Marine Conservation Alliance
promoting sustainable fisheries to feed the world

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Adak Fisheries, LLC
Alyeska Seafoods
Alaska Crab Coalition
Alaska Draggers Association
Alaska Groundfish Data Bank
Alaska Pacific Seafoods
Aleutian Islands Brown Crab Coalition
Aleutian Pribilof Island Community Development Association
Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, St. George
At-Sea Processors Association
Bristol Bay Economic Development Corp.
Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, Ugashik
Central Bering Sea Fishermen's Association
St. Paul
City of Unalaska
Coastal Villages Region Fund
Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, Tununak
Groundfish Forum
High Seas Catchers Cooperative
Icicle Seafoods
Mid-Water Trawlers Cooperative
Mothership Group
PV Excellence
PV Ocean Phoenix
PV Golden Alaska
Norton Sound Economic Development Corporation
Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain
Pacific Seafood Processors Association
Alaska General Seafoods
Alyeska Seafoods, Inc.
Golden Alaska Seafoods, Inc.
Peter Pan Seafoods, Inc.
Premier Pacific Seafoods, Inc.
Supreme Alaska Seafoods, Inc.
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Western Alaska Fisheries, Inc.
Westward Seafoods, Inc.
Prowler Fisheries
Trident Seafoods Corp.
United Catcher Boats
Akutan Catcher Vessel Assoc.
Arctic Enterprise Assoc.
Mothership Fleet Cooperative
Northern Victor Fleet
Peter Pan Fleet Cooperative
Unalaska Co-op
Unisea Fleet Cooperative
Westward Fleet Cooperative
U.S. Seafoods
Waterfront Associates
Western Alaska Fisheries, Inc.
Yukon Delta Fisheries Development Association
Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, Nunam Iqua

August 11, 2008

Alan Risenhoover
Director, Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway
SSMC3
Silver Spring, MD 20901

Dear Mr. Risenhoover:

Re: RIN 0648-AV53

The Marine Conservation Alliance ("MCA") is pleased to submit comments on the Proposed Rule to revise procedures for complying with the National Environmental Policy Act ("NEPA") in the development of fishery management actions pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). 73 Fed. Reg. 27998 (May 14, 2008)("Proposed Rule").

MCA was established in 2001 by fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations – based on sound science, prudent management, and a transparent, open public process. MCA supports research and education about the fishery resources of the North Pacific, and seeks practical solutions to resource issues to protect the marine environment and to minimize adverse impacts on the North Pacific fishing community.

I. <u>First Principles and the Purpose of the Proposed Rule</u>

In December 2006, Congress approved legislation amending the MSA. When the President signed the legislation on January 12, 2007, Pub. L. 109-479, Section 304(i)(1), 16 U.S.C. § 1854(i)(1), became law. That section directed the development of revised NEPA procedures that would (1) "conform to the [MSA's] time lines for review and approval of fishery management plans and amendments" and (2) "integrate applicable environmental analytical procedures" into the process by which such plans and amendments are developed and approved. Although much has been and will be written about this provision, it is important to recognize what Congress did and did not do.

First, Congress did not amend the MSA to change the legal and policy relationship between the Secretary of Commerce ("Secretary"), acting through the

National Marine Fisheries Service ("NMFS"), and the Regional Fishery Management Councils ("Councils"). Nothing in Public Law 109-479 changed the fact that the Councils are vested with the authority to develop fishery management plans ("FMPs") for fisheries within their jurisdiction. NMFS evaluates Council recommended FMPs for consistency with the MSA and other applicable law. Based on that evaluation, NMFS approves, disapproves, or partially approves the Council's recommended FMP. NMFS, like a trial court reviewing a case pursuant to the Administrative Procedure Act, may not revise an FMP to substitute its management judgment for that of the Council. As the Court found in *Fishing Company of Alaska v. Gutierrez*, 510 F.3d 328 (D.C. Cir. 2007), NMFS cannot change a Council's recommended plan without first receiving a new recommendation from the Council. In *Fishing Company of Alaska*, the Court held NMFS lacked the authority to establish fishery management regulations unless the Council first recommended those regulations. The Court found that the structure of the MSA is that the Council recommends and then NMFS may act. Thus, much like the relationship between Congress and the President, once Congress approves a bill, the President may sign or veto the measure but he may not amend it. Nothing in § 304(i)(1) changes the relationship between the Councils and NMFS.

Second, nothing in Public Law 109-479 amends NEPA to change the existing statutory structure, confirmed by a wealth of judicial precedent, that NEPA is a procedural, not a substantive, statute. In the early years of NEPA, a debate raged over whether NEPA was a substantive statute requiring an agency to adopt the least damaging environmental alternative or whether NEPA was a procedural statute simply requiring that the agency evaluate and be aware of the environmental consequences of its action so that those consequences could be taken into account during the agency's decisionmaking process. Early court decisions trended toward finding NEPA to be a substantive statute compelling the choice of specific actions. A series of four Supreme Court decisions resolved the debate by finding that NEPA is a procedural statute. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). As a result of these four decisions, it is well established that if an agency has taken a hard look at the environmental consequences of its proposals and at appropriate alternatives, courts will not substitute their judgment for that of the agency in determining the appropriate final agency action, even if that action is not the least environmentally damaging alternative. NEPA is not a statute that can be used to dictate the substantive content of proposed action. NEPA is designed to provide for full consideration of the environmental impacts of a proposed action.

