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**Part VI**

## **Department of Commerce**

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**National Oceanic and Atmospheric  
Administration**

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**50 CFR Part 700**

**Magnuson-Stevens Act Provisions;  
Environmental Review Process for  
Fishery Management Actions; Proposed  
Rule**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 700**

[Docket No. 070824479-8107-02]

RIN 0648-AV53

**Magnuson-Stevens Act Provisions; Environmental Review Process for Fishery Management Actions**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would revise and update the NMFS procedures for complying with the National Environmental Policy Act (NEPA) in the context of fishery management actions developed pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). These regulations are modeled on the Council of Environmental Quality (CEQ) regulations implementing the procedural provisions of NEPA, 40 CFR parts 1500-1508, with specific revisions to the existing NMFS procedures made pursuant to the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA). The procedures are designed to conform to the timelines for review and approval of fishery management plans and plan amendments developed pursuant to the MSA. Further, these procedures are intended to integrate applicable environmental analytical procedures, including the timeframes for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to the MSA in order to provide for timely, clear, and concise analysis that is useful to decisionmakers and the public, reduce extraneous paperwork, and effectively involve the public.

**DATES:** Comments must be received by 5 p.m., EST, on August 12, 2008.

**ADDRESSES:** You may submit comments on this proposed rule or the associated Regulatory Impact Review (RIR), identified by 0648-AV53, by any of the following methods:

- *Mail:* Alan Risenhoover, Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, SSMC 3, Silver Spring, MD 20910.

- *Fax:* (301) 713-0596.

- *E-mail:* [NEPAprocedures@noaa.gov](mailto:NEPAprocedures@noaa.gov). Include in the subject line of the e-mail the following document identifier: "MSA Environmental Review Procedures"

- *Federal e Rulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Copies of the Regulatory Impact Review (RIR) prepared for this action may be obtained from Alan Risenhoover at the address above. Requests should indicate whether paper copies or electronic copies on CD-ROM are preferred. This document is also available at the following Web site: <http://www.nmfs.noaa.gov/msa2007/implementation.htm>.

**FOR FURTHER INFORMATION CONTACT:** Marian Macpherson at 251-751-0650, e-mail: [Marian.Macpherson@noaa.gov](mailto:Marian.Macpherson@noaa.gov).

**SUPPLEMENTARY INFORMATION:****Background**

The National Marine Fisheries Service (NMFS) proposes new regulations to establish procedures by which NMFS and the regional Fishery Management Councils (FMCs), established under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), will comply with the National Environmental Policy Act (NEPA) when preparing fishery management actions pursuant to the MSA. NMFS issues this proposed rule to comply with the requirements of section 107 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA), Pub. L. 109-479. NMFS proposes specific provisions in the following areas.

1. **Form of documentation:** The proposed rule would retain the use of Environmental Assessments (EAs), Findings of No Significant Impact (FONSI), and Categorical Exclusions (CEs) where appropriate, and would establish two new forms of documentation for actions with potentially significant environmental impacts: the Integrated Fishery Environmental Management Statement (IFEMS) and the Memorandum of Framework Compliance.

2. **Roles and Responsibilities:** This proposed rule would clarify the roles of the FMCs and NMFS in the

development and approval of fishery management measures and actions.

3. **Timelines and Flow of Process:** The proposed rule would build flexibility into the timelines for complying with NEPA in order to allow for compliance with NEPA within an MSA context.

4. **Alternatives to be Analyzed:** This proposed rule would clarify what "reasonable alternative" and "no action" alternative mean in the context of fishery management.

5. **Exempted Fishing Permits (EFPs):** This proposed rule would establish a new CE for certain types of EFPs where impacts have been analyzed within an overarching analysis.

6. **Incomplete or unavailable information:** This proposed rule would clarify how NEPA's requirements concerning incomplete and unavailable information and conflicts of interest are applicable to MSA actions.

7. **Emergency or interim rules:** This proposed rule would allow for programmatic arrangement with the Council on Environmental Quality (CEQ) to address page limits of IFEMS and NEPA requirements for emergency and interim rules.

**I. Statutory Overview***A. The Magnuson-Stevens Fishery Conservation and Management Act*

The MSA, 16 U.S.C. 1801 *et seq.*, established a national program to manage and conserve the marine fisheries of the United States. Under this system, the United States exercises sovereign rights and exclusive fishery management authority as provided in 16 U.S.C. 1811. Specifically, the Secretary of Commerce (Secretary), acting through the NMFS, oversees and manages our nation's domestic fisheries through the development and implementation of fishery management plans and actions (e.g., fishery management plans (FMPs), amendments, frameworks, annual specifications, regulations, etc.). For most domestic fisheries, the MSA requires management decisions to be based on recommendations from unique advisory bodies, the FMCs. In certain circumstances, NMFS may develop management measures or actions on its own.

The MSA management system is unique insofar as Congress has authorized the FMCs to develop and recommend fishery management measures and actions to NMFS. Comprised of Federal, state, and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery conservation and

management, the FMCs' primary responsibility is to develop and recommend fishery management measures and actions for any fishery under their jurisdiction that is in need of conservation and management. Specifically, MSA section 302(h)(1) (16 U.S.C. 1852(h)(1)) requires FMCs to prepare and submit to NMFS FMPs for fisheries in need of conservation and management. Section 303(c) of the MSA requires FMCs to submit to NMFS regulations that the FMCs deem necessary and appropriate to implement the FMP. The MSA mandates an open, public process for the development of fishery management measures and actions through the FMC system.

The MSA establishes strict timelines and limited discretion for Secretarial review of FMC-recommended measures and actions. For FMPs and FMP amendments, upon receipt of an FMC's complete submission, NMFS must immediately commence a review of the recommendation to determine whether it is consistent with the national standards, other provisions of the MSA, and other applicable law. NMFS is also required immediately (within 5 days) to publish a notice in the **Federal Register** informing the public that the FMP or FMP amendment is available for a 60-day public review and comment period. Thereafter, NMFS evaluates the public comments received during the comment period. NMFS must also complete any necessary consultations with other federal agencies prior to the MSA's deadline for a final decision. If, after undertaking the requisite review, NMFS determines that the recommended FMP or FMP amendment complies with the standards and provisions of the MSA and is consistent with other applicable law, including NEPA, NMFS must approve it on behalf of the Secretary. If the recommendation does not comply with these requirements, NMFS must disapprove or partially approve it and provide the FMC with recommendations for actions the FMC could take to conform the FMP or FMP amendment to the applicable requirements. The MSA does not allow NMFS to substitute a different management alternative for that recommended by the FMC. If NMFS fails to notify the FMC within 30 days of the end of the comment period of the recommendation's approval, disapproval, or partial approval, the plan or amendment takes effect as if approved.

For proposed regulations recommended by an FMC to implement an FMP or FMP amendment, the MSA provides NMFS 15 days to review proposed regulations to determine consistency with the underlying FMP or

FMP amendment before publishing the proposed regulations for a 15–60 day comment period. A final rule must be promulgated within 30 days of the close of the comment period on the proposed rule.

In certain situations, the MSA allows NMFS to develop fishery management measures and actions outside of the FMC process, subject to separate procedural requirements. For example, section 304(c) authorizes NMFS to prepare a Secretarial FMP or FMP amendment if: (1) A fishery is in need of conservation and management and the appropriate FMC fails to develop and submit, after a reasonable time, an FMP or FMP amendment; (2) NMFS disapproves or partially disapproves an FMP or FMP amendment, or disapproves a revised FMP or FMP amendment, and the FMC involved fails to submit a revised or further revised FMP or FMP amendment; or (3) NMFS is given authority to prepare an FMP or FMP amendment under section 304 of the MSA, such as FMPs or FMP amendments pertaining to any highly migratory species (HMS) fishery to which section 302(a)(3) of the MSA applies. Procedures for these types of "Secretarial" actions, which are specified in MSA section 304(c), (e) and (g), provide for public and FMC input into their development. Section 305(d) provides additional authority for NMFS, on behalf of the Secretary, to promulgate regulations necessary to carry out its responsibilities under the MSA.

In this proposed rule, the term "fishery management measure" refers to management strategies contained in FMPs, FMP amendments and regulations, including but not limited to closed areas, quotas, and size limits as contemplated in MSA section 303(a)(1) (16 U.S.C. 1853(a)(1)). The term "fishery management action" refers to actions NMFS takes to implement the measures contained in an FMP, including but not limited to the promulgation of regulations and the establishment of dates of closures as contemplated in MSA section 305(f) (16 U.S.C. 1855(f)). In developing and recommending an FMP, FMP amendment or regulation, FMCs may consider and include both measures and actions. The NEPA provisions described in this proposed rule are intended to cover all such recommendations.

#### *B. NEPA's Relationship to the MSA Process*

NEPA is the fundamental national charter for environmental protection. As the Supreme Court has noted, NEPA Section 102 (42 U.S.C. 4332) requires Federal agencies to examine the

environmental effects of proposed Federal actions and to inform the public of the environmental impacts considered in an agency's decision-making process. See, e.g., *DOT v. Public Citizen*, 541 U.S. 752, 768 (2004). NEPA does not mandate a particular substantive outcome; rather, NEPA is a procedural statute, the purpose of which is to protect the environment by requiring Federal agencies to carefully weigh environmental considerations in their decision-making processes, including alternatives to their proposed actions, before taking final action. An essential element of the NEPA process, as highlighted in CEQ's regulations, is the requirement to make relevant environmental information available to the public and afford the public an opportunity to participate in the agency's decision-making process. Ultimately, NEPA is designed to ensure that Federal agencies utilize a sound and public process in making decisions that affect the environment, and to ensure that agencies consider the environmental impacts of, and alternatives to, their proposed actions.

