MSA, time periods for comment, use of the Council process for taking NEPA comments, defining the range of alternatives, the no-action alternative, addressing incomplete and unavailable information, the relationship between frameworking and tiering, and documentation of public comments and responses. Additional concerns focused on the use of FONSIs for previously analyzed significant impacts, and "alternatives."

NMFS has prepared this PD in consideration of the extensive outreach that has taken place on this topic. This overview highlights some of the major concerns raised via the outreach efforts and explains how the PD addresses them.

A. Roles and Responsibilities

<u>Proposed Rule</u>: In the proposed rule, NMFS described three alternative interpretations of the relationship between the FMCs and NMFS as they execute their roles established by the MSA

and NEPA: (1) FMCs are fully responsible for NEPA compliance; (2) NMFS is solely responsible for NEPA compliance; or (3) the procedures for NEPA compliance should reflect the different roles of NMFS and the FMCs as advisory bodies and action agency. The proposed rule's approach was based on option 3 and would have recognized the statutory requirements applicable to each entity and established new regulatory requirements for consideration of NEPA-related public comments during the MSA process at the Council level.

Comments Received: Public comments varied greatly regarding this approach. Some commenters expressed concern that the proposed rule gave too much authority to the Councils, other expressed concern that it unfairly burdened and constrained the Councils and Council process.

Policy Directive: The PD, like the proposed rule, is based on the interpretation in option 3 above. However, rather than creating a new regulatory structure that would establish additional steps for fulfilling these roles, the PD restates statutory duties in a clear format, identifies special issues pertaining to complying with NEPA in an MSA context, and establishes a procedural nexus between NEPA and MSA compliance. The approach in the PD is intended to foster partnerships and cooperation between NMFS and the Councils while retaining NMFS oversight and legal responsibility for NEPA compliance, and recognizing the Councils' important authority under the MSA.

The PD recognizes MSA-mandated roles and responsibilities for Councils with respect to conducting public meetings and developing management recommendations. It recognizes NMFS as the Federal agency responsible for ensuring NEPA compliance. It encourages NMFS and the FMCs to prepare and make available as much NEPA documentation as possible (given timelines and resource needs) during the FMC's development of its management recommendation. This includes providing opportunities for public participation as early in the process as possible while accommodating fishery resource management needs. However, NMFS remains responsible for the scope, objectivity, and content of the NEPA documents and for ensuring overall compliance with NEPA.

For HMS, NMFS retains responsibility over all aspects of compliance.

B. Timing and Flow of Process

Proposed Rule: The proposed rule would have required two public comment periods on the NEPA analysis: one at the FMC level and one during NMFS's review. The rule would have required the comment periods to be 45 days each, except in limited circumstances, and in no case could the combined periods be shorter than a total of 45 days. Thus two comment periods would exist under the proposed rule whereas CEQ regulations provide for only one. Two of the main goals of these provisions were to align public comments with the appropriate point in the MSA process for informing and influencing policy outcomes and to maintain the capability for FMCs to respond rapidly to management needs when necessary in no more than two meetings, which is not a frequent occurrence, but which can be very important to address urgent issues when they arise. This approach was similar to the approach in the CEQ regulations for legislative proposals.

Comments Received: While some public comments supported the idea of requiring certain types of comments to be raised at Council meetings, many expressed strong objections for varying reasons. Some of the concerns were that the proposed approach would hamper public participation in the process, give too much authority to councils, or use NEPA to inappropriately constrain the MSA Council process.

Policy Directive: NMFS has determined that CEQ's regulations are appropriate for the process of revising and updating agency NEPA procedures for MSA actions. This PD is an internal NOAA directive and it does not include any proposed new regulatory time periods or process. Rather it retains the existing comment period structure set forth in the CEQ regulations. The PD is intended to enhance NEPA compliance by establishing the procedural nexus between NEPA and MSA based on completion of the Council action for transmittal to NMFS. It also encourages conducting as much of the NEPA process as practicable at the Council level so that the Councils and the public are informed during the development of a management recommendation of potential positive and negative environmental impacts of a proposed action and alternatives. This means that NMFS and the Councils should engage the public as early as practicable in the development of EAs and EISs and, when practicable, actively involve the public in scoping and identifying alternatives for both EAs and EISs. However, the PD also recognizes that there will be variations regarding the extent to which this can happen, and establishes minimum requirements, factors to consider in maximizing public participation while allowing fishery management needs to be addressed in a timely manner.