MCA begins with these two legal principles for one purpose only. There are those who have as their objective using the NEPA procedures that are the subject of the Proposed Rule to dictate or otherwise control the Councils' deliberative process and management choices. Such a result is contrary to both the MSA and NEPA. Any effort to convert the procedures provided for in § 304(i)(1) of the MSA into a process by which NMFS seeks to control the outcome of a Council's deliberative process will not survive legal challenge.

For those who find fault with the structure, membership, and/or deliberative process of the Councils, the § 304(i)(1) procedures were not intended to be, and are not, the means to

address those issues. Some people presenting comments on the Proposed Rule at the public hearings seek to address these issues via the Proposed Rule. For such persons, recourse is not to the Proposed Rule but to Congress. Only Congress has the authority to change NEPA from a procedural to a substantive statute. Congress alone has the authority to alter the relationship between the Councils and the Secretary.

A third fundamental legal principle to be borne in mind is that the clear intent of § 304(i)(1) is to conform the NEPA review timelines to the MSA decisional timelines. The only way that can be done for Council developed fishery management actions is to use the Council process for the development of the necessary NEPA documents. Further, given the role of the Councils, unchanged by § 304(i)(1), the only way to achieve the objective of integrating environmental analyses with the FMP development process is to use the Council process to implement NEPA's analytical process. As Congressman Don Young stated during the Congressional debate on this provision, the new procedures suggested in the Proposed Rule "shall integrate NEPA's environmental analytical procedures with the procedures for preparing and approving fishery management plans and amendments under the Magnuson-Stevens Act …." Congressional Record, December 8, 2006, page H9233. Congressman Young went on to state that the new procedures "shall conform" the timelines for NEPA compliance with the timelines for approval of FMPs under the MSA. *Id.* Clearly, Congress intended that NEPA be integrated into the MSA process and that means using the Council process for NEPA compliance. This is confirmed by Congressman Young who stated:

> That means NEPA procedures must be integrated into the Council process which will be the vehicle for identifying the problem to be addressed, identifying the reasonable alternatives to address that problem, identifying the preferred alternative, and examining the environmental consequences, positive and negative, of the preferred alternative and the reasonable alternatives. After the Council completes its processes, the Secretary will have the final responsibility for determining if NEPA has been complied with and may disapprove the plan, plan amendment, or regulation pursuant to section 304(a)(3) of this Act.

Id. Senator Stevens further confirmed this intent and process in his comments on the Senate floor during the debate on this issue. There, Senator Stevens stated that the new procedures would allow the "Councils to consider the substantive requirements of NEPA under the timelines provided in the Magnuson-Stevens Act when developing fishery management plans…." Congressional Record, June 19, 2006, page S6050. There can be no doubt of the fact that Congress intended to use the Council MSA process to identify and examine the relevant issues and alternatives.

II. Programmatic Comments on the Proposed Rule

A. Submission of Public Comments to the Council and NMFS

Consistent with the above principles, the Proposed Rule provides that for fishery management actions developed through the Council process, the public must provide to the Council comments on the purpose and need statement, range of alternatives, and evaluation of environmental impacts. Proposed Rule, § 700.303(b)(1). The Proposed Rule goes on to state that when NMFS considers comments on a final Integrated Fishery Environmental Management Statement ("IFEMS"), NMFS "is not required to respond to comments raised for the first time" with NMFS "if such comments were required to be raised with respect to a draft IFEMS pursuant to § 302(b)."[1] Proposed Rule, § 700.305(d).

These two provisions, read together, recognize the statutory structure of the MSA in establishing and empowering the Councils regarding fisheries management. These provisions also recognize the significant advantages to environmental analysis of utilizing the Council deliberative process to join NEPA's procedural analytical standards with the MSA's substantive decisionmaking process. Although these two provisions of the Proposed Rule are fundamentally sound, their wording should be modified to fully implement the policy set forth in the two sections.

At the outset, the second sentence of §700.305(d) should be amended to read "NMFS is not required to, and shall not respond to, comments raised for the first time with respect to a Final IFEMS if such comments were required to be raised with respect to a draft IFEMS pursuant to § 303(b)." The addition of the words "and shall not respond to" is intended to make it clear, consistent with the MSA and judicial precedent (*see Fishing Co. of Alaska v. Gutierrez, infra.*), that the Councils' role is to develop the purpose and need for the management action, to identify the alternatives, and to conduct the requisite environmental analyses. In that regard, § 303(b) should be amended to add the words "the preferred alternative, if any," to the list of subjects on which substantive comments must be submitted to the Council.

Corresponding changes would need to be made to the preamble discussing these public comment provisions. As now written, the preamble explains that these provisions are intended to "encourage" the public to seek changes at the Council level. 73 Fed. Reg. at 28006. The word "encourage" should be replaced with "require." That change is more reflective of the policy in §§ 700.303(b) and 700.305(d) and is consistent with the respective roles of the Councils and NMFS discussed in Part I. Similar adjustments need to be made in the preamble section styled "Cooling Off Period and Comment Period for a Final IFEMS." *Id.* at 28007.

