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DRAFT Proposed 'Revised Procedure' for MSA/NEPA Compliance

(February 28, 2007 draft as proposed by the subcommittee of the Council
Coordination Committee (CCC))

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) was recently amended with explicit direction to the Secretary of Commerce to "revise and update agency procedures for compliance with NEPA". Moreover, the revised MSA specifically states that such procedures "shall integrate applicable environmental analytical procedures, including time frames for public input, with the procedures for preparation and dissemination of FMPS, plan amendments, and other actions taken or approved pursuant to this Act (the MSA)...", and that "the updated agency procedures promulgated in accordance with this section shall be the sole environmental impact assessment procedure for FMPS, plan amendments, regulations, or other actions taken or approved pursuant to this Act (the MSA)". The revised procedure proposed herein envisions a single environmental review procedure, and a single environmental impact assessment (EIA), that pertains to all FMPS, amendments, or regulations promulgated through the regional fishery management council (RFMC) process under MSA. The distinction between an environmental assessment (EA), and environmental impact statement (EIS) becomes moot, as does the determination of 'significance'. This is because the single environmental assessment procedure (EIA) will be the same for any actions taken under MSA, and will generally be designed consistent with the higher standards typically associated with preparation of an EIS, in order to better ensure compliance with the underlying intent of NEPA. While it is envisioned that the level of analysis will be dictated by the issue at hand and the information at hand, this approach allows for the development of some tiers, related to the significance of the action (no impact, minor impact, major impact, for example), which may be created to frame the range of alternatives and necessary level of analysis.

It is proposed that the appropriate way to achieve this revised procedure is to develop a new NOAA Administrative Order (AO) which would be specific to fisheries actions under the MSA. NOAA and possibly CEQ regulations would be amended as necessary to reflect the application of this revised procedure. This new AO will specify the procedures to be used to integrate the environmental impact assessment (EIA) of proposed fishery management actions within the existing MSA process, in a manner which meets the NEPA requirements, and thereby achieve functional equivalency relative to the NEPA statute. The MSA process will be the vehicle for promulgating all fisheries actions, but will include measures necessary for NEPA compliance, as well as requirements of all other applicable Acts and Executive Orders, all incorporated into a single document. This Order would not affect any other existing regulations, Orders, or Acts, including the existing AO216-6, as it pertains to other NOAA line offices, which are promulgated under authorities other than the MSA.

Philosophy of proposal:

1. All actions approved or taken pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) must comply with the National Environmental Policy Act (42 USC 4321-4347).
2. MSA actions, under this approach, need not necessarily comply with *existing* CEQ regulations (40 CFR 1500-1508), which govern the procedural provisions of the Act (NEPA). However, *new CEQ regulations may need to be developed* to reflect the new AO.

3. NOAA's environmental review procedures for implementing NEPA (NAO 216-6) must be replaced or rewritten with new procedures specifically for MSA actions, in the form of a new Administrative Order, but which include key CEQ regulatory provisions.
4. The single analytical process will be based on development of an environmental impact assessment (EIA), rather than make any distinction between an EA or EIS (and there is no need to determine whether 'significant' effects on the quality of the human environment will occur). The higher standard of the EIS model will be the default, though range of alternative and level of analysis would depend on the issue at hand and the information at hand. Some definition of tiers (no impact, minor impact, major impact, for example) may be included to frame the analytical requirements.
5. The Secretary cannot comply with timelines specified in the MSA, if the NEPA process commences only upon receiving the Council's proposed plan. Therefore, to implement the provisions of PL109-479, that the NEPA and MSA timeframes be consistent, the Council FMP development process (MSA) needs to be the primary vehicle for identifying alternatives and conducting the requisite analyses. The EIA (NEPA document) will be incorporated within the overall MSA analytical document.

Solution

- Develop a single environmental impact assessment (EIA) procedure to be used for all MSA actions.
 - Categorical exclusions for actions that have no environmental impact may still be utilized.
- Proposed Procedure will replace the CEQ regulations and NAO 216-6 as procedure for complying with NEPA for MSA actions.
 - Procedure will capture the substance of the CEQ regulations regarding analytical content and opportunities for public review and input.
 - Procedure will modify NAO 216-6 procedure to replace CEQ/NOAA's public involvement and notice requirements with the MSA public involvement procedure.
- Procedure and sample analytical format **attached**.
- Proposed new administrative order will specify the detailed new procedures.