Through these proposed regulations, NMFS seeks to better integrate NEPA into the unique FMC process established by the MSA. For MSA actions, the scope of NMFS's authority to modify FMC-recommended fishery management plans and plan amendments is narrow: NMFS may approve, disapprove, or partially approve a proposed FMP or FMP amendment recommended by the FMC, and the sole basis for disapproval of any such recommendation is that it is not consistent with applicable law, including NEPA, the MSA and its national standards. Applying NEPA solely to the Secretary's limited discretion under the MSA cannot foster the type of informed consideration of the effects of the action in light of reasonable alternatives that NEPA envisions. Because policy recommendations are developed and alternatives narrowed through the public forum of FMC meetings, it is important to integrate the analysis of alternatives and impacts for the NEPA analysis with the FMC's development of recommended management measures and actions. For this reason, NMFS addresses several key issues in this proposed rule: (1) The different roles of FMCs and NMFS under the MSA, as advisory bodies and decision-maker respectively, as those roles relate to NEPA's requirements; (2) the integration of statutory and regulatory timelines to provide for timely responses to fishery resource management needs; and (3) the

complexities of defining the appropriate range of alternatives for analysis.

*C. MSRA Requires Revised and Updated Agency Procedures to Comply With NEPA*

In December 2006, the U.S. Congress acted to amend the MSA through the MSRA, which was subsequently signed into law by the President on January 12, 2007. Pub. L. 109–479. The MSRA addresses a number of fisheries issues, but pertinent to this rulemaking is section 107, which imposes a requirement that NMFS better integrate and more closely align applicable environmental analytical procedures with the MSA's fishery management process.

Congress directed the Secretary, acting through NMFS, and in consultation with the FMCs and CEQ, to revise and update agency procedures to comply with NEPA. Congress stated that the procedures shall:

(A) conform to the [MSA's] time lines for review and approval of fishery management plans and amendments under this section; and

(B) integrate applicable environmental analytical procedures, including the time frames for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act in order to provide for timely, clear and concise analysis that is useful to decision makers and the public, reduce extraneous paperwork and effectively involving the public.

16 U.S.C. 1854(i)(1)(A) and (B).

Moreover, Congress stated that the revised and updated procedures are to be the sole environmental impact assessment procedures for fishery management actions (e.g., FMPs, FMP amendments, or other actions taken or approved pursuant to the MSA) used by the FMCs or NMFS. 16 U.S.C. 1854(i)(2). Finally, Congress authorized and directed NMFS, in cooperation with CEQ and the FMCs, to involve the affected public in the development of the revised procedures.

The MSRA's legislative history reveals Congress' interest in gaining efficiencies in the MSA's environmental review process. Specifically, the Senate Report accompanying the MSRA contained the following language: “[t]he intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation, but to establish one consistent, timely, and predictable regulatory process for fishery management decisions \* \* \* [t]he Committee intends section 107 to streamline this environmental review

process in the context of fishery management.” S. Rept. 109–229, at 8.

**II. NMFS' Implementation Efforts**

*A. Consultations and Public Outreach*

As required by the MSRA, NMFS has consulted with CEQ and the FMCs, and has initiated public involvement in the development of the revised procedures. In the spring of 2007, NMFS and the FMCs conducted two separate forms of outreach. NMFS posted a series of trigger questions on the Internet, soliciting public input on how the process should be revised. At about the same time, the FMCs' Council Coordinating Committee (CCC) developed a strawman proposal for revised procedures. Both the CCC strawman and NMFS' questions were posted on the agency's Web site for a 60-day public comment period. Moreover, each of the eight FMCs held public listening sessions at their respective FMC meetings between February and April 2007.

NMFS received a total of 1,660 comments, all but 8 of which were form letters that expressed general disapproval of the CCC strawman. The remaining eight comments were submitted by a variety of environmental and fishery-related organizations and reflected a wide range of opinions on the new procedures in general, the CCC strawman, and the trigger questions. The main topics addressed by the commenters were:

1. *Need for/Authority to Change Regulations/Guidance.* There is disagreement about the legislative intent of the MSRA with regard to revision of the agency's NEPA procedures, the need for changes to the NEPA procedures, the timeframes for public review of NEPA documents, and the adequacy of the existing process to meet NEPA requirements and fishery management needs.

2. *Roles of FMCs and NMFS.* There are opposing opinions about whether FMCs or NMFS should have the lead on conducting the NEPA process. One environmental organization proposed a specific alternative approach to that set forth in the CCC strawman.

3. *Using the FMC Process to comply with NEPA.* There is disagreement about the appropriateness of using the FMC process to comply with NEPA. A major concern is whether the public would be adequately included. Many suggestions were provided on how to make the FMC process more accessible.

4. *Reasonable Alternatives.* There is consensus that reasonable alternatives must be able to achieve the objectives of the management action. In addition,

several specific suggestions were offered as to how to further define “reasonable alternatives.”

5. *Tiering/Scaling the Level of Analysis.* There is agreement that not every action merits the same level of detail and length in its analysis and that some form of scaling is appropriate, but disagreement as to how to determine the appropriate level of analysis. Some commenters felt that the existing EA/EIS distinction adequately allows for determining the appropriate level of analysis based on an action's degree of significance. Other commenters suggested alternative approaches. Two commenters opposed applying specific criteria to determine the level and detail of analysis and indicated that the circumstances around each action would dictate what level of analysis is appropriate.

6. *Eliminating the EA/EIS Distinction.* Many commenters support keeping this distinction, although one commenter identified a potential benefit of avoiding litigation over which type of analysis should have been prepared.

7. *Reducing the Length of the Comment Period to 30 days.* There is disagreement as to whether longer or shorter comment periods are desirable, as well as on the effects of any change on streamlining and process.

8. *Scientific Research and Experimental Fishing.* The need to improve NEPA's application to scientific research and experimental fishing was pointed out.

At its May 2007 meeting the CCC decided to recommend its strawman to NMFS as the basic approach for the new process and made several additional comments and suggestions. Since May 2007, NMFS has consulted with CEQ and the CCC subcommittee to develop the environmental review procedures proposed in this rule.

*B. Alternatives Considered by NMFS*

In addition to conducting public outreach, NMFS engaged in an internal scoping process to consider the most appropriate means to revise and update the NEPA procedures to better integrate NEPA and MSA. NMFS examined a number of important issues during this process, which included, but were not limited to: NEPA's role in the fishery management context; ways to integrate the NEPA and MSA process to ensure successful implementation of MSA actions; mechanisms for improving public participation; whether NMFS, the FMCs, or both should prepare environmental analyses; and the type of environmental document and level of analysis applicable to a specific fishery management measure or action. As a

result, and after careful consideration of public comments on NMFS' trigger questions, the CCC subcommittee Strawman proposal and public input received at each of the Council listening sessions, NMFS developed an array of alternatives intended to achieve the following goals: (1) Ensure compliance with NEPA when developing and implementing fishery management measures and actions under the MSA; (2) Adhere to the principles of public involvement and agency accountability (i.e., requirements that agencies consider and respond to public comment) set forth in the existing CEQ regulations; (3) Integrate NEPA's requirements into the MSA public processes for developing and approving fishery management measures and actions; (4) To the extent appropriate, build on recommendations in the CCC Strawman document; (5) Appropriately align public participation in the NEPA process to reflect differences in the roles of the Regional Fishery Management Councils (FMCs) and NMFS in the development and approval of fishery management measures and actions and conducting the NEPA analysis; and (6) Conform the MSA and NEPA timelines to achieve greater efficiencies in fisheries management and allow rapid response to fishery management needs, while providing the public meaningful opportunity to influence policy decisions.

In developing these proposed procedures, NMFS attempted to determine where fishery-specific improvements could be gained while supplementing the key elements of the CEQ regulations that ensure opportunities for public participation and agency accountability. Some of the key features of the CEQ regulations centered around the early public scoping process, the opportunity for public comment on a draft analytical document, a revised final document that addresses public comment, a cooling-off period prior to the final decision, and a Record of Decision (ROD) documenting the agency's final decision. NMFS then considered whether the procedural aspects of these elements (such as timing, sequencing, and feedback mechanisms) could be implemented to provide more appropriate opportunities for public participation in the process for developing MSA measures and actions. Specifically, NMFS sought an approach that would: (1) Integrate NEPA's public participation opportunities with the FMC development of analyses and alternatives and NMFS' decisionmaking under the MSA; and (2) allow the MSA

decision-making process to proceed in a timely manner to address real time fishery management needs.

NMFS identified alternatives for possible fisheries-specific improvements in several general categories: form of documentation; roles and responsibilities; timing and flow of process; and other elements (experimental fishing, emergencies, page limits, and the range of alternatives to be analyzed).

#### 1. Form of Documentation

##### a. Single Integrated Document

Pursuant to NEPA, an EIS must be prepared for any major Federal action significantly affecting the quality of the human environment. An EA may be prepared as a first step to inform the determination of whether a proposed action would have a significant effect on the quality of the human environment, thereby requiring an EIS. Generally, the EIS is a more thorough analysis of impacts and alternatives than the EA. For development of FMPs by FMCs, however, this is not always the case. Development of FMPs or amendments under the MSA requires development of a comprehensive analysis that incorporates almost all of the content requirements for an EIS. In many cases, an FMC can relatively easily incorporate the additional EIS content requirements (i.e., cumulative impact analysis and reasonable range of alternatives) into the existing fishery management analysis.