To avoid confusion in the implementation of §§ 700.303(b) and 700.305(d), the language of §§ 700.203(b)(6)(i) and (ii) should be amended to indicate that the comments sought regarding an IFEMS, including a supplemental one, shall be submitted consistent with §§ 700.303(b) and 700.305(d).

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[1] The reference to § 302(b) should be to § 303(b).

After a Council has approved and recommended a fishery management program, opponents of the Council's plan can be expected to attempt to submit comments on a Final IFEMS arguing or rearguing their case. Given the structure of the MSA, this cannot be allowed if the objective of the Proposed Rule is to further integrate environmental analyses into the Councils' decisionmaking process. Any attempt to reargue the case regarding the alternatives and their analysis through comments submitted on the Final IFEMS must be considered in light of NMFS' limited role in determining whether to approve, disapprove, or partially approve a Council management program. If the Council has considered the issues and reasonably explained its decisions, the Council plan should be approved if it has complied with MSA and other applicable law. NMFS cannot substitute its judgment for that of the Council. Thus, comments on the selection and analysis of alternatives must go to the Council. After the Council has completed its task, comments on whether the Council has complied with the procedural requirements of NEPA for environmental analysis go to NMFS.

Indeed, MCA's approach on this entire matter is consistent with the applicable statutes summarized in the preamble to the Proposed Rule. The preamble states "NEPA does not mandate a particular substantive outcome," "the scope of NMFS' authority to modify [Council]-recommended [FMPs] is narrow," "the MSA does not allow NMFS to substitute a different management alternative for that recommended by the [Council]." 73 Fed. Reg. at 27999.

B. <u>Scoping</u>

The scoping process should be focused on identifying the alternatives and issues associated with addressing the problem at hand. However, it should be recognized that this process may be iterative in that not all reasonable alternatives and issues may be immediately obvious. Thus, it may be appropriate to have more than one scoping session as the debate becomes more refined. The Proposed Rule should specifically allow for this eventuality.

The first sentence of § 700.108(a)(1) properly provides, consistent with the MSA's structure, that NEPA scoping "shall be based on the MSA's public process for the development of fishery management actions by [Councils]." In that regard, it is fully appropriate to use a Council's meeting agenda to provide the public with notice of the scoping process. However, the notice provisions in the Proposed Rule are problematic.

Section 700.108(b)(1) provides that NMFS, working with the Council, shall "ensure" that affected parties and interested persons "are invited to participate" in the scoping process. Subsection (c)(1) contains similar language for NMFS initiated actions. The word "ensure" is not found in existing NEPA regulations promulgated by the Council on Environmental Quality (CEQ"). MCA questions what new standard is contemplated by the word "ensure." Does the concept of ensuring notice mean that NMFS has an affirmative obligation to identify all such persons and to provide them with notice? Is any person who might meet the legal standards for standing to challenge the agency action part of the universe of interested persons who must be identified and contacted? Alternatively, if such persons have an obligation to identify themselves to NMFS as interested parties, by what process are these people to learn that there is an action pending and of their responsibility to identify themselves? Regardless of how these persons are identified, by what process are they to be notified? Does the word "ensure" preclude the use of general mail, email, or general publications as a means of notice? Does satisfying an

"ensure" standard in court mean that only certified mail, return receipt requested will suffice as a means of notification? And if NMFS lacks a valid mailing address, what legal burden does an "ensure" standard impose on NMFS to find a current address? Most importantly, if NMFS fails to meet the "ensure" standard for identifying and then notifying interested persons, and if just one such person appears as a plaintiff in court claiming his rights were infringed, is the entire NEPA process procedurally defective and, therefore, legally insufficient, thus making the NEPA document legally flawed and consequently prohibiting implementation of the fishery management action at issue?

NMFS should replace the "ensure" identification and notification standard here and everywhere it appears in the Proposed Rule with a reasonable standard of notification based on publication of notice in the Federal Register and in newspapers of general circulation.

Section 700.108 is replete with references to NMFS and/or the Council. Thus, § 700.108(a)(1) provides "NMFS and [the Council] may conduct scoping hearings." Similarly, §§ 700.108(b) and (d) provide "NMFS and [the Council] shall" determine the scope and issues for analysis, allocate assignments, identify environmental review requirements (and associated documents), set page limits, and set time limits. An initial review of these provisions leaves one wondering whether NMFS or the Council have ultimate responsibility. However, § 700.112 clarifies that where the Proposed Rule provides that NMFS and/or the Council shall take action then NMFS and the Council "must establish which entity will carry out such action." Section 700.112 goes on to state that "in no case should scoping activities be considered complete" until the decisions regarding who is in charge are made.

Notwithstanding the attempt in § 700.112 to minimize ambiguity about who is in charge, further clarification is warranted in § 700.108(a)(1). One expects that a successful process requires consultation and cooperation. One does not expect, however, that both NMFS and the Council will be conducting scoping hearings pursuant to § 700.108(a)(1). To clarify that this is not intended, and notwithstanding § 700.112, § 700.108(a)(1) should be rewritten to remove the internal inconsistency between the first sentence quoted at the beginning of this section and the second sentence such that the second sentence reflects the intent of the first sentence. Thus, the words "NMFS and" should be removed from the second sentence of § 700.108(a)(1).