Changes to CEQ regulations:

- Amend CEQ regulations as necessary to state that 40 CFR Parts 1500-1508 will not apply to actions approved or taken pursuant to the MSA (or revise with regulations which mirror the new procedures).
- For MSA actions, the newly developed, integrated procedure defined here will be the functional equivalent of the provisions of NEPA as implemented by CEQ regulations.
- Issue revised CEQ regulations consistent with provisions in the new AO.

Changes to NAO 216-6:

- Amend NAO 216-6 to state that administrative order does not apply to actions approved or taken pursuant to the MSA.
- Issue new administrative order and/or procedural regulations, as appropriate, specifying procedure for satisfying NEPA compliance for MSA actions (as contained in the new AO).
- RFMCs should be identified as partners in preparing the EIA to satisfy NEPA procedures.
- Remove references to fishery actions from NAO 216-6.

Changes to the Operational Guidelines for the Fishery Management Process

- Revise to incorporate process as described.

Practical effects of proposed process

- The Council shall complete a scoping process to identify the range of reasonable alternatives to accomplish the Council's management objective and to identify the issues which should be examined to evaluate the merits of those alternatives. In completing the scoping process, the Council shall solicit public comment.
- After completing the scoping process, the Council shall identify a reasonable range of reasonable alternatives to accomplish the Council's objectives. The Council shall explain its reasons for selecting those alternatives and for rejecting any other alternatives which may have been identified in the scoping process.
- After selecting the range of reasonable alternatives, the Council shall evaluate the ecological, social, economic, health, aesthetic and cultural effects of each alternative on the affected environment. The Council shall also evaluate the cumulative impact on the environment of each such alternative. In developing the required analyses, the Council shall solicit public comment regarding the effects of each alternative.
- After completing the evaluation provided for above, the Council shall review the analysis and may select a preferred alternative, or combination of alternatives, to accomplish the Council's objective. The Council shall explain the purpose of, and need for, the action and the reasons for selecting the alternative adopted by the Council. The Council shall solicit public comment on the analysis and the alternatives, including the preferred alternative if identified.
- After considering the analysis and public comments, the Council shall select a preferred alternative for recommendation to the Secretary for approval pursuant to the MSA. The submittal package to the Secretary shall include the necessary environmental analyses (EIA) required pursuant to 40 C.F.R. Part 1500 (*or the necessary revised regulations*).
- The Secretary shall review the FMP and NEPA documents (EIA) to determine if the requirements of MSA and NEPA have been satisfied. If not, the Secretary shall disapprove the FMP or FMP amendment. Practically, the EIA and other analyses would be evaluated concurrently and jointly throughout the development process by both the Council and appropriate NMFS personnel, to ensure that MSA, NEPA, and other requirements have been satisfied.

New process

Steps in MSA-NEPA analytical process		MINIMUM timeline to be specified in procedure
RFMC initiates analysis	<ul style="list-style-type: none"> - develops purpose and need - develops alternatives 	1 st RFMC meeting (may take several meetings to refine problem statement and alternatives depending on complexity and controversy of analysis)
Public input	<ul style="list-style-type: none"> - scoping commences with RFMC/NMFS action to initiate analysis - public notice of proposed analysis in RFMC agenda, and in RFMC newsletter/ website - public comment invited as written letters to RFMC or oral testimony at RFMC meeting 	
Initial Review Draft	<ul style="list-style-type: none"> - RFMC/NMFS prepare draft analysis that addresses MSA, NEPA and other analytical requirements (see outline) - may be distributed at or before RFMC meeting, depending on size and complexity of analysis; RFMCs/NMFS should try to circulate document 14 days before start of meeting (mailing, website) 	before/at 2 nd RFMC meeting
RFMC reviews IR draft, approves for public review	<ul style="list-style-type: none"> - RFMC will consider scoping comments (on the purpose and need and the alternatives) and comments on the draft document - RFMC will approve draft for public review (perhaps following staff alterations to the document) 	2 nd RFMC meeting (may also take multiple meetings and iterations of draft before document is ready to be released for public review)
Public Review Draft distributed <i>(functional equivalent of CEQ Draft EIS)</i>	<ul style="list-style-type: none"> - mailed to RFMC, any affected agencies, or interested persons who have requested document - public notice of availability announced in RFMC agenda (published in FR); posted on RFMC website 	distribution to occur a minimum of 23 days before first day of meeting at which final action is scheduled
Public comment	<ul style="list-style-type: none"> - public comment accepted as written letters to RFMC or oral testimony at RFMC meeting 	minimum 23 days (RFMC/NMFS may specify a longer comment period or an end date for accepting written letters)
RFMC Final Action	<ul style="list-style-type: none"> - RFMC will consider public comments - RFMC will respond appropriately to issues raised in public comment - RFMC decision on recommended action 	3 rd RFMC meeting (RFMC may request further analysis in response to public comment before they are ready to take final action)
Secretarial Review Draft <i>(functional equivalent of CEQ Final EIS)</i>	<ul style="list-style-type: none"> - Document will include RFMC/NMFS response to written public comment on the public review draft - NMFS will follow existing procedure to check document for legal compliance (NEPA and other laws) 	after 3 rd RFMC meeting
Transmission to SoC/HQ	<ul style="list-style-type: none"> - RFMC transmits Secretarial Review Draft to Secretary - ?NMFS files document w/ EPA as Final EIS 	begins 90 day approval timeline
SoC decision on amendment	<ul style="list-style-type: none"> - SoC concurrently signs Record of Decision 	within 90 days of transmission