Given these requirements, one possible approach would be to eliminate the EA/EIS distinction, ensure that content requirements of an EIS are included in the MSA analysis, and adjust the procedures and timing for completing an EIS through the FMC process. Rather than focusing on whether or not an action is "significant," this approach would undertake the more comprehensive analysis and consideration of alternatives for every action. Among other things, this approach would ensure preparation of EIS-level documents in "close call" situations. This approach was recommended by the CCC in their strawman, which would have required a single analytical document labeled an Environmental Impact Analysis (EIA).

However, there was little support for this approach expressed through public comment. One of the most noted concerns expressed by the public focused on the potential difficulty in developing scaling criteria, and how EIAs would be tailored to allow an appropriate scaling of the analysis based on the scope of the proposed action.

This approach could result in unnecessary analysis and delay for actions where an EA/FONSI is appropriate.

##### b. Status Quo

NMFS considered retaining the three main forms of documentation currently provided for in the CEQ regulations: The EIS, EA/FONSI, and CE. While these forms of documentation are familiar to the public, retaining them as they currently exist in the CEQ regulations would negate the opportunity for improvements to the NEPA process for MSA actions as intended by the MSRA.

##### c. New Forms of Documentation

The preferred alternative, as set forth in this proposed rule, would provide for four types of documentation based on the current EIS/EA structure, but tailored to address the unique needs of the fishery management process: (1) An IFEMS, which would be similar to an EIS but with more explicit integration of MSRA requirements, (2) an EA/FONSI, (3) a CE, and Determination of Categorical Exclusion, and (4) a Memorandum of Framework Compliance (this would allow NMFS and the FMCs to efficiently implement the NEPA process for actions (e.g., frameworks and annual specifications) that fall within the scope of a prior NEPA analysis). These documents, with the exception of the Memorandum of Framework Compliance, would have content requirements similar to those provided under existing NMFS procedures and caselaw, but with revisions to address specific fishery-related needs. In combination with the adjustments to process and timing described below, the intent of these revisions is to retain the flexibility to utilize an EA/FONSI or CE, where appropriate, but to make the process for completing an EIS-level document (i.e., IFEMS), and/or utilizing a Memorandum of Framework Compliance, better integrated with existing MSA timing and decision-making requirements.

#### 2. Roles and Responsibilities

NMFS analyzed the MSA and NEPA statutory and regulatory requirements and identified several different ways of viewing the roles and responsibilities of NMFS and the FMCs in an integrated MSA/NEPA process.

##### a. FMCs Responsible for NEPA Compliance

One option would be to vest sole responsibility for preparing the NEPA analysis with the FMC and require that

the FMC develop the NEPA analysis during development of MSA management recommendations. This option would give the FMC full responsibility for completing the NEPA analysis. Under this scenario, the NEPA document would be primarily an FMC document. FMCs would be solely responsible for developing the final NEPA document prior to recommending management measures and actions to NMFS. The analysis would be prepared in accordance with the requirements for an EIS. NMFS would not participate substantially in the development of the document. The FMCs would be required to complete all required NEPA procedures, including the cooling-off period, prior to taking the final vote to recommend a measure or action. Because of the MSA's unique structure, based on the FMCs considering public input and making management recommendations to NMFS, and NMFS' subsequent decision to approve, disapprove, or partially approve any recommendation, this approach would effectively align NEPA's consideration of impacts and alternatives with the FMC's consideration of alternatives for recommendation to NMFS. However, NMFS is the Federal action agency ultimately responsible for NEPA compliance, and this option would not give NMFS involvement in the NEPA documentation and process to assure that NMFS satisfies its NEPA obligations.

b. NMFS Solely Responsible for NEPA

NMFS identified two approaches by which NMFS could comply with the mandates of NEPA without involving the FMCs. However, neither of these scenarios would result in the type of information sharing and public participation envisioned by NEPA and these proposed regulations.

(i) *Separating the NEPA Analysis From the FMC's Process.* Under this first scenario, NMFS, as the action agency, would conduct the NEPA analysis and prepare the appropriate NEPA document. NMFS would publish and make available the NEPA document separate from the FMC process, but if practicable NMFS could align its release of the document within the FMC process. NMFS, as a member of the FMC, could recommend NMFS's alternatives and NEPA analysis to the FMC as it considered alternatives prior to its final vote. However, NMFS has only one vote on each FMC and therefore could not ensure the range of alternatives NMFS analyzed in the NEPA document would be considered by the FMC as it developed its recommendation under the MSA. While

the Secretary must disapprove a recommendation that does not comply with NEPA, MSRA directed NMFS to revise and update its procedures to integrate NEPA procedures with the procedure for the preparation and dissemination of fishery management plans, amendments, or other actions taken or approved pursuant to the MSA. NMFS did not adopt this alternative because it does not effectively integrate consideration of alternatives and impacts for the NEPA analysis and for the FMCs' development of management recommendations.

(ii) *NMFS Prepares the NEPA Analysis After the FMC Takes Final Action.* Under this scenario, NMFS would again conduct the NEPA analysis and prepare the appropriate NEPA document. However, the NEPA process would not commence until after the FMC takes a final vote on its recommendations. This option is based on the theory that there is no proposed Federal action to analyze until the FMC transmits its recommendation and the Secretary is required to take action on the FMC's recommendation. However, this approach does not effectively integrate the analysis of alternatives and impacts for the NEPA analysis with the FMCs' development of recommended management measures and actions. This option would require significant reductions in the amount of time available for public review and comment on the NEPA analysis for all fishery management measures and actions.

c. Preferred Alternative

The third alternative NMFS considered would modify the procedural requirements for conducting the NEPA analysis and preparing the appropriate NEPA document to accommodate the unique relationship between the FMCs and NMFS in the MSA context.

This alternative is intended to better align public input to FMC recommendations and NMFS authority for approval and implementation of fishery management measures and actions and would establish a regulatory requirement that FMCs consider public comments on an IFEMS before taking a final vote. It is based on an understanding of the role of the FMC as an advisory body that narrows alternatives and makes recommendations and which, therefore, should be informed by public comment. This alternative also recognizes that NMFS, after having provided input and guidance to the FMC for the development of the NEPA document, bears ultimate responsibility for

compliance with both MSA and NEPA. The requirements of NMFS procedures implementing NEPA would be modified to accommodate the respective roles of the FMCs and NMFS in the NEPA process. This alternative would provide for more explicit integration of NEPA in the MSA decisionmaking process and maximize opportunities for public participation by providing opportunities for review and comment at by both FMC and NMFS, levels, while allowing flexibility to reduce comment periods for FMCs in certain circumstances to meet fishery management need.

3. Timing and Flow of Process

NMFS analyzed different ways to build flexibility and predictability into the timing requirements of the NEPA procedures to assure the appropriate level of NEPA analysis is prepared and to allow for the maximum amount of public participation during the FMCs' development of recommended management measures and actions.

a. CCC Strawman (Three-Meeting Minimum for IFEMS)

The CCC strawman includes a recommended process that would require a minimum of three FMC meetings to develop a management recommendation and associated NEPA documentation. Upon further consideration at its May 2007 meeting, however, the CCC determined that some management recommendations needing to be completed in fewer than three meetings would benefit from and/or require analysis in an EIS-level document and recommended that the revised procedures address this issue.

b. Preferred Alternative (Two-Meeting Minimum for IFEMS)

After analyzing the minimum timelines set forth in the CEQ regulations, the statutory timelines of the MSA, and the practical issues surrounding scheduling of FMC meetings and the logistics of completing the necessary steps to develop a fishery management recommendation, NMFS constructed an approach that would allow for the development of an IFEMS through a minimum two-meeting cycle, thus allowing for even the most time-constrained fishery management needs to be informed by an IFEMS.

This alternative would take into account the statutory structure of the MSA decision-making process and the need for the FMC recommendation to move forward through Secretarial review to an ultimate decision in order to respond to real-time fishery management needs. This alternative accommodates the typical FMC process

for development of a management recommendation with an EIS-level document, which usually involves an iterative process with the public in which several versions of a draft are shared and modified over the course of several FMC meetings prior to a final FMC vote. This alternative also recognizes that in some circumstances certain minimum time periods identified in the CEQ regulations may need to be reduced to allow the completion of an IFEMS in as few as two FMC meetings as described below.

For a smaller subset of fishery management needs, various factors (such as the timing of the availability of fishery statistics, the timing of the opening of the fishing season, judicially-imposed deadlines, and the schedule of FMC meetings) can interact to constrain the available time between identification of a management need and the time when a management measure needs to be effective. The intent of this proposed rule is to maintain the iterative and deliberative processes of the FMCs as they exist for addressing management needs in a situation not subject to such time constraints, but to allow enough flexibility so that the system can also accommodate an IFEMS in a time-constrained situation. This proposed rule (§ 700.604) would establish the following considerations for determining the appropriateness of reductions in minimum time periods for public comment:

- (1) Whether there is a need for emergency action or interim measures to address overfishing;
- (2) The potential long- and short-term harm to the fishery resource;
- (3) The potential long- and short-term harm to the marine environment, including non-target and protected species;
- (4) The potential long- and short-term harm to fishing communities;
- (5) FMC meeting schedules and ability to respond;
- (6) Degree of public need for the proposed action, including the consequences of delay;
- (7) Time limits imposed on the agency by law, regulations, or Executive Order.