Each paragraph in §§ 700.108(b)(4)-(7) should also be amended to mirror the language in §§ 700.108(b)(1) and (2) which provide that NMFS and the Council shall cooperate in making certain determinations. The "shall cooperate" language should be added to subsections (b)(4)-(7). Those words should also be added to subsection (d) by dividing subsection (d) into two parts, one relating to NMFS initiated actions and one relating to Council initiated actions. For Council initiated actions, the introductory clause should read NMFS and the Council "shall cooperate" in making any decisions under that subsection.

The changes suggested in the preceding paragraph are consistent with § 700.108(d) which provides that NMFS and the Council "shall cooperate" in revising any of the determinations provided for in subsection (b). If NMFS and the Councils are to cooperate regarding revisions, then cooperation in the initial decisions is implied and should be so stated

throughout subsection (b).

In reviewing § 700.108(e), a technical question arises regarding that part of subsection (e) referencing "determinations" under subsection (a). First, there appear to be no "determinations" provided for in subsection (a). Second, as noted above, subsection (a)(1) should be clarified to leave no doubt that it is the Council process that shall be used to conduct scoping and the use of words such as "shall cooperate" in subsection (e) should not modify or undermine the intent of using the Council process to conduct scoping.

C. Alternatives

Section 700.212 establishes the standards for selecting the alternatives for analysis. There are several elements to this process and MCA will examine each in turn.

Section 700.212(b) provides that an alternative is reasonable and, therefore, within the universe of alternatives that could be evaluated if that alternative is derived from the statement of purpose and need and satisfies in whole or substantial part the objectives of the proposed action. This subsection is a good foundation on which to build but it merits clarification. This subsection should clearly state that for an alternative to be reasonable, it "must" be derived from the purpose and need for the action. The language in the Proposed Rule that an alternative is reasonable if it satisfies the objectives of the proposed action in "substantial part" raises questions of whether substantial is 25%, 40%, 51%, or more. The Proposed Rule should be amended to delete the concept of in "substantial part." To implement NEPA's purpose of providing decision makers with meaningful analysis, that analysis must focus on alternatives relevant to the decision, *i.e.,* the alternatives that can effectuate the proposed action given its purpose and need.

Section 700.212(b) further provides that "all" alternatives falling within the universe of reasonable alternatives must be "rigorously" explored and examined. As the preamble to the Proposed Rule notes, lack of precision in defining the alternatives to be examined has lead to overly complex NEPA documents. Requiring that "all" reasonable alternatives be examined does nothing to address that issue. The word "all" admits of no exception. Interpreted literally, use of the word "all" precludes the selection for analysis of a range of alternatives that would embrace all other alternatives. For example, if a proposed action provides for an action that can be implemented in steps or ranges varying between 0 and 100, a "reasonable" alternative might be every point between 0 and 100, or 100 different alternatives. Whilst someone might suggest such a result is nonsensical and not intended, use of the word "all" permits that result. To avoid such unintended results, § 700.212(b) should be amended to delete the word "all." The concept of examining "all" reasonable alternatives should be replaced with the concept of examining a range of reasonable alternatives that embraces the points/ideas/proposals that lie between including a sufficient number of the in-between points/ideas/proposals as to provide an adequate basis for decision makers to understand the environmental consequences, good and bad, of the choices that are made. Absent this change, the purpose of streamlining the NEPA process to prevent overly complex documents without sacrificing a meaningful environmental analysis is forfeited. This concept of a reasonable range of alternatives is fully consistent with existing CEQ Guidance. *See* 46 Fed. Reg. 10826 (March 23, 1981), Question 1(b) and response thereto.

The determination of what constitutes a reasonable alternative, and which of those alternatives constitute a sufficient range to provide adequate analysis of environmental consequences, should be made by the Council in consultation with NMFS. To do otherwise undermines the purpose and benefits of using the Council process to fully implement the NEPA process. MCA recognizes that NMFS sits in final judgment of whether NEPA has been complied with, which is why MCA proposes that Proposed Rule be amended to provide that determinations of what constitutes a reasonable alternative and what is an appropriate range of such alternatives for analysis be made by the Council in consultation with NMFS.

Finally, § 700.212(e) clarifies that the "no action" alternative means continued management of the fishery as it is prosecuted absent implementation of the proposed action. The Proposed Rule states that the "no action" alternative does not mean the management program that would result from no federal action. This section is an important clarification of the no action alternative. However, the text should be amended to clearly state that the no-action alternative does not mean no fishing unless that is the existing fishery management program.

D. The Council Decisional Process and Supplementing an IFEMS

An important issue is what documents should be before the Council when a final decision is made, and what is the Council's responsibility in preparing these documents. At the outset, MCA believes it is important that the Council have as complete an understanding of the issues as is reasonably possible at the time a decision is made. Therefore, MCA suggests that the Proposed Rule provide that before making a final decision on an issue requiring an IFEMS that the Council have analyzed and responded to comments on the draft IFEMS in the same way as NMFS currently prepares its response to public comments. Thus, the Council will have prepared an analysis/response to public comments and will have the benefit of a full analysis of public comments at the time of the Council's final decision. Should the Council select one of the existing alternatives as its final action, Council action is complete, and the NEPA document transmitted to NMFS is in effect a final document subject to review by NMFS and a determination as to whether the document complies with NEPA.