Sample Format for Analytical Document Supporting Fishery Action Under MSA

Title page

(equates to CEQ 'cover sheet')

- Identify title of analysis; responsible agencies; contact person with contact information; designation of draft, public review draft, etc; one paragraph abstract; date by which comments must be received

Table of Contents

Table of Figures and Tables (as appropriate)

List of Acronyms and Abbreviations (as appropriate)

Summary

- Identify objectives or purpose of action *(equates to CEQ 'issues to be resolved')*
- Identify alternatives and brief comparison of impacts under the alternatives (summary table often works well) *(equates to CEQ 'major conclusions')*
- In Secretarial Review Draft, describe RFMC's recommended action, identify how factors were balanced among alternatives to enter that into the decision, identify environmentally preferable alternative, and state whether all practicable means to avoid or minimize environmental harm from recommended alternative have been adopted, or why not
- In Secretarial Review Draft, include areas of controversy including those raised by the public

Problem statement

(equates to CEQ 'need for action')

Purpose or objectives of action

Alternatives for proposed action

- explore range of reasonable alternatives
- include a no action alternative (defined as status quo)
- identify the preferred action if possible
- if appropriate discuss why alternatives may have been eliminated from detailed study (this discussion may instead be appropriate in an appendix)

NEPA effects analysis (as appropriate)

- environmental consequences of the alternatives (including direct, indirect, and cumulative effects, and describing any adverse environmental effects which cannot be avoided should the proposal be implemented)
- discuss affected environment as necessary to understand environmental consequences

EO 12866, Regulatory Impact Review analysis (as appropriate)

- description of the affected fishery
- economic analysis of the expected effects of each alternative relative to the baseline

Analysis of consistency of action with MSA, National Standards

Regulatory Flexibility Act analysis (as appropriate)

- description and estimate of the number of small entities affected by the proposed action
- estimate of the economic impacts on small entities

EO 12898, Environmental Justice analysis (as appropriate)

- assess whether there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the proposed action

List of preparers, list of agencies/persons consulted

List of those to whom analysis is distributed (for the Public Review Draft)

References, Index (as appropriate)

Appendices (as appropriate)

NEPA Compliance in Implementation of Fishery Actions Under MSA

	NEPA Process – Environmental Impact Statement			Proposed MSA EIA approach
	NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)	
Notice of Intent	--	1501.7	5.02d (p.15)	- No NOI. Differs from CEQ regulations.
		- agency shall publish NOI in FR	- agency shall publish NOI in FR - NOI shall include proposed action and alts, logistics of scoping process, contact info for RPM - NOI initiates formal scoping process - written and verbal comments must be accepted during identified comment period - 30 day min formal comment period from date of NOI	
Scoping	--	1501.7	4.01w (p.9), 5.02d (p.15)	- RFMC/NMFS will solicit public comment on proposed analysis in RFMC newsletter and on website - RFMC will consider comments and revise problem statement and alternatives accordingly - RFMC meetings will provide opportunity for public input
		- agency shall invite participation	- solicit comprehensive public involvement and interagency and Indian tribal consultation	
		- agency shall eliminate from study issues that are not significant - agency may hold scoping meetings	- scoping may be satisfied by meetings, or request for comment on documents; or discussion papers	

