North Pacific Fishery Management Council

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Mr. Steve Leathery
National NEPA Coordinator
NMFS – Office of Assistant Administrator
1315 East-West Highway
Silver Spring, MD 20910

Dear Steve:

Pursuant to our discussions with NOAA Fisheries leadership earlier this month at the Council Coordination Committee (CCC meeting), I am providing you with some general comments regarding the agency's proposed revisions to the NEPA process, revisions which were mandated in the recent Magnuson-Stevens Act (MSA) reauthorization. Speaking for the subcommittee of the CCC assigned with tracking this issue (Chris Oliver – NPFMC, Dan Furlong – MAFMC, and Bob Mahood – SAFMC), we appreciated the opportunity on December 19, 2007 to sit down and review with you and CEQ representatives the proposed regulations to implement a revised process for NEPA compliance within fishery management actions promulgated under the MSA. However, as you well know, we do not consider the process since passage of the MSA to constitute any meaningful 'consultation' with the Councils, as was directed by the MSA.

The Councils were allowed to submit a 'strawman' proposal in February of 2007, which was constructed to incorporate the requirements of NEPA within the MSA process, as was directed by the Act. Following that, NOAA and CEQ worked for the next 10 months developing a significantly different proposal, without any further input or consultation with the Councils. We were only brought back into this loop this past December, when the three members of the CCC subcommittee were allowed to meet with you and review an already largely complete proposed rule. With the understanding that you intend to publish this proposed rule in the next few weeks, it appears highly unlikely that significant changes are possible, thereby rendering our 'consultation' role largely a sham.

Because we were directed to keep the specifics of this draft proposed rule confidential, I am focusing on general rather than specific comments. Because we were not allowed to retain a copy of the proposed rule, my comments are from my handwritten notes and my own memory, so please pardon any inadvertent misquotes. While we believe that some improvements can be made on specific elements of your proposed rule, we believe that the fundamental approach is fundamentally flawed and inconsistent with Congress' intent. Rather than incorporate NEPA into the MSA process (and thereby make MSA the guiding Act relative to fisheries management), your revised procedure subsumes the MSA process within the NEPA process, thereby formally and in regulation making NEPA the primary Act with regard to fisheries management actions promulgated (ostensibly) under the MSA. This fundamental reversal of Congressional intent does not appear to be accidental when one references Section 1500.2a Policy of the draft proposed rule, which states that it is the intent of NMFS (working with the FMCs) to "*interpret and administer the MSA in accordance with the policies set forth in NEPA and in these regulations*".

Congress' direction in the MSA was to incorporate provisions of NEPA within the MSA process. Your proposed rule does just the opposite – it incorporates the MSA process and all other applicable laws for fishery management actions within the NEPA vehicle. The result will be to 'cement' the overapplication of NEPA to fisheries management actions, rather than streamline the application of NEPA within the conservation and environmental protections already implicit or explicit within the MSA. This will make NEPA, formally and by regulation, the driving Act for fisheries management, and relegate the Magnuson-Stevens Act to a backseat status. There is the additional, significant concern on our part that by making NEPA (which is NMFS' authority and responsibility) the driving Act, the Councils' authorities under MSA could be eroded and subsumed within NMFS' authorities under NEPA. Finally, this approach may also create the potential for enhanced litigation fodder under the auspices of NEPA.

Of closely related concern are the changes, either explicit or implicit, relative to the Regional Councils' roles and authorities. By formally incorporating the Councils' decision making process within NEPA (which is the agency's responsibility), the proposed revised procedure subjugates and marginalizes the Councils' authorities and increases NMFS' control over the Council decision-making process. This fundamental change (whether intentional or unintentional) is underscored in numerous places in the document by such statements as "*A key factor in developing this timeline was the understanding of the role of the FMC as an advisory body that narrows alternatives and makes recommendations…..and NMFS as the ultimate decision-maker*". While NMFS certainly retains ultimate approval or disapproval of Council recommendations, the tenor of this statement (and the attendant regulations) minimizes the Councils' decision making role as specified in the MSA. Indeed, except in rare cases of Secretarial amendments, the Councils *decide* whether and when to even initiate consideration (without such a decision in the first place, there would never be any alternatives or decision for NMFS to even contemplate). They then *decide* what alternatives will be considered (subject to influence of NEPA and other applicable laws). They then *decide* (with input from NMFS) when an analysis of alternatives is complete enough to make a Council *decision* to forward for Secretarial (NMFS) review. Finally, the FMC *decides* the action to be forwarded for final review by the Secretary (NMFS).

This process outlined within the MSA clearly intends the Councils to be more than simply 'advisory bodies'. They were intended to develop FMPs and associated fishery management policy, subject to final approval by the Secretary. The role of the Secretary (NMFS) under the MSA is limited to approve, disapprove, or partially approve, NOT to replace the judgment of NMFS for that of the Councils' by selecting a different alternative. As we discussed in December, there is one specific aspect of the proposed rule that we found particularly distressing. That is the added provision in your proposed rule for the Secretary to have the option of "*determining that additional conservation and management measures are necessary*". This is tantamount to substituting NMFS' judgment for that of the Councils', which is clearly contrary to the MSA (and effectively is a major amendment to the MSA). In a related vein, the overall proposed process of placing all fishery management actions squarely under NEPA authority, and placing all documents pursuant to Councils decisions under authority of NMFS, has the potential to create a situation where NMFS controls the alternatives, the analyses, and the ultimate decision which they will then be 'recommending' to themselves.

NMFS may well be the "ultimate decision-maker" under NEPA, as well as under MSA. However, by formally subsuming the entire MSA/Council process under the NEPA umbrella, this revised proposed procedure potentially undermines Council authority and decision-making as is explicitly contained in the MSA. It does not appear that Congress' intent in streamlining the NEPA process was to diminish the Councils' authorities contained in the MSA, or to further elevate NEPA as the driving Act relative to fisheries management policy in the U.S. However, that appears to be the potential net effect of the proposed revised procedure.

While the revised draft proposed rule does contain opportunities for streamlining some aspects of the process, the major changes appear to be simply changes in terminology, and would explicitly, and by regulation, apply the existing CEQ regulations for NEPA compliance directly to all fishery management actions (in fact, the approach appears to take the easy, convenient path of simply using the existing CEQ regulations for NEPA compliance, and inserting the word 'fisheries' in numerous places). This would appear to be a counterproductive approach to implementation of Congress' intent, which we believe was to recognize the MSA process as the primary Act for fisheries management actions, and to incorporate NEPA compliance therein. It is not merely a difference of semantics. It is not and has never been the intent of the CCC or any Council to avoid the underlying intent of NEPA. However, we continue to believe that underlying intent can be appropriately accommodated without explicitly making NEPA the driving Act for fisheries management actions promulgated under the MSA.

We hope that these critical concerns can be addressed prior to publication of the existing draft proposed rule. We also believe that interested Congressional offices should be afforded the opportunity to review this draft proposed rule prior to its publication, in order to assess its consistency with Congress' intent.

Sincerely,

Chris Oliver
Executive Director

CC: Mr. John Oliver, Acting Assistant Administrator
Dr. James Balsiger, Regional Administrator, NMFS Alaska Region
Council Executive Directors