An important component of this approach would be supplementation of the requirement in the CEQ regulations linking the start of minimum time periods for public comments and the delay associated with the cooling off period to the Environmental Protection Agency's (EPA's) publication of the notice of availability (NOA). EPA publishes a notice in the **Federal Register** each Friday, listing all the EISs that were filed with EPA the previous

week. In severely time-constrained fishery management situations, the time that is lost prior to EPA's weekly filing could be used by NMFS, the FMCs, and the public to complete better documents, to have a few more days of public comment, and/or to be able to complete an IFEMS on a very short deadline. The preferred alternative would allow NMFS to start the clock on the minimum time periods by filing the NOA of the IFEMS in the **Federal Register** as soon as the IFEMS is available to the public and filed with EPA. In such circumstances, the minimum time period could be calculated from the **Federal Register** publication date of the NMFS NOA. The EPA notice to follow would state that, pursuant to MSRA and EPA's authority to reduce prescribed periods for timing of agency action (40 CFR 1506.10(d)), EPA has reduce the applicable time according to the number of days provided for in preceding the NMFS NOA.

In addition to providing for time savings in time-constrained situations, this proposed change would allow NMFS to start the clock on the comment period on the NEPA document simultaneously with the start of the comment period on the proposed fishery management measure or action. Allowing the clocks for the two sets of comment periods to begin and run simultaneously would further integrate the requirements of NEPA and the MSA.

#### 4. Other Elements (Experimental Fishing, Emergencies, Page Limits, and the Range of Alternatives To Be Analyzed)

##### a. Experimental Fishing

The public raised the issue that NEPA's requirements sometimes hinder the ability of research organizations to obtain EFPs. NMFS considered maintaining the status quo, as well as whether there may be opportunities to improve the current NEPA procedures with regard to EFPs. The preferred alternative would specify that, where experimental fishing activities proposed to be conducted under an EFP, and where the fish to be harvested have been accounted for in other analyses of the fishery such as by factoring a research set-aside into the allowable biological catch (ABC), optimum yield (OY), or fishing mortality, the activities could be eligible for a CE, as appropriate. Activities that are truly "scientific research," as defined by 50 CFR 600.10, are not subject to regulation under the MSA and thus not subject to this rulemaking.

##### b. Emergencies and Interim Actions Pursuant to the MSA

NMFS possesses authority under section 305(c) of the MSA to promulgate emergency rules or interim measures. NMFS's must be able to respond quickly to emergency or overfishing situations while accommodating NEPA's requirements to ensure adequate public involvement and prepare the requisite analyses for a particular measure or action.

As part of this proposed rulemaking, NMFS considered two options to comply with NEPA in the context of section 305(c) emergency and interim actions. One option would have allowed NMFS to prepare an abbreviated NEPA analysis for the measure or action. The scope and degree of analysis would have been determined in light of the nature and timeframe in which to address the emergency. Further, if good cause existed to waive the requirements for notice and opportunity for public comment on the proposed rule under the Administrative Procedure Act, NMFS would have afforded an opportunity for public comment on the NEPA document after implementation of the emergency or interim measures. The preferred option, as described in § 700.701, would establish the option of developing programmatic alternative arrangements for NEPA compliance with CEQ for emergency or interim actions that may result in significant impacts. The intent is to limit such arrangements to specific types of emergency or interim actions that necessitate immediate attention and for which public involvement or detailed analyses would interfere with NMFS' ability to control the immediate impacts of the emergency. While this alternative would still allow for the use of ad hoc approaches where appropriate, it would allow flexibility to prepare planned and managed approaches that would avoid the inefficiencies and uncertainties of reactive, situation-specific arrangements.

##### c. Page Limits

CEQ's guidance for preparation of EISs states that the text "shall normally be less than 150 pages," and for proposals of unusual scope or complexity "shall normally be less than 300 pages." 40 CFR 1502.7. NMFS and FMC-generated NEPA documents sometimes exceed these expected page limits. It has been suggested that reducing the number of pages of MSA NEPA documents could improve the overall analytical quality and public accessibility and understanding of the documents. The complexity of the

alternatives that must be analyzed for fishery management actions and measures and the difficulty of sufficiently analyzing these alternatives in a relatively short document, however, may result in documents exceeding these page limits. NMFS proposes to consult with CEQ on a programmatic basis in those situations where page limits for NEPA analyses are exceeded.

#### d. The Range of Alternatives To Be Analyzed

A Federal agency's range of alternatives is reasonable if the alternatives meet an agency's stated purpose and need and, if they are consistent with an agency's statutory authorities and policy objectives. Although the range of alternatives should not be so narrowly defined so as to preclude meaningful consideration of alternate ways of accomplishing agency objectives, courts have afforded agencies much discretion to define what they consider to be reasonable in light of the controlling statute or purpose and need for the action. In some cases the lack of precisely drawn alternatives has led to overly complex NEPA documents.

The CCC Subcommittee commented, in the context of MSA fishery management actions, that a literal interpretation of the requirement in CEQ's regulations that the EIS "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," results in FMCs and NMFS analyzing alternatives that the FMC would never recommend, requires detailed analysis of every reasonable alternative suggested by the public, and results in an overapplication of NEPA's requirements. The CCC Subcommittee recommended striking the word "all" from before "reasonable alternatives" and clarifying that the requirement is to consider a "reasonable range" of reasonable alternatives. NMFS believes that clear guidance on the range of alternatives in the fishery management context would reduce the over-inclusion of alternatives that results in overly complex and voluminous alternatives analyses. The proposed rule would not eliminate the word "all," but would encourage better analysis of an appropriate, not overly-inclusive, range of alternatives.

### III. Proposed Changes to Existing NEPA Review Procedures

After consulting with the FMCs and CEQ, and carefully considering input from the public, NMFS is proposing to implement new regulations, to be

published at 50 CFR part 700, establishing fisheries-specific procedures for NEPA compliance. This approach would replace the existing NMFS procedures for complying with NEPA in the context of fishery management under the MSA. These specific regulations for implementing NEPA in the context of fishery management under the MSA would supplement the general CEQ regulations implementing the procedural provisions of NEPA. While the CEQ definitions (40 CFR part 1508) and other generally applicable provisions of the CEQ regulations are not paraphrased or repeated, they would remain relevant and applicable. Based on public review and comment on these proposed regulations, CEQ will review the final NMFS regulations for conformity with NEPA. 40 CFR 1507.3.

#### A. Form of Documentation

The proposed process would utilize four forms of documentation: The IFEMS, the EA/FONSI, the CE, and the Memorandum of Framework Compliance.

##### 1. IFEMS

The IFEMS would be comparable to an EIS-level analysis. As the name indicates, it would integrate applicable environmental analyses into a single document.

The content of the IFEMS would be largely similar to that of an EIS. This proposed rule contains additional specificity concerning what constitutes a reasonable range of alternatives, including the "no action" alternative, how incomplete or unavailable information should be treated for purposes of fishery management, and a specific requirement to consider cumulative impacts. The proposed process would also allow for the timing and procedures associated with the IFEMS to be modified from those CEQ has established for EISs.

While the NEPA-related contents of the IFEMS would be similar to the EIS, the procedural requirements would be different. The proposed name change from EIS to IFEMS is intended to make clear that the requirements applicable to an IFEMS are distinct from those applicable to an EIS, especially in terms of procedure and timing, but also regarding the identification of alternatives, how to deal with incomplete information, and the requirement to analyze cumulative impacts. Existing FMPs and EISs would not need to be amended to comply with the new IFEMS requirement. IFEMS would only need to be developed for

new actions or to take advantage of new frameworking measures.

This proposed rule would also establish categories of actions that would normally require an IFEMS, such as new FMPs, and FMP amendments with significant impacts (§ 700.103). These categories are expected to assist with agency and FMC planning and inform public expectations on the appropriate level of NEPA documentation. For example, when initiating analysis of a new action, an FMC or NMFS would be able to quickly determine which level analysis would most likely be applicable to that type of action. However, the determination of significance for a particular action would still ultimately be based on the application of the significance criteria.

##### 2. EA/FONSI

The EA/FONSI would still be available for use based on the "significance" test as is currently the case. In addition, the proposed revisions would establish certain categories of actions that would normally qualify for this level of analysis, such as emergency actions and annual specifications or frameworks not covered by a Memorandum of Framework Compliance as described below. The effect of these categories would also be to assist with agency and FMC planning and inform public expectations. However, the determination of significance for a particular action would still ultimately be based on the application of the significance criteria.

In addition, new § 700.401(d) would authorize the use of a FONSI for an action that may have significant or unknown effects, as long as the significance and effects have been analyzed previously. This provision is intended to address situations such as recurrent annual management measures, the effects of which are significant or unknown, and which therefore do not qualify for a CE, but nevertheless do not require a new EIS every year given the previous analysis.

##### 3. CE (and Determination of Categorical Exclusion (DCE)) (§§ 700.105 and 700.702)

The current CEQ guidance defines CEs and encourages agencies to use them. The proposed revisions include a new section on CEs that would establish a new form of documentation (DCE). The proposed revisions would also establish a new CE category for experimental fishing activities permitted under an EFP, where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the



ABC, OY, or fishing mortality. In addition, the proposed revisions would establish, by regulation, other categories of actions that would qualify for a CE and which are currently contained in NOAA's Administrative Order that provides internal agency guidance on administering NEPA (NOA 216-6).