NEPA Compliance in Implementation of Fishery Actions Under MSA

	NEPA Process – Environmental Impact Statement			Proposed MSA EIA approach
	NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)	
<p>EIS content</p> <p>102(C)</p> <p>Include:</p> <ul style="list-style-type: none"> - environmental impact of proposed action - adverse environmental impacts of proposal - alts - relationship between local short-term uses of environment and long-term productivity - irreversible/irretrievable commitments of resources of proposal 	<p>1502.10</p> <ul style="list-style-type: none"> - cover sheet - summary - TOC - purpose/need - alts - affected environment - environmental consequences (to include all elements required by statute) - list of preparers - circulation list - index 	<p>5.04b (p.19)</p> <ul style="list-style-type: none"> - cover sheet and TOC - purpose/need - summary - alts - affected environment - environmental impacts of proposed action and alts including cumulative impacts - circulation list and list of those consulted - index and appendices as appropriate 	<ul style="list-style-type: none"> - include all these elements in analysis, as well as other requirements of MSA and other laws/ executive orders - see <i>sample document format for a fishery action analysis</i> 	
<p>Draft EIS</p>	<p>1502.9</p> <ul style="list-style-type: none"> - draft statements shall satisfy to extent possible the requirements established for final statements in 102(C) 		<ul style="list-style-type: none"> - RFMC/NMFS will prepare a Public Review Draft of the analysis that will satisfy to extent possible the requirements established for final statements in 102(C) 	

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		NEPA Process – Environmental Impact Statement		Proposed MSA EIA approach
		NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)
Filing and Distribution of Draft/ Final EIS	102(C)	1506.9, 1502.19	5.04c (p.20) - preliminary review of D/FEIS by NEPA coordinator 1 week before package is submitted so changes can be incorporated - NEPA review package (D/FEIS and transmittal memos) to NEPA coordinator for clearance signatures min. 5 days before filing with EPA	- EPA filing requirements will only apply to Secretarial Review Draft (functional equivalent of CEQ Final EIS). No NOA for Draft EIS. Differs from CEQ regulations.
	- [final] statement shall be made available to President, CEQ, and public	- file statement with EPA, who will give to CEQ (counts as President) - distribute to affected and interested parties at same time as EPA	- 5 copies to EPA by 3pm each Friday - at same time, copies of D/FEIS and transmittal letter should be sent to interested parties - EPA publishes NOA 1 week later	- Public Review Draft will be circulated to the RFMC, interested entities and persons, minimum 30 days prior to the first day of the RFMC meeting at which final action is scheduled to occur - Draft will be accessible to the public on RFMC website and available by request
Comments on Draft EIS	---	1506.10, 1503.1	5.04c.6 - date of NOA determines start of review period - public comment period on DEIS is min. 45 days	- Public Review Draft will be available for a minimum of 30 days before RFMC final action. Differs from CEQ regulations.
		- agency shall request comments of appropriate Federal, State and local agencies, Indian tribes, affected public and organizations		- RFMC/NMFS will consult with affected Federal, State and local agencies and Indian tribes (some of whom are represented on RFMC) - RFMC/NMFS will request comments from public and specifically any persons or organizations who express interest

NEPA Compliance in Implementation of Fishery Actions Under MSA

		NEPA Process – Environmental Impact Statement		Proposed MSA EIA approach	
NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)			
Final EIS	1503.4	5.04c6	5.04c6	5.04c6	5.04c6
	<ul style="list-style-type: none"> - all comments or summaries thereof must be attached to FEIS regardless of merit - agency must assess comments individually and collectively, and respond appropriately (5 ways) - must state response in FEIS 	<ul style="list-style-type: none"> - must include all substantive comments or summaries of comments received during the public comment period of the draft EIS - comments must be responded to in an appropriate manner 	<ul style="list-style-type: none"> - RFMC/NMFS will include all written comments on the Public Review Draft in Secretarial Review Draft (functional equivalent of CEQ Final EIS) - RFMC will consider all comments, written and oral, on both drafts and respond appropriately - RFMC response to written comments will be included in the Secretarial Review Draft 		
Record of Decision	1505.2, 1506.10	5.04c.7	5.04c.7	5.04c.7	5.04c.7
	<ul style="list-style-type: none"> - agency shall prepare a concise public record of decision ROD shall: <ul style="list-style-type: none"> - state the decision - identify all alternatives, including the environmentally preferable alternative, and how factors were balanced to enter into the decision - state whether all practicable means to avoid or minimize envtl harm from selected alt have been adopted, or why not - no decision may be recorded until later of 90 days after NOA for DEIS or 30 days for NOA of FEIS 	<ul style="list-style-type: none"> - ROD will be made available through appropriate public notice (but not necessarily FR) 	<ul style="list-style-type: none"> - RFMC will include recommendation to Secretary of Commerce on the MSA action as part of the Secretarial Review Draft - RFMC will address these elements in its recommendation 		
					<ul style="list-style-type: none"> - NEPA analysis (EIA) will be submitted with MSA action, and ROD will be finalized along with SOC decision on MSA action