There may be circumstances when the Council, upon consideration of all the comments and analysis before it, decides to combine various parts of already analyzed alternatives or to select a variant that is within the range of, and encompassed by, the alternatives already analyzed. In those circumstances, and again assuming the Council has responded to public comments in the NEPA document before the Council at the time of the decision, the NEPA document transmitted to the Secretary is essentially a final document ready for Secretarial review as discussed in the preceding paragraph.

Finally, there may arise the situation in which the Council selects an option that has not been analyzed in the NEPA document. In that situation, the Council should prepare a supplemental NEPA document, provide for public comment, and prepare a response/analysis to those comments prior to making its final decision. In this way, the Council will have the benefit of a thorough analysis of the issues before making a final decision. And, as discussed above and subject to concurrence by NMFS, the NEPA document transmitted to NMFS will, in effect, be the final NEPA document.

E. When to Prepare an Environmental Assessment

Section 700.102(a) identifies actions that will normally require only an environmental assessment ("EA"). Among those actions identified in the Proposed Rule are "framework actions or annual specifications" that are taken pursuant to an FMP "and tiered" to an IFEMS, environmental impact statement ("EIS"), or prior EA. Although this formulation appears to exclude a category of minor actions that may be new and, therefore, cannot be tiered to a prior document, subsection (d) appears to allow an EA for an action that cannot be tiered. This inconsistency should be rectified by allowing an EA for an action that is neither an emergency nor an interim action (as provided for in § 700.102(b)) and that does not rise to the level of an EIS or IFEMS.

Section 700.103(a) of the Proposed Rule sets forth principles to be used by NMFS, in consultation with the appropriate Council, in determining whether to prepare an IFEMS. The import of the words "in consultation with" is that NMFS will make the ultimate decision. That the Proposed Rule vests NMFS with the authority to decide the type of environmental document to prepare (IFEMS, EA, Categorical Exclusion, or Memorandum of Framework Compliance) is clear from the text of the Proposed Rule. *See* Proposed Rule §§ 700.103(a), 700.102, 700.104(b), 700.105(a).

If the objective of the Proposed Rule is to further integrate the NEPA process into the MSA, then each decision regarding the type of environmental document to prepare should be made by NMFS in consultation with the Council. Each of the sections of the Proposed Rule cited in the previous paragraph should be amended accordingly. The more difficult question is what happens when, despite the best efforts of the Council and NMFS, there remains an honest disagreement as to the proper course of action. In that circumstance, MCA recommends that the Proposed Rule be amended with respect to each of the four environmental documents to allow the Council to proceed along the pathway it deems appropriate and to prepare the document it believes is necessary. Given that NEPA vests NMFS with the ultimate responsibility for NEPA compliance, if the Council proceeds down a pathway with which NMFS disagrees, the Council is accepting both a burden and a responsibility. The burden is to persuade NMFS through the quality of the analysis in the particular environmental document that the Council's position is the correct one. The responsibility the Council accepts is that choices can have consequences. If, at the end of the day, NMFS remains unpersuaded and continues to believe a different category of environmental document should be prepared, NMFS will likely disapprove the NEPA documents, delaying final action on the fishery management action at issue.

MCA firmly believes the best solution to the often difficult problem of which type of environmental document to prepare is best made jointly and cooperatively by the Council and NMFS. Absent agreement, the Council can accept the burden of, and responsibility for, pursuing a pathway with which NMFS disagrees. The Proposed Rule should be amended to reflect that policy. In so doing, §700.106 of the Proposed Rule should be adjusted to reflect that the purpose of this section is to allocate responsibilities among federal agencies and is not itself an allocation of responsibilities between NMFS and the Councils with respect to either the type of document prepared by the Council or the content of that document.

F. IFEMS

Section 700.103 addresses the question of when to prepare an IFEMS, as defined in § 700.3(4). Much has been made in public meetings about the decision to create a new environmental document called an IFEMS. Opponents of the Proposed Rule complain loudly that NMFS is somehow violating the spirit of NEPA. What opponents of the Proposed Rule neglect to mention is that the statute itself does not provide for a document called an EIS. The issue is not what the document is called but what it does. MCA has no objection to the creation of a newly named document. The appropriate issue for debate is substance, not form. That said, perhaps a middle ground position that utilizes the term EIS, and recognizes that the MSA has created a unique entity in the Councils and has established specific decisional timelines, is to call the document an MSA-EIS.

G. Framework Management Plans and Framework Implementation Procedures

The concepts of a framework management plan and a framework implementation procedure ("FIP") will facilitate real time and effective fishery management. However, it would be helpful to adjust the definition of a framework management measure eligible for the FIP in § 700.3(6) to provide that the actions eligible for frameworking are determinations that are made by formula such as certain annual specifications, as well as routine determinations that are made using specified criteria and that are the equivalent of a formulaic determination.