#### 4. Framework Implementation Procedures and the Memorandum of Framework Compliance (§ 700.104)

This section would allow the NEPA process for fishery management to be streamlined for measures or actions that have been previously analyzed by the FMCs or NMFS. Specifically, this proposal would allow FMCs or NMFS to establish Framework Implementation Procedures (FIPs), i.e., formal mechanisms to allow actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional NEPA analysis. In its simplest terms, the goal of a FIP is to provide that, when the environmental impacts of fishery management measures have been analyzed in a broad parent document, subsequent actions to implement these measures, e.g., a framework action, annual specifications, or harvest limits, would not need further NEPA analysis, so long as the impacts of a subsequent action fall within the range of effects considered by the broad parent document.

The proposed use of FIPs would allow FMCs and NMFS to integrate NEPA's requirements into an existing MSA management tool that provides for advance planning and rapid response to real-time fishery management needs. Many FMPs include provisions, known as "frameworks," that permit a class of actions to be undertaken pursuant to procedures described under the FMP without requiring an amendment to the underlying FMP. The FMP or FMP amendment that establishes these procedures often includes extensive analysis of a range of measures and actions that are anticipated to be taken in the future through the use of these framework procedures. The FIP provisions proposed in this rule would allow an FMC or NMFS to utilize the same sort of advance planning for analysis of environmental impacts. FIPs could be used for a variety of fishery management measures and actions, including traditional framework actions, annual specifications, and other fishery management actions, as appropriate.

To establish a FIP, the FMCs or NMFS would include procedures in an FMP that comply with the requirements specified in § 700.104(a) of the proposed regulations. For example, the FIP would

need to specify criteria that would trigger the requirement to supplement a prior analysis if a new IFEMS or EA for the subsequent fishery management action would be needed.

This proposed rule would also establish a Framework Compliance Evaluation process to evaluate whether a fishery management action taken pursuant to an FIP established under an FMP requires additional action-specific analysis. At a minimum, the Framework Compliance Evaluation would serve two purposes: First, to identify the applicable underlying NEPA document(s) for the subsequent fishery management action; and second, to determine whether the underlying NEPA document(s) can support the action (i.e., whether the action and its anticipated effects fall within the scope of the prior analysis) or whether the NEPA analysis requires supplementation due to new information or because the effects of the subsequent action have not been previously analyzed.

The Framework Compliance Evaluation would result in one of two outcomes, as specified in § 700.104(c) and (d): (1) The development of a Memorandum of Framework Compliance that documents briefly how the fishery management action taken pursuant to a FIP falls within the scope of a prior NEPA analysis; or (2) the determination that supplementation of the prior NEPA analysis is needed to satisfy NMFS's NEPA obligation for the subsequent fishery management action.

#### *B. The Role of the FMCs and NMFS in the NEPA Process*

The proposed approach recognizes that the MSA created a unique structure for Federal fisheries management, under which both the FMCs and NMFS have important roles. The FMCs are advisory bodies that develop management alternatives and make recommendations that NMFS must approve or partially approve unless they are inconsistent with applicable law. Given the primary role FMCs play in the development of fishery management measures and actions, FMC decisions should be directly informed by public comment, and the MSA's public process requirements address this need. For its part, NMFS has the authority to approve and implement fishery management measures and actions and bears ultimate responsibility for compliance with the MSA and NEPA. To account for these different roles, portions of the proposed procedures would differ from the current NMFS procedures with respect to the requirements for public participation and consideration of and

responses to public comment by NMFS and the FMCs.

This proposed rule would establish new duties and opportunities intended to ensure both that public input relevant to the development of alternatives and policy recommendations is provided to the FMC when the FMC is developing its recommendations, and that NMFS considers and responds to comments addressing its decision to approve, disapprove, or partially approve an FMC recommendation, which includes consideration of NEPA compliance. This proposed rule would establish: a new requirement for FMCs to consider public comments on draft IFEMSs prior to voting to recommend a measure or action for Secretarial review; flexibility to reduce the public comment period on IFEMSs to fit a two-meeting cycle where necessary; additional requirements for consideration and response to public comments by NMFS (including a new comment period on the Final IFEMS and a new requirement to respond to comments on the Final IFEMS in the ROD, as appropriate); and flexibility for NMFS to reduce the cooling-off period where necessary.

In light of the important role the FMCs play in the MSA process, public comment regarding scope of analysis, alternatives, and impacts should appropriately be directed to the FMCs during the development of recommended management measures and actions. However, NMFS recognizes that this requirement could affect the FMCs' ability to respond rapidly to a fishery management need in some cases. Because integrating NEPA requirements into the FMC process requires assurances that public input can be considered prior to narrowing the range of alternatives, this proposed rule attempts to balance opportunities for public input with the need for rapid response to management needs. Therefore, this proposed rule includes modifications to timing and process as discussed further in section C below.

#### *C. Timing and Process*

This proposed rule would establish a process for conducting the necessary NEPA analyses within the context of the FMC process. For EAs and CEs, the procedures currently used by the FMCs would not be affected. Likewise, there would not be significant changes to the existing process for Secretarial and HMS actions. Therefore, this discussion focuses on the proposed process by which an IFEMS would be prepared for an FMC-initiated action.

The key concept behind the proposed changes in procedure is that the opportunities for public participation

and the requirements for comment and response have been revised to align with the MSA process and to reflect the respective roles of the FMCs and NMFS under the MSA, as discussed above. To allow the process to flow, as envisioned under the MSA, from FMC recommendation to an ultimate final agency action by NMFS, flexibility would be built into the procedural timelines.

As described in the discussion of roles in section B. above, this proposed rule strikes a balance between creating additional NEPA procedures required for the FMCs and where appropriate allowing for reductions of time for public review and input. While it imposes new duties on the FMCs to consider public input before voting, it does so in a manner intended to allow the process to continue moving forward to a decision point at the NMFS level. It is vital that FMCs and NMFS retain the ability to respond rapidly to fishery management needs. It is important to note that the public would be given as much time to review the draft as the FMC members and that any reduction in time must be supported by one of the criteria enumerated in these proposed regulations.

To offset any potentially shortened public review period on the draft during the development of FMC recommendations, this proposed rule would add additional public input requirements for NMFS. This would include a new comment period on a Final IFEMS, and a new requirement to respond to comments on the Final IFEMS in the ROD.

The goal of the proposal is to make the process flexible enough to allow adequate public involvement, but to allow for adjustments when necessary to meet a time-sensitive resource management need. The minimum time period in which an FMC recommendation supported by an IFEMS could be completed under the proposed regulations would be over the course of two FMC meetings.

For FMC-initiated actions, the process would flow as follows:

#### 1. Scoping

The basic scoping approach for FMC-initiated actions would be based on the MSA process. Generally, the initial scoping notice would be published in the **Federal Register** as part of an FMC's meeting agenda notice, and no less than 14 days in advance of the FMC meeting. This provision would not limit the ability of an FMC or NMFS to publish a scoping notice earlier in the process. In addition to the FMC meeting, other scoping activities could also be

conducted by the FMC or NMFS. NMFS would have to ensure that the scoping process meets the purposes of scoping as proposed to be set forth at § 700.108. The scoping notice would be required to be titled and formatted in a manner that provides the public with adequate notice of the NEPA-related scoping process. For NMFS-initiated actions, including HMS actions, NMFS would initiate scoping via a **Federal Register** notice and would provide notice of scoping activities, if any, conducted in conjunction with HMS Advisory Panel meetings or other meetings held by NMFS.

While the intent is to utilize the existing FMC processes to the extent practicable, the proposed regulations would allow scoping to be satisfied by many different mechanisms, including: FMC or NMFS planning meetings and public hearings; requests for public comment on public hearing documents; discussion papers; and other versions of decision and background environmental documents. Scoping meetings should adequately inform interested parties of the proposed action and alternatives to facilitate substantive participation in the development of the management measures and environmental document. If the proposed action has already been subject to a lengthy development process that has included early and meaningful opportunity for public participation in the development of the proposed action, those prior activities may be used as part of meeting the scoping components of these environmental review procedures.

Note that, in order to get the scoping notice out as early as possible, the FMC may not identify alternatives prior to publication of the notice. In this case, it would be sufficient to indicate that alternatives will be identified through the FMC process and that the public will have an opportunity to provide input through the FMC process.

NMFS, working with the FMCs, will develop guidance on the appropriate format and content for scoping notices.

In addition, the proposed rule includes a requirement at § 700.112 that, with respect to any responsibilities not clearly assigned by this rule, NMFS and the FMC would assign these responsibilities prior to completion of the scoping process.

#### 2. Draft IFEMS

The draft IFEMS would be circulated for public comment for at least 45 days prior to the FMC voting to recommend an action to NMFS, unless any of the considerations in § 700.604(b)(2) are met. The FMC would be required to consider public comment on the IFEMS

prior to voting to recommend the action. At a minimum, the notice of its availability would be required to be published no later than with the agenda notice for the upcoming FMC meeting at which FMC action would take place.

Under the proposed rule, the allowable public comment period on a draft IFEMS might, in extraordinary circumstances, be only 14 days, compared to CEQ's required minimum time period of 45 days for public comment on draft EISs (DEISs). It is important to note, however, that the draft IFEMS informs the FMCs in their development of recommended management measures and actions. In light of the unique role the FMCs play, the draft IFEMS would be specifically designed to link NEPA's considerations to the FMC process of developing recommended management measures and actions under the MSA.