C. Documentation:

Proposed Rule: In recognition of the fishery-related refinements and new regulatory procedures, the proposed rule would have changed the title of the NEPA compliance document from "Environmental Impact Statement" to "Integrated Fisheries Environmental Management Statement" (IFEMS). In addition, the proposed rule would have created a new tool for planning and analyzing ahead of time which would be documented in a Memorandum of Framework Compliance.

Comments Received: There was widespread opposition to this proposed title change. There were mixed comments pertaining to the use of the Memorandum of Framework Compliance. Many commenters supported the idea of increasing efficiencies in the NEPA process. Some commenters expressed concern that the Framework compliance process would exclude the public.

Policy Directive:
The PD retains use of traditional NEPA documents: CE, EA, EIS. It also adds additional guidance pertaining to purpose and need, consolidated documents, and the contents of the ROD.

It provides that the identification of purpose and need for the NEPA analysis should be linked to, and consistent with the fishery management need an FMC is addressing. For FMC-initiated fishery management actions, NMFS's decision is whether to approve, partially approve, or disapprove an FMC-recommended measure. If appropriate, the ROD may include a

determination as to whether there is a need for additional conservation and management in the fishery. In light of NMFS's oversight responsibilities and its ability to develop Secretarial actions where necessary, each EIS provides important information pertinent to determining whether such a need exists. Thus a ROD may serve the dual purposes of documenting a decision on a specific FMC recommendation as well as providing useful information to assist NMFS in its management and oversight roles consistent with MSA section 304. CEQ's requirements for contents of the ROD are set forth at 40 CFR 1505.2.

In the interest of promoting efficiencies, the PD includes a section describing a non-exclusive, non-mandatory, set of approaches that may be used to increase efficiency and utility of the NEPA process. One of these approaches is the NEPA Advanced Planning Procedure (NAPP), which is structurally similar to the proposed Memorandum of Framework Compliance, but has been re-worked to clarify that it is based on CEQ's provisions for tiering.

D. Alternatives

Proposed Rule: The proposed rule would have retained the requirement to consider "all" reasonable alternatives, while clarifying that "reasonable" must be derived from the statement of purpose and need, and clarifying that an alternative is not reasonable if it is inconsistent with MSA and national standards, if it is impractical or ineffective, or if it would fail to achieve stated goals. The proposed rule also would have clarified that "no action" does not mean the literal "no action" (i.e., does not mean open access or closures due to sunsets), but rather does mean "continued management of the fishery as it is being managed" with reasonable assumptions with the point being to provide a reasonable baseline for comparison.

The proposed rule would have defined the "no action" alternative to mean continued management of the fishery as it is being prosecuted at the time development of the NEPA analysis is initiated, taking into account the underlying management regime with assumptions as to how it would continue being prosecuted into the future. It further stated that "'No action' does not mean the literal fishery management regime that would result in the absence of a Federal action."

Comments Received: NMFS received a variety comments on this topic. Some commenters supported these provisions. Others felt that the rule would have excluded some reasonable comments from consideration. Still others felt that the provision would result in consideration of an overbroad array of alternatives. There was a suggestion to change the requirement from consideration of "all reasonable alternatives" to "a reasonable range of reasonable alternatives." NMFS also received feedback that in some cases the "no action" alternative should be the literal absence of action.