Although MCA supports the use of framework management plans and an FIP, an issue of concern is whether the Framework Evaluation Procedure ("FEP") described in § 700.104(b) is such that by the time the FEP is concluded it would have been just as easy to prepare an EA. More than one program manager has complained that by the time he or she complies with all of the requirements to prove a categorical exclusion is appropriate, an EA could have been written. This often makes the categorical exclusion useless as an expedited procedure. The same fate should not befall the FEP and its consequent Memorandum of Framework Compliance. Thus, NMFS should amend the Proposed Rule to provide that the FEP is not the equivalent of an EA. In that regard, the Proposed Rule should state that it is dispositive for purposes of an FEP determination if a framework management plan identifies the actions that qualify for an FIP, and provides the analytical basis for so categorizing such actions. Thus, if a proposed action falls within a previously approved and analyzed framework, and if there is no new information calling into significant question the prior analyses, the proposed action automatically qualifies for a Memorandum of Framework Compliance. Moreover, if prior analyses have been done, the FEP should not require a new evaluation just because of the presence of new information. The issue is not the mere existence of new information. The issue is the existence of new information raising significant questions about the vitality of prior analyses. That point should be clarified and codified in revisions to the Proposed Rule.

H. Using a Categorical Exclusion

Section 700.105 provides that NMFS shall determine if a proposed action qualifies for a categorical exclusion ("CE") pursuant to the standards set forth in § 700.702.[2] The CE procedure is an important one for streamlining the NEPA process. However, § 700.702(d) provides that the procedures for determining whether a proposed action qualifies for a CE remain those set forth in NOAA Administrative Order 216-6 ("AO"). As noted above, many program managers have protested that by the time one examines whether the exceptions to invoking a CE apply, one could have done an EA. This defeats the purpose of a CE. Thus, the AO should be amended to streamline the CE process to reflect the Proposed Rule. Specifically, § 6.03d4 of the AO should be amended to remove the cross references to §§ 5.05b and 6.02 of the AO that require determinations regarding whether the proposed action has significant effects. Very often, by the time those determinations are written, an EA has been written. Rather than continue that process, NMFS should revise the Proposed Rule to identify specific items or classes of items that qualify for a CE. If those items fall within a previously analyzed fishery management action and if there is no new information casting doubt on the continued vitality of the prior analysis, then a CE should be issued. If a proposed action falls within the category of actions set forth in § 700.702(a), it should automatically qualify for a CE. Indeed, to further streamline the process, an FMP could specify, and analyze through the NEPA process when the FMP NEPA documents are prepared, those actions for which a CE is appropriate. Actions falling within the identified category or categories would automatically qualify for a CE.

I. Determinations of Significance

Section 700.401 provides that in determining the significance of a proposed action, NMFS shall consider the context and intensity of that action. The context and intensity factors are then used to determine if a Finding of No Significant Impact ("FONSI") or an IFEMS should be prepared. This section generally follows 40 C.F.R. § 1508.27 except that in § 700.401(b) the reference to "society as a whole" removes the reference to society including humans and national interests found in the CEQ regulations. Those references should be reinserted.

Of particular concern regarding the significance determination is § 700.402(b) providing that NMFS "may" develop additional "guidance" regarding how to determine significance. If NMFS wishes to further clarify this issue, it should be done through the Administrative Procedure Act ("APA") notice and comment rulemaking process. The Proposed Rule is not, and cannot be, a substitute for appropriate notice and rulemaking procedures. Nor can NMFS successfully make the argument that the public has, via the Proposed Rule, had an adequate opportunity to comment on this issue. The Proposed Rule states NMFS "may" consider guidance that "may" include up to ten different factors in evaluating significance. Which, if any, of those factors NMFS might consider, or what additional factors might be considered is unknown. Such uncertainty does not provide a basis for public comment and is no substitute for proper procedures.

[2] Several internal section citations are incorrect and all citations need to be reviewed for accuracy. For example, the citation in § 700.105(a) is to § 700.701. The correct cross reference is to § 700.702. *See also* footnote 1 above.

MCA believes that any further clarification of this Proposed Rule, should it become final, should come through a regulatory proceeding that subject to public review and comment. This is particularly true given (1) the sweeping nature of the considerations set forth in § 700.402(b), (2) many of the § 700.402(b) considerations such as impacts on endangered and threatened species are already included under the existing list of factors to be considered pursuant to § 700.402(a), and (3) § 700.402(b)(9) apparently seeks to overturn existing judicial precedent regarding what constitutes a controversy. This last point is of particular importance.

The courts have consistently ruled that a controversy does not exist simply because the agency receives a large amount of communications about a proposal. Rather, a controversy exists if there is scientific dispute about the facts. For an action to qualify as "controversial" there must be a substantial dispute about the size, nature, or effect of the major federal action rather than simply the existence of opposition to it. 40 C.F.R. §1508.27(b)(4); *The Fund for Animals v. Williams*, 246 F.Supp.2d 27, 45, *citing Friends of the Earth v. Army Corps of Eng'rs*, 109 F.Supp.2d 30, 43 (D.D.C. 2000); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). A "controversy" does not exist merely because some individuals or groups are highly agitated about, vigorously oppose, or have raised questions about the action.