#### 3. Public Comment

In order to ensure that the public has a meaningful opportunity to participate in the NEPA process as the FMC develops its recommended management measures and actions, as well as ensure that the FMC is well-informed when making its MSA recommendations, the FMC would be required to consider public comment on the draft IFEMS prior to voting to make a final recommendation to the Secretary. Because FMC meetings are public meetings and transcripts are kept, there would be a record of how the FMC addresses comments. The FMC's vote would also provide evidence of how the FMC responded to comments. In addition, this proposed rule would require the final IFEMS to document how both the FMC and NMFS responded to comments on the draft (§ 700.304).

Likewise, the commenting public would need to raise comments pertinent to the FMC's analysis, such as the scope of the analysis, the alternatives considered, and the expected environmental impacts, to the FMC prior to its vote. The proposed regulations state that NMFS is not obligated to respond to comments relevant to the draft IFEMS that are raised for the first time during Secretarial review. (See § 700.305(d)). The proposed regulations are intended to encourage the public to seek any change in the policy recommendation or alternatives considered before the FMC's vote when this can and should appropriately be done via the FMC process. Therefore, the proposal highlights the obligations of the interested public to raise pertinent comments at appropriate points in the

process. As discussed below, comments relevant to the draft IFEMS raised for the first time when the action is under MSA Secretarial review will be considered only in light of the Secretary's decision on the proposal's ultimately approvability, which includes compliance with NEPA and other applicable law.

#### 4. Vote

The FMC would vote to recommend action. Depending on the outcome of the vote, either a final IFEMS or a supplemental IFEMS could be prepared. A final IFEMS could be prepared and submitted with the transmittal package to begin Secretarial review if the FMC voted to recommend: (1) An alternative considered and analyzed in the draft IFEMS; (2) a hybrid of the alternatives analyzed in the draft; or (3) another alternative not specifically analyzed in the draft IFEMS, but otherwise within the range of the alternatives analyzed in the draft. If, however, the FMC voted to recommend a completely new alternative ("outside the box" alternative) that was not previously analyzed, there would be a requirement for additional analysis, but the proposed approach would offer some flexibility in determining how to proceed as described below.

#### 5. Supplemental IFEMS

Section 700.203(b)(5) is intended to address the question of how to allow the FMC's recommended action to move forward towards submission to NMFS for decision, while assuring meaningful opportunity for the public to comment on the NEPA analysis both as the FMC develops its recommendation and as NMFS reviews the recommended action. Because the FMC process culminates in a vote from the FMCs, the FMCs rarely have a preferred alternative fully fleshed out prior to their vote. At FMC meetings, after hearing public testimony, an FMC may vote to recommend an action that is a modification of alternatives or combinations of alternatives specifically analyzed. Unless the impacts are beyond the scope of the analysis the FMC considered, these types of changes should not require a new draft IFEMS, but rather can be fully assessed in a final IFEMS and distributed for additional public comment before NMFS's final decision. The intention is to prevent the FMC from becoming trapped in a cycle of preparing a revised analysis to address the new alternative and conducting another vote, which again results in a completely new alternative, leading to yet another round of analysis and voting. On occasion, this

cycle can lead to gridlock such that necessary and appropriate conservation and management measures or actions are inordinately delayed. If, however, the FMC selects a completely new alternative beyond the scope of the draft IFEMS, the public must be provided an opportunity to review a supplemental IFEMS.

As described below, the proposed approach would give the FMCs and NMFS some flexibility in determining how to proceed when an unanalyzed alternative is selected by the FMC. The FMC could choose to take public comment on the supplemental IFEMS through the FMC process or to transmit the supplemental IFEMS to NMFS and have NMFS take public comment on it during Secretarial review of the proposed action.

The FMC could decide to supplement the analysis, take public comment at the FMC level, and then submit the final IFEMS to NMFS with the transmittal package for the MSA recommendation(s). The supplemental document would be distributed to the public as another "draft" IFEMS and would comply with timing and commenting provisions regarding drafts. This approach would allow the FMC to maintain control of their analysis in the MSA process, and would allow a new vote at the FMC level prior to Secretarial review in the event that the supplemental analysis identified impacts that caused the FMC members to change their votes.

Alternatively, the supplemental IFEMS could be prepared and submitted with the transmittal package for the MSA recommendation(s). NMFS would then request comment on the supplement during the Secretarial review period. This approach also contemplates that the supplemental IFEMS would be treated as another "draft" IFEMS and would comply with timing and commenting regarding drafts. There are many drawbacks to this approach, and NMFS anticipates that it would be used rarely, if ever, and only to address extraordinary circumstances. The FMC would not have the ability to revise its recommendation based on the results of the supplemental IFEMS. In addition, because of the limited time available for an additional notice and comment opportunity during the MSA's Secretarial review period, this approach would involve extremely tight turn-arounds due to the MSA's statutory time periods. This type of scheduling would involve severe workload burdens on staff and would involve a high risk of failure to meet the statutory deadline. However, in certain circumstances

requiring the need for rapid response, this approach may be appropriate.

To allow for the necessary steps to be completed within the mandatory review periods, when NMFS is reviewing an FMC-recommended regulation with a supplemental IFEMS on the MSA clock (MSA sec. 304(b)), the proposed rule would allow the minimum NEPA time periods to be adjusted to run concurrently with the comment period on the proposed regulation, if justified.

The FMCs and NMFS should continually evaluate the adequacy of existing IFEMS that cover ongoing management activities.

#### 6. Final IFEMS

For fishery management actions developed through the FMC process, the final IFEMS would: Describe the public comments received through the FMC public process; describe any changes made through the FMC public process, either to the analysis or to the proposed action; and describe any additional modifications to the alternative recommended as the proposed action by the FMC.

#### 7. Transmittal

When the package is complete, it would be "transmitted" to NMFS to initiate the MSA statutory review time periods.

#### 8. Cooling Off Period and Comment Period for a Final IFEMS

a. For a final IFEMS submitted with the transmittal package, NMFS would publish in the **Federal Register** an NOA of the Final IFEMS as part of the appropriate notice of proposed rulemaking or NOA of a proposed FMP or FMP amendment and solicit public comment on the IFEMS, along with public comment on the FMC's recommended action. This would represent a new opportunity for public comment not provided for under CEQ NEPA regulations or current NMFS NEPA procedures. Comments would address the Secretary's decision to approve, disapprove, or partially approve the recommended action, which requires consideration of consistency with applicable law such as the MSA and NEPA. The reason for providing a new opportunity for comment on the final IFEMS is to assure that, as the Federal action agency, NMFS provides the public an opportunity to participate in its decision-making. In addition, this provision would better align the MSA public comment opportunities during Secretarial review with those for the NEPA analysis.

As discussed above, this proposed rule would require comments relevant to the FMCs' NEPA analysis to be raised via the FMC process. Therefore, comments on the final IFEMS should address issues relevant to NMFS' decision on the FMC's recommendation, such as compliance with the MSA, its National Standards, and other applicable law including NEPA. If comments requesting a change in the FMC's policy recommendation or otherwise relevant to the draft IFEMS are not made initially during the FMC process, but could have been, the Secretary would not be required to consider them at a later stage.

Comments would be addressed in the ROD as provided for in the regulations (see § 700.502(b)(4)). The Final IFEMS would also need to be filed with the EPA, and NMFS' publication of the NOA for the IFEMS would initiate the 30-day cooling-off period (which could be reduced to 15 days under certain circumstances).

b. If a Supplemental IFEMS is submitted with the transmittal package, a Final IFEMS would need to subsequently be prepared and circulated for a period of public comment (which could be reduced to 15 days if the action is a regulatory amendment) during Secretarial review. Publication of the Final IFEMS would initiate the 30-day cooling-off period (which could be reduced to 15 days if necessary to complete the Final IFEMS within the MSA's Secretarial review period).

#### 9. ROD

In the ROD, NMFS would respond to comments received on the Final IFEMS. However, as described below, NMFS would not be required to 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 § 700.303(b) and § 700.304(d).

#### 10. Public Comment and Agency Response Under the New Process

As discussed above, in order to inform the development of the NEPA document and fishery management alternatives considered by the FMCs, comments relevant to the draft IFEMS, such as comments on the statement of purpose and need, range of alternatives, and evaluation of environmental impacts, would need to be raised prior to the FMC's vote to recommend a measure or action to NMFS. Because section 304 of the MSA limits NMFS' discretion to approval, partial approval, or disapproval of FMC-recommended actions, the proposed rule is intended to discourage the public from seeking a

policy change for the first time at the NMFS level when this should appropriately be done via the FMC process. Therefore, the proposal highlights the obligations of the interested public to raise pertinent comments at appropriate points in the process. Comments raised for the first time when the action is under MSA Secretarial review would be considered only in light of the Secretary's decision whether to approve the proposal, which includes compliance with NEPA and other applicable law. Recommendations for additional or revised policy approaches not presented to the FMC are inappropriate at this time.

#### D. Alternatives To Be Analyzed

Through this proposed rule, NMFS clarifies that "reasonable alternatives" are those derived from the statement of purpose and need of the action and that satisfy, in whole, or substantial part, the objectives of the proposed Federal action. Alternatives that are impractical or ineffective are not "reasonable alternatives." This means that alternatives that are not consistent with the MSA and its national standards are not reasonable.

With regard to the range of alternatives to be considered, the proposed rule uses the same language as the CEQ regulations requiring that the IFEMS "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." The new language explicitly linking the scope of reasonable alternatives to the statement of purpose and need, in combination with existing language regarding the elimination of alternatives from detailed study, should provide more clarity to NMFS and FMCs that detailed analysis of alternatives not linked to the purpose of the action is unnecessary. As a result, NMFS and the FMCs will be better able to reduce the over-inclusion of alternatives that results in overly complex and voluminous alternatives analyses.