NEPA Compliance in Implementation of Fishery Actions Under MSA

		NEPA Process – Environmental Impact Statement		Proposed MSA EIA approach
NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)		
Termination	--	5.01c, 5.04c.8	<ul style="list-style-type: none"> - environmental review process may be terminated at any stage - termination must be announced in the FR and explained in writing to EPA - for supplemental NEPA documents, must notify CEQ if process stops after draft SEIS but before final 	<ul style="list-style-type: none"> - proposed MSA action, including NEPA analysis (EIA), may be terminated at any stage - RFMC newsletter announces if analysis does not go forward
Public Involvement	1506.6	<ul style="list-style-type: none"> - agencies shall make diligent efforts to involve the public in preparing and implementing NEPA procedures - agencies shall provide public notice of hearings/mtgs, documents - in cases of national concern notice to include publication in the FR - hold hearings/mtgs where appropriate - solicit appropriate info from public 	<ul style="list-style-type: none"> - RPMs must make every effort throughout process to encourage participation of affected Fed, State, local agencies, Indian tribes, and interested persons - RPM must provide public notice of NEPA hearings/mtgs, documents 	<ul style="list-style-type: none"> - public involvement keystone of RFMC process – MSA requires regular, open meetings; timely public notice of time, place, and agenda of meetings; interested persons may present written or oral comments - RFMC meetings/agendas noticed in FR, documents available on RFMC websites (or by request)
Agency Responsibility	1506.5	<ul style="list-style-type: none"> - EIS shall be prepared directly by or by a contractor selected by the lead agency, or by a cooperating agency 	<ul style="list-style-type: none"> - public involvement may be solicited through hearings/mtgs and through comments as appropriate 	<ul style="list-style-type: none"> - RFMC meetings held regularly - public invited to comment on any RFMC agenda item
	2.02 (p.3)	<ul style="list-style-type: none"> - NOAA NEPA coordinator will review and provide final clearance for all NEPA envtl review documents - a designated RPM will carry out specific proposed actions in the NEPA process 		<ul style="list-style-type: none"> - procedure should reflect that RFMCs are partners in preparing NEPA analyses and complying with NEPA procedures

NEPA Compliance in Implementation of Fishery Actions Under MSA

NEPA Process – Environmental Impact Statement				Proposed MSA EIA approach
NEPA Statute	CEQ Regulations	NOAA NEPA procedures (216-6)	NOAA NEPA procedures (216-6)	
Categorical Exclusion	<p>1508.4</p> <ul style="list-style-type: none"> - category of actions which do not individually or cumulatively have a significant effect on the human environment and which therefore require neither an EA nor an EIS 	<p>5.05, 6.03d.4</p> <ul style="list-style-type: none"> - actions that individually and cumulatively do not have the potential to pose significant effects to the quality of the human environment - examples given 		- same as NOAA procedure
Emergency Actions	<p>1506.11</p> <ul style="list-style-type: none"> - when emergency circumstances require an agency to take action with significant environmental impact without observing these regulations, the agency should consult with CEQ 	<p>5.06</p> <ul style="list-style-type: none"> - if timelines associated with EIS limit attaining the objectives of the emergency action, the NEPA Coordinator may consult with CEQ about alternative arrangements for NEPA compliance 		- same as NOAA procedure

NMFS Request for Comments

To inform the development of the new procedures, NOAA Fisheries is soliciting public comment on the following topics:

- 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?
- 2) What opportunities exist to improve efficiencies in the NEPA process that may not have been applied in the past?
- 3) How should the Councils and NOAA Fisheries ensure that analysis is conducted on 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?
- 4) Should NOAA Fisheries consider eliminating the distinction between an environmental assessment (EA) and environmental impact statement (EIS), and instead, rely solely on an integrated environmental impact analysis?
- 5) How should a “reasonable” range of alternatives be defined for purposes of the new procedures?
- 6) What opportunities, if any, 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 an environmental analysis?
- 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?
- 8) What key features of the current NOAA NEPA process or of CEQ’s regulations should be modified in the new procedures?
- 9) How should emergency actions be treated under the new procedures?
- 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?

Dates and Addresses: Comments should be directed to NEPAprocedures@noaa.gov and must be received by COB on April 20, 2007.