> That kind of bootstrap reasoning would permit such an opponent to sidestep his burdens under the law simply by declaring the existence of a controversy.... [I]f controversy were equated with opposition, the EIS outcome would be governed by a "heckler's veto."

The Fund for Animals v. Williams, 246 F.Supp.2d 27, 45 n.18, *citing Peshlakai v. Duncan*, 476 F. Supp. at 1255 n.23 and *State of N.C. v. Fed. Aviation Admin.*, 957 F.2d 1125, 1134 (4th Cir. 1992. Nor does "controversy" exist simply because there are conflicting views among experts. *The Fund for Animals v. Williams*, 246 F. Supp.2d at 45, *citing Sierra Club v. Watkins*, 808 F. Supp. 852, 862 (D.D.C. 1991).

Through a "guidance" document, NMFS seeks to redefine what constitutes a controversy and to allow a proposed action to be deemed controversial and, therefore, significant based on the amount of mail or email received. Such a policy elevates form over substance and is contrary to existing judicial precedent. Section 700.402 should be deleted from the Proposed Rule. If NMFS seeks to further clarify the significance standard, it should use the APA rulemaking process. Seeking comment today on something that is not even officially proposed is no substitute for proper administrative process.

J. <u>Emergency Regulations</u>

Section 700.701 provides a framework for NEPA compliance in emergency situations. Section 700.701(b) states that if an emergency exists and if emergency regulations proposed to address the situation will not result in a significant environmental impact, then NMFS shall document that in an EA and a FONSI and proceed. This subsection wisely allows the promulgation of emergency regulations without completion of a final EA and FONSI if the emergency warrants. However, subsection (b) is limited to emergencies and emergency

regulations not involving significant environmental impacts.

Section 700.701(a), intended to address other emergencies, lacks the precision found in subsection (b). Indeed, the authority in subsection (a) is limited to addressing emergencies arising from overfishing. Any other type of emergency is left unattended if addressing that emergency may have environmental consequences. If a resource or human disaster arises, emergency regulations are not permitted because the crisis is not caused by overfishing. There is no procedure for weighing whether the consequences of allowing the emergency to continue outweigh the potential environmental impacts of addressing the emergency. The Proposed Rule should be amended such that subsection (a) is not limited to emergencies involving overfishing.

K. Assignment of Tasks

Throughout the Proposed Rule, the text refers to NMFS and/or the Council, leaving one to wonder who is to be performing the task at issue. However, § 700.112 provides that when the text states a task is to be undertaken, or a decision made, by NMFS and/or the Council, then NMFS and the Council "must" establish which entity will carry out the action, etc. However, no provision is made for resolving disagreements if both entities want to perform the task, etc. Section 700.112 should be amended to provide that for Council initiated fishery management actions, the Council shall be entity to undertake the task, make the determination, etc., unless the Council elects to not do so, in which case, the responsibility shall transfer to NMFS.

L. Time Periods for Public Comment

During the public meetings on the Proposed Rule, several speakers complained bitterly that the 14-day comment period provided for in § 700.603 on a draft IFEMS was inadequate. The problem with those comments is that § 700.603 does not provide for a 14-day public comment period. Section 700.603 provides for a comment period of "at least 45 days." Moreover, this comment period is to be in advance of the meeting where the Council may take action, thereby further integrating environmental considerations into the MSA process and providing the Council with the benefits of the public's analysis prior to a Council decision.

What § 700.603(b) does allow is a shortening of the comment period for a draft IFEMS if there is a resource emergency or a need to act quickly to prevent harm to the environment. In the face of such circumstances, shortening the minimum 45-day comment period may be in the best interest of the environment. In such circumstances, the comment period may be reduced to no less than 14 days. However, even if "the public interest" weighs in favor of shortening the minimum 45-day public comment period, § 700.603(b) provides that NMFS should ignore the public interest and not shorten the comment period "if the value of public notice and comments" outweighs the need to take action. This is not, as some have claimed, an automatic 14-day comment period. It is a reasoned approach to establishing a framework within which to deal with special circumstances. Furthermore, under existing CEQ regulations, the comment period can be reduced to zero days based on "compelling reasons of national policy." 40 C.F.R. § 1506.10(d). Many of the speakers at public hearings on the Proposed Rule called for a return to the CEQ regulations, specifically protesting the possibility of a 14-day comment period in emergency circumstances. If these commenters wish to return to a possible zero-day comment period, MCA has no objection. However, MCA believes that establishing decisional standards

regarding when the comment period may be shortened and providing for a minimum 14-day comment period is an improvement over the status quo.

Similarly, § 700.603(c) reasonably provides that NMFS may reduce the time within which NMFS must make a final decision on a fishery management action in the case of "a fishery management emergency" or for "the purpose of protecting the public health or safety." In addition, consistent with the requirements of § 304(i)(1) of the MSA, NMFS may reduce the timeframe for NMFS decisions if doing so is necessary to meet the MSA timeframes provided a public comment period has already occurred.

M. Policy Statement

Section 700.1(a) states that NMFS and the Councils "shall to the fullest extent possible" implement certain policies. However, paragraph (3) contains a limitation providing that the public involvement procedures set out in the MSA shall be utilized only "to the extent practicable." The juxtaposition of the concept of "to the fullest extent possible" and "to the extent practicable" creates the potential for confusion. Therefore, MCA recommends that the words "to the extent practicable" be deleted from § 700.1(a)(3).