These proposed regulations would also clarify NEPA's requirement to consider the "no action" alternative in the context of fishery management actions. For purposes of the MSA, unless a fishery is regulated, at least with regard to approved gear types, fishing is unrestricted. However, FMPs vary in the way management measures are implemented. In some FMPs, management measures sunset at the end of a certain time period, in others they have annual expirations, and in others they are effective until modified or

removed. Thus, a literal interpretation of the term "no action" could sometimes result in an unregulated, open access fishery. Other times "no action" could mean a complete closure of the fishery. Still other times, it could mean something in between. NMFS proposes to clarify that the "no action" alternative does not mean the literal result of no Federal action. Rather, in a fishery management context, the no action alternative means the presumption that the fishery would continue being prosecuted in the same manner that it is being prosecuted at the time the development of the IFEMS is initiated. This interpretation produces a reasonable approximation of a baseline for purposes of NEPA's comparative analysis. Thus "no action" does not mean the literal management regime that would result if no Federal action were taken (such as sunset of measures resulting in open access, or complete closure of the fishery). Rather it means presumed continuation of management at the current baseline. However, in cases where it is reasonable to consider open access or complete closure alternatives, the analysis should include these as part of the reasonable range.

NMFS notes however that the selection of alternatives for the purposes of NEPA compliance may be more limited than the selection of alternatives pursuant to other analytical requirements, including the Regulatory Flexibility Act, Executive Order 12866 and OMB Circular A-4, and the Unfunded Mandates Act. Pursuant to these authorities, the agency may consider alternatives that are inconsistent with the MSA or the National Standards, in the same way that the "no action" alternative may be inconsistent with statutory requirements. In addition, NMFS and the FMC may include in their analyses alternatives that are not "reasonable alternatives" at the time of the scoping decision for other reasons.

#### E. Experimental Fishing

The preferred alternative would specify that, in cases where experimental fishing activities are proposed to be conducted under an EFP, and where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or fishing mortality, the proposed activities would be eligible for a CE.

#### F. Incomplete/Unavailable Information

Pursuant to the mandates of section 301(a)(2) of the MSA, NMFS and the FMCs are required to utilize the "best

available scientific information” in developing fishery management measures and actions. Case law has held that the MSA does not require NMFS or the FMCs to generate new information not already available (see, e.g., *Recreational Fishing Alliance v. Evans*, 172 F. Supp. 2d 35 (D.D.C. Sep 20, 2001), *Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411 (D.D.C. 1998), *Blue Water Fisherman’s Ass’n v. Mineta*, 122 F. Supp. 2d 150 (D.D.C. 2000), *A.M.L. Intern., Inc. v. Daley*, 107 F. Supp. 2d 90 (D. Mass. 2000)). However, to maintain consistency with the existing CEQ regulations, this proposed rule would include a requirement that:

NMFS shall identify incomplete information that is relevant to reasonably foreseeable significant adverse impacts and that is essential to a reasoned choice among alternatives and determine the overall costs and benefits of obtaining it. If NMFS finds that the overall costs of obtaining the information are not exorbitant, NMFS shall ensure that the information is obtained and include the information in the IFEMS. (§ 700.220)

MSA National Standard 2 requires FMCs and NMFS to base their decisions on the best scientific information available. In light of the MSA’s statutory provisions, in determining whether the costs of obtaining such information are “exorbitant,” NMFS must consider the availability of appropriated funds and research priorities identified by the agency, the FMC Science and Statistical Committees and FMCs pursuant to section 302(h)(7) of the MSA. It is also necessary to consider the cost of delaying an action to seek additional information. In addition, NMFS recognizes that the nature of the stock assessment process creates a dynamic flow of information, and that fishery management will always involve uncertainty. Therefore, the relevance of unavailable information must be considered within this context. § 700.220(c) would also specify that, if the uncertainties have already been analyzed in a prior analysis, subsequent analyses would cite to the previous analyses on the issue of unavailable information.

#### G. Emergency and Interim Actions

This proposed rule would allow for the development of programmatic alternative arrangements for NEPA compliance with CEQ for emergency or interim actions that may result in significant impacts. The intent is to limit such arrangements to specific types of emergency or interim actions that necessitate immediate attention and for which public involvement or

detailed analyses would interfere with NMFS’s ability to control the immediate impacts of the emergency. For emergencies or interim actions that will not result in significant impacts, NMFS would prepare an EA and FONSI. In the event the nature and scope of the emergency requires immediate promulgation of regulations and NMFS has not completed the EA and FONSI, NMFS would be required to publish the draft EA and FONSI with the final rule and subsequently complete the NEPA analysis prior to the expiration or extension of the emergency or interim rules’ effective period.

#### H. Page Limits/Contents

This proposed rule would require that NMFS consult with CEQ on a programmatic basis in those situations where recommended page limits are exceeded. The intent would be to assess the effectiveness of these documents and the reasons why a particular document or documents exceed the recommended limit and determine the feasibility of complying with this recommended goal.

#### I. Conflicts of Interest

The proposed rule would clarify the conflicts of interest safeguards that apply when NMFS or the FMC selects a contractor to work on an analysis. It would require contractors to execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project. If the NEPA document is prepared by contract, this proposed rule would require the responsible Federal official to provide guidance to contractors, to participate in the preparation of the contracted document, and to independently evaluate the IFEMS prior to its approval and take responsibility for its scope and contents. This proposed rule would also clarify that, to the extent that members of an FMC are involved in development of an IFEMS, they must comply with the rules regarding conflicts of interest as set forth in section 302(j) of the MSA, 15 CFR 14.42, 15 CFR 24.36(b), and 40 CFR 1506.5(c).

#### Relationship to the CEQ Implementing Regulations

NMFS proposes these regulations as a customization of and a supplement to the CEQ NEPA implementing regulations at 40 CFR Parts 1500–1508. Readers familiar with the CEQ regulations will find many similarities, and in some places restatement of CEQ language into these regulations. However, where there are differences between the two, NMFS intends that

these more specific regulations will be followed (in place of the general CEQ regulations) for fishery management actions. Similarly, for issues where these regulations are silent, the CEQ regulations continue to apply to fishery management actions where relevant.

#### Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is as follows:

The proposed rule would implement a new environmental review process under the National Environmental Policy Act (NEPA) for fishery management actions pursuant to the MSA.

This rulemaking is being conducted pursuant to section 304(i) of the MSA, which requires the Secretary of Commerce, in consultation with CEQ and the FMCs, to revise and update the NMFS procedures for compliance with NEPA for actions taken pursuant to the MSA. The purpose of the legislation is to conform the environmental review procedures to the time lines for review and approval of fishery management actions, and integrate applicable environmental analytical procedures with the procedure for preparation and dissemination of fishery management actions.

The proposed rule is procedural in nature and is intended solely for internal agency and FMC use when preparing NEPA analyses for fishery management actions. Moreover, the proposed rule does not mandate that small entities behave in a particular way or regulate existing or future activities of an economic nature. Thus, the Department of Commerce does not anticipate that any small entities would be affected, directly or indirectly, by this proposed action.

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

**List of Subjects in 50 CFR Part 700**

Administrative practice and procedure, Environmental protection, Fisheries, Intergovernmental relations.

Dated: May 2, 2008.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR Chapter VI by adding part 700 to read as follows:

**PART 700—ENVIRONMENTAL REVIEW PROCESS FOR FISHERY MANAGEMENT ACTIONS**

**Subpart A—General**

Sec.

- 700.1 Policy.
- 700.2 Authority.
- 700.3 Definitions.
- 700.4 NMFS capability to comply.
- 700.5 Agency procedures.
- 700.6 Elimination of duplication with State and local procedures.
- 700.7 Effective date and applicability.

**Subpart B—NEPA and Fishery Management Planning**

- 700.101 Apply NEPA throughout the fishery management process.
- 700.102 When to prepare an environmental assessment.
- 700.103 When to prepare an IFEMS.
- 700.104 Using a memorandum of framework compliance pursuant to a framework implementation procedure.
- 700.105 Using a Categorical Exclusion.
- 700.106 Lead agencies.
- 700.107 Cooperating agencies.
- 700.108 Scoping.
- 700.109 Time limits.
- 700.110 Adoption.
- 700.111 Combining documents.
- 700.112 Assignment of tasks.

**Subpart C—Integrated Fishery and Environmental Management Statement**

- 700.201 Purpose of the IFEMS.
- 700.202 Implementation.
- 700.203 Timing.
- 700.204 Interdisciplinary preparation.
- 700.205 Page limits.
- 700.206 Writing.
- 700.207 Phases of analysis; draft, final, and supplemental IFEMSs.
- 700.208 Recommended format.
- 700.209 Cover sheet.
- 700.210 Summary.
- 700.211 Purpose and need.
- 700.212 Alternatives including the proposed action.
- 700.213 Affected environment.
- 700.214 Environmental consequences.
- 700.215 List of preparers.
- 700.216 Preparation of an appendix.
- 700.217 Circulation of the IFEMS.
- 700.218 Tiering.
- 700.219 Incorporation by reference.
- 700.220 Incomplete or unavailable information.
- 700.221 Cost-benefit analysis.

700.222 Methodology and scientific accuracy.

700.223 Environmental review and consultation requirements.

**Subpart D—Public Participation**

- 700.301 Public outreach.
- 700.302 Inviting comment on the IFEMS.
- 700.303 Opportunity to comment.
- 700.304 Specificity of comments.
- 700.305 Response to comments.