Policy Directive: The requirement to consider "all reasonable alternatives" is set forth in CEQ's regulations at 40 CFR 1502.14(a). NMFS does not have authority to modify CEQ's regulations. However, we believe that by strengthening the linkage between the Council's management need and the statement of purpose and need in the NEPA document, and emphasis on the requirement that an alternative is reasonable only if it meets the stated purpose and need, this issue can be

addressed under the CEQ regulations. In addition, the PD states that NMFS will apply this standard consistent with relevant case law which provides for a rule of reason.

The PD also provides guidance on defining the "no action" alternative. Consistent with CEQ's discussion of the "no action" alternative in the 40 Most-Asked Questions, there are two distinct interpretations of "no action" that may be utilized, depending on the nature of the proposal being evaluated. If the "no action" alternative will literally result in the sunsetting of a management measure, it may be reasonable to consider the "no action" alternative to be the fishery absent the management measure that would sunset. If, on the other hand, the underlying management will not sunset, it is reasonable to use a continuation of the status quo, or baseline, as the "no action" rather than the hypothetical scenario of no federal management. This determination depends on the circumstances. The key is to provide a meaningful analysis of anticipated results of the proposed action relative to the status-quo fishery management regime.

Finally, in circumstances where there is significant uncertainty or controversy as to what the appropriate "no action" alternative is, the NEPA document should explain why the agency chose the "no action" alternative it did, state that it had considered a different "no action" alternative, and ask the public to comment on the issue of the appropriate "no action" alternative. It might also be prudent and helpful in some circumstances to analyze the other "no action" approach as an additional alternative in the NEPA document.

E. Other Elements of the Proposed Rule

Proposed Rule: The proposed rule would have established a new CE for certain types of EFPs where impacts have been analyzed within an overarching analysis. It would have clarified how NEPA's requirements concerning incomplete and unavailable information and conflicts of interest are applicable to MSA actions; and it would have allowed for programmatic arrangement with the Council on Environmental Quality (CEQ) to address page limits of IFEMS and NEPA requirements for emergency and interim rules.

Comments Received: Comments varied widely on these proposals. Some commenters supported the increase used of CEs. Other expressed concern that significant impacts would not be analyzed. There were also differing perspectives on the other elements.

Policy Directive: The PD does not include any of these elements. The NAO under development with PPI will address CE's. The provisions in CEQ's regulations will continue to govern issues pertaining to unavailable information and conflicts. NMFS believes that CEQ's provisions are sufficient. Rulemkaing would be required to alter these provisions.

F. Additional Approaches to Improving Efficiencies

Some of the commenters on the proposed rule encourage NMFS to better utilize the efficiencies provided for under NEPA such as tiering. However, the proposed "Frameworking" approach in the proposed rule was controversial. In the PD, NMFS has reworked its approach to utilizing

efficiencies. The PD contains a section describing a non-exclusive, non-mandatory, set of approaches that may be used to increase efficiency and utility of the NEPA process.

In this section the PD describes the "NEPA Advanced Planning Procedure" (NAPP). CEQ's guidance on NEPA promotes the use of tiering as described in 40 CFR 1502.20. This section describes a model process for utilizing tiering in a fishery management context. The model is based on the concept of tiering and using advanced planning to promote greater efficiencies in conducting NEPA analyses. Its use is optional, and it does not represent the only approach to tiering or NEPA efficiencies. This section also provides for use of a "Supplemental Information Report" (SIR). In the event that an NAPP is not in use, on a case-by-case basis, an SIR may be used to document why further NEPA analysis is not necessary. The SIR is a concise document that contains the rationale for determining if new information, changed circumstances, or changes to the action are not significant and thus why a supplemental NEPA analysis is not required. Both of these approaches require a factual determination that adequate analysis has been conducted.

This section also provides guidance on improving partnerships with FMCs. NMFS Regions are encouraged to work cooperatively with their FMC partners to identify additional opportunities for coordination and cooperation. Strategies that may be beneficial include: using new technologies; real-time sharing of documents; and "frontloading."

G. Proposal for alternative approaches.

Several commenters submitted suggestions for alternative approaches to the strategies contained in the proposed rule. They included the following suggestions:

(1) NMFS should do the NEPA analysis up front, then provide it to the FMCs. The FMCs would be constrained to considering only the alternatives in the NMFS analysis.