N. Adoption of an EA, EIS, or IFEMS

Section 700.110 provides that NMFS "may" adopt a draft or final EA, EIS, or IFEMS if the document meets the standards for an adequate environmental document pursuant to the regulations. It is not clear why the Proposed Rule uses the word "may." Use of that word suggests that adoption of a document fully meeting the regulations is somehow discretionary pursuant to some unknown and unspecified standards. The word "may" should be replaced by "shall."

O. Timing

Section 700.203(b)(1) provides that NMFS shall "ensure" that the draft IFEMS is made available to the public at least 45 days in advance of a Council meeting. As noted above, the word "ensure" when coupled with the notification requirements discussed elsewhere may impose an unnecessary procedural burden on NMFS. The concept of ensuring availability should be replaced by notification standards requiring publication in the Federal Register and in newspapers in general circulation.

Section 700.203(b)(5) provides that in adopting a management plan, a Council may select combinations of various alternatives analyzed in the draft IFEMS or even a new alternative within the scope of those alternatives already examined in the draft IFEMS. This is an important provision. It provides needed flexibility, consistent with NEPA and the MSA, to allow the Council to select the best management program. It is important to clearly state in this part of the Proposed Rule that if the Council recommendations are indeed within the scope of those analyzed in the draft IFEMS, no further analysis or supplementation is required. Indeed, § 700.207(c)(6) already states that no further analysis or supplementation is required if the selected action is comprised of, or within the scope of, previously analyzed alternatives. Both of these provisions are important and need to be retained and clearly stated in any Final Rule published

by NMFS.

P. References in § 700.213

Section 700.213 of the Proposed Rule indicates that in preparing that part of an IFEMS describing the affected environment, NMFS should avoid useless bulk, etc. The references in this section to NMFS should be amended to add the Councils as the Councils will be preparing IFEMS.

Q. Incomplete or Unavailable Information

Section 700.220 addressing decision-making in circumstances in which there is incomplete or unavailable information appears to create a litigation quagmire for NMFS. At the outset, § 700.220(a) provides that NMFS or the Council shall identify information that is unavailable but "that is essential to a reasoned choice among alternatives." The implication is that no reasoned decision can be made in the absence of this "essential" information. This subsection goes on to state that unless the cost, including the cost of delay of obtaining information, are not excessive, NMFS shall "ensure" that the information is obtained. Again, the word "ensure" imposes an absolute standard upon NMFS and should be replaced with the concept of making every reasonable effort to gather the information. However, that relatively technical change does not overcome the fundamental problem with subsection (a). The problem is that NMFS and the Council are to identify information that is "essential" to a "reasoned" choice among alternatives but may then proceed to make a decision which is by definition unreasoned. This section allows plaintiffs to argue that a reasoned choice cannot possibly be made in the absence of the "essential" information. This subsection should be modified to reflect the introductory part of § 700.220 that National Standard 2 of the MSA provides for the use of the best available information. MCA recommends that § 700.220(a) be amended to replace the word "essential" with the concept that NMFS and the Council shall identify additional information which should be useful to gather in the future to facilitate later decision. In the interim, and consistent with MSA National Standard 2, NMFS and the Council shall use the best available information in making decisions.

R. Transmittal of Documents

Section 700.203(b)(6) provides that a final or supplemental IFEMS shall be transmitted to NMFS along with the Council's proposed action. This section should be clarified to provide that the decision regarding when to transmit the documents to NMFS is in the sole discretion of the Council. The documents to be transmitted are Council documents. The Council bears both the burden and the responsibility to assure the documents are complete and legally sufficient. Once the Council makes that determination, the documents shall be transmitted to NMFS. The Proposed Rule should be amended to reflect this policy. Too often in the past NMFS has delayed action on a Council decision by refusing to allow or accept transmittal of the Council documents. This is simply unacceptable. If the Council determines the documents are legally adequate and are complete, then the documents must be transmitted to, and accepted for review by, NMFS. As noted above, the Council bears the burden and responsibility for that decision – but it is the Council's decision not NMFS' decision that the documents are to be transmitted to NMFS. Once the Council determines the documents are complete and legally adequate, the

Council shall transmit them to NMFS and the period for secretarial review begins.

S. Response to Comments

Section 700.202(b)(5) requires that an IFEMS "must" address all public comments…." Similarly, §700.305 provides that comments received on a draft IFEMS "shall be addressed" in the final IFEMS. The issue is what is contemplated by the words "must address" and "shall be addressed." The Proposed Rule should be clarified to provide that similar comments may be grouped and summarized such that the response addresses the content of the comments as distinct from each individual comment. Also, the Proposed Rule should allow for a grouping of comments based on those that are relevant to the issues at hand and those that are not. Comments falling into the latter category would receive less attention.

III. Conclusion

MCA appreciates the opportunity to provide these comments on the Proposed Rule. MCA looks forward to working with NMFS, CEQ, and other interested parties to develop a Final Rule that fairly reflects the intent and purposes of the MSA and NEPA.

Sincerely,

David Benton
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