(2) NMFS would retain control of NEPA review, and would be required to utilize independent science teams, use best science available, consider impacts on ecosystems, encourage public participation in the process, and prevent FMCs from ignoring sound science. This approach would recognize that FMCs may recommend a measure beyond the scope of the NMFS analysis, but, if this happened, the FMCs would be required to justify their recommendations with analysis equally rigorous to NMFS's.

(3) Retain the Status quo, but improve planning and increase use of tiering. A related suggestion was to build on the Draft Operational Guidelines and NMFS Policy Directive 30-131 which delegates NEPA authority to Office Directors, Regional Administrators, and Science Directors, and focus on improving NMFS's internal guidance and compliance.

(4) The FMCs should be completely in charge of the NEPA analysis until transmittal. The FMC, rather than NMFS, should declare the date of transmittal. This approach would also add more responsibilities at the FMC level, such as requiring that an FMC, prior to making a recommendation, analyze and prepare responses to public comments. In essence, this proposal would have the FMC develop a preliminary final EIS-level document before it votes, and it

would give the FMC full authority to determine the adequate level of NEPA analysis (EA vs. EIS) and the structure of the analysis including the range of alternatives.

(5) NMFS and the FMCs should develop a concurrent, but coordinated process for NEPA review by NMFS and the development of fishery management recommendations by the FMCs. During the joint planning process, the FMCs and NMFS could develop an outline of their proposed action and alternatives together, after which the NEPA process could occur under a NMFS process in parallel with the FMC's fishery management process.

Policy Directive. NMFS believes that the approach set forth in the PD most appropriately and effectively complies with the mandates of NEPA, the MSA, and the MSRA. Some of these suggestions are similar to the basic alternatives we considered in the proposed rule; others contain variations on the allocation of roles and responsibilities. Some would require rulemaking.

(1) The first suggestion is a variation of the alternative we considered in the proposed rule of assigning sole responsibility for NEPA compliance to NMFS; however this suggestion adds the requirement that NMFS must complete the NEPA compliance prior to the FMCs vote, and limits the FMCs to considering the options analyzed in NMFS's analysis. This approach would contradict the requirement of the MSA for the FMCs to develop management recommendations through their public processes and then submit those recommendations to NMFS. NMFS then reviews these recommendations for compliance with applicable law. Proposals to modify this statutory process are beyond the scope and jurisdiction of this PD.

(2) The second suggestion contains some concepts that are currently implemented and will continue to be implemented under the PD, such as the use of the best available science and encouragement of public participation. In addition, the PD requires NMFS to retain responsibility for NEPA compliance, although it encourages cooperation and coordination with FMCs in light of their MSA responsibilities and Congressional direction to integrate the processes. The recommendation that FMCs be required to justify their recommendations with analysis equally rigorous to NMFS's appears to create a duplicative analysis. NMFS believes it is more efficient, effective, and responsive to the clear MSRA mandate to integrate NMFS's and the FMC's considerations of environmental impacts into a "sole" analysis.

(3) NMFS agrees that effective coordination and integration can be achieved through improvements to internal policies and guidance documents. This PD satisfies the requirements of section 304(i) for NMFS to update its procedures for compliance with NEPA and integrate NEPA compliance with the process for development of fishery management actions.

(4) The fourth suggestion is similar to the alternative considered in the proposed rule to vest sole responsibility for NEPA compliance with the FMCs. This approach is not consistent with NEPA's requirement that NMFS, the federal action agency, maintain responsibility for NEPA compliance.

(5) The fifth suggestion does not appear to implement the requirement of section 304(i) of the MSRA to integrate NEPA compliance into the processes for development of fishery management

actions under the MSA. This alternative also appears to put the development of the proposed action and alternatives ahead of the public processes required by both NEPA and the MSA. However, the PD does promote the importance of teamwork and joint planning.