**Subpart E—Fishery Conservation and Management Actions That Significantly Affect the Quality of the Human Environment**

- 700.401 Determining the significance of NMFS's actions.
- 700.402 Guidance on significance determinations.

**Subpart F—NEPA and Fishery Management Decisionmaking**

- 700.501 Fishery management decisionmaking procedures.
- 700.502 Record of decision.
- 700.503 Implementing the decision.

**Subpart G—Additional Requirements and Limitations**

- 700.601 Limitations on fishery management actions during MSA-NEPA process.
- 700.602 NMFS responsibility for environmental documents produced by a third-party.
- 700.603 Filing requirements.
- 700.604 Minimum time periods for agency action.

**Subpart H—Emergencies and Categorical Exclusions**

- 700.701 Emergencies.
- 700.702 Categorical exclusions.

**Authority:** 16 U.S.C. 1854(i).

**Subpart A—Policy and Authority**

**§ 700.1 Policy.**

(a) The National Marine Fisheries Service (NMFS) and the Fishery Management Councils (FMCs) shall to the fullest extent possible:

(1) Integrate the requirements of the National Environmental Policy Act (NEPA) and other planning and environmental review procedures required by law with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) procedures for preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to the MSA in order to provide for timely, clear, and concise analysis.

(2) Implement procedures to make the NEPA and MSA processes more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental documents shall be concise, clear, and to the point, and shall be supported by

the best available scientific information and evidence that NMFS has made the necessary environmental analyses.

(3) Encourage and facilitate public involvement in decisions which affect the quality of the human environment, utilizing, to the extent practicable, the public involvement procedures set out in the MSA.

(4) Apply NEPA through the MSA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(b) In the development of fishery management actions pursuant to the MSA NMFS and the FMCs shall:

(1) Integrate the requirements of NEPA early and throughout the MSA's fisheries conservation and management process to insure implementation of NEPA's policies and the standards of the MSA while eliminating unnecessary delay in environmental impact assessment and fisheries conservation and management decisions.

(2) Provide for consideration of environmental impacts, alternatives, and public comments at key points in the process to inform both the FMC's development of recommendations to the Secretary and the Secretary's decision whether to approve and implement the fishery management action.

(3) Identify at an early stage the significant environmental issues deserving of detailed study and deemphasizing insignificant issues, thereby narrowing the scope of the environmental document accordingly.

(4) Provide for appropriate time limits on the processes provided by this part.

(c) NMFS shall use all practicable means, consistent with the requirements of the MSA, NEPA, and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

**§ 700.2 Authority.**

This part is applicable to and binding on NMFS and the FMCs, and other interested agencies and members of the public for implementing the procedural provisions of NEPA, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*), in the context of fishery management actions except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the MSA as amended (Pub. L. 109-479, sec. 107), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by

Executive Order 11991, May 24, 1977). The regulations apply to NMFS compliance with the whole of NEPA section 102. The provisions of NEPA, the MSA, and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. Subject to the limitations in MSA section 305(f), judicial review of NMFS' compliance with these regulations shall not occur before NMFS has promulgated regulations with a final Integrated Fishery Environmental Management Statement (IFEMS), has made a finding of no significant impact (when such a finding will result in action affecting the environment), or has made a Determination of Categorical Exclusion, or takes action that will result in irreparable injury. Any trivial violation of these regulations shall not give rise to any independent cause of action.

### § 700.3 Definitions.

For the purposes of this part, all terms defined in the regulations implementing NEPA established by the Council for Environmental Quality at 40 CFR part 1508 apply where relevant. The following definitions supplement these definitions.

(a) *Amendment*. A change to an FMP (FMP amendment) or to an FMP's implementing regulations (regulatory amendment). For purposes of Secretarial review and procedure, the MSA treats an FMP amendment the same as an FMP (MSA section 304(a)). An amendment is different from a Framework Action in that a Framework Action is an action provided for within the structure of an existing FMP or regulatory scheme. An amendment is a change to the underlying FMP or regulatory scheme itself. See also the definitions of FMPs and Framework Actions, below.

(b) *Emergency action*. A fishery management emergency action is an action taken pursuant to section 305(c) of the MSA, that responds to a situation that: Results from recent, unforeseen events or recently discovered circumstances; presents serious conservation or management problems in the fishery, including loss of life or serious injury; and can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

(c) *Environmental document*. An EA, FONSI, draft IFEMS, supplement to a draft IFEMS, final IFEMS, supplement to a final IFEMS, or a Record of Decision (ROD). The memorandum issued to

document a CE ("DCE") or Framework Compliance Evaluation is also considered an environmental document.

(d) *Integrated Fishery and Environmental Management Statement (IFEMS)*. The analysis undertaken, to:

(1) Identify the scope of issues related to a conservation and management need;

(2) Make decisions that are based on understanding the environmental consequences of the proposed action; and

(3) Determine the necessary steps for NEPA compliance.

(e) *Fishery Management Plan (FMP)*. A management plan for a federal fishery or fisheries developed and implemented pursuant to the MSA. The MSA establishes certain components that each FMP must include and sets up required policy considerations with which FMPs must comply (national standards). An FMP may include some measures that are implemented as regulations and others that are not. The MSA establishes separate timelines and review tracks for regulatory versus nonregulatory measures.

(f) *Framework implementation procedure*. A Framework Implementation Procedure is a procedure established under an FMP that allows actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis. The types of measures that could fall within a Framework Implementation Procedure may include traditional framework actions, annual specifications and other fishery management actions, as appropriate. The intent of a Framework Implementation Procedure is to facilitate the adjustment of management measures within the scope and criteria established by an underlying management regime and analysis to provide for real time management of fisheries. A Framework Implementation Procedure achieves this goal by developing early broad-based analysis of management approaches and impacts that provide a foundation that specified subsequent actions, or categories of actions, may rely on. As long as subsequent management actions and their environmental effects fall within the scope of a prior analysis, no additional action-specific analysis would be necessary.

(g) *Framework Compliance Evaluation (FCE)*. Documentation to determine whether an existing NEPA document remains adequate to support a fishery management action undertaken pursuant to a Framework Implementation Procedure. The FCE

will culminate in either a determination that the existing NEPA analysis must be supplemented or preparation of a Memorandum of Framework Compliance for the file. Section 700.104 establishes a process for the development of an FCE.

(h) *Determination of Categorical Exclusion*. A memorandum for the record providing the specific rationale that a fishery management action qualifies for a Categorical Exclusion under § 700.701.

### § 700.4 NMFS capability to comply.

NMFS shall ensure that it is capable (in terms of personnel and other resources) of complying with the requirements enumerated herein. Such compliance may include use of other's resources, but NMFS shall itself have sufficient capability to evaluate what others do for it. NMFS shall:

(a) Fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. NMFS shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Ensure preparation of adequate IFEMSs pursuant to section 102(2)(C).

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to IFEMSs.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I) of NEPA, and of Executive Order 11514, Protection and Enhancement of Environmental Quality, section 2.

### § 700.5 Agency procedures.

NMFS and the FMCs shall periodically review, and revise as necessary, their procedures to comply with the requirements set forth in the regulations in this part.

**§ 700.6 Elimination of duplication with State and local procedures.**

(a) NMFS and the FMCs shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(b) NMFS and the FMCs shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, including through development of joint environmental documents. In such cases NMFS and one or more State or local agencies may be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, NMFS shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(c) Where applicable, to better integrate environmental documents into State or local planning processes, environmental documents shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the environmental document should describe the extent to which NMFS would reconcile its proposed action with the plan or law.

**§ 700.7 Effective date and applicability.**

The effective date of this part is [INSERT DATE 30 days from publication of the final rule in the Federal Register]. This part shall apply to fishery management actions initiated by NMFS or the FMCs after this effective date. NMFS or an FMC may also apply these regulations to actions already under development if NMFS or the FMC determines it is appropriate. No completed environmental documents need be redone by reasons of this part.

**Subpart B—NEPA and Fishery Management Planning****§ 700.101 Apply NEPA throughout the fishery management process.**

NMFS and the FMCs shall integrate the NEPA process at the earliest

possible time and throughout fisheries conservation and management planning to ensure that planning and decisions reflect environmental values and the purposes and policies of the MSA including the MSA's national standards, to avoid delays later in the process, and to head off potential conflicts. NMFS and the FMCs shall:

(a) Comply with the mandates of section 102(2)(A) of the NEPA, to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," and National Standard 2 of the MSA (section 301(a)(2)).

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be made readily available and reviewed at the same time as other fisheries conservation and management planning and decision documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the NEPA.

**§ 700.102 When to prepare an environmental assessment.**

(a) An environmental assessment will normally be prepared for the following types of actions:

(1) Framework actions or annual specifications taken pursuant to a fishery management plan and tiered to an IFEMS, EIS, or prior EA that are not covered by a CE or Memorandum of Framework Analysis; and

(2) Emergency and interim actions under MSA section 305(c) developed in accordance with § 604 of this part.

(b) An environmental assessment is not necessary if NMFS or an FMC has decided to prepare an IFEMS or an environmental impact statement (EIS), or if NMFS has determined a DCE or Memorandum of Framework Analysis applies.

(c) NMFS or an FMC may prepare an environmental assessment on any action at any time in order to assist fisheries conservation and management planning and decisionmaking.

(d) An EA is required for a proposal for fishery management action that is not analyzed in an IFEMS or EIS and is not appropriately included in a categorical exclusion (§ 700.702).

**§ 700.103 When to prepare an IFEMS.**

(a) In determining whether to prepare an IFEMS, NMFS, in consultation with the relevant FMC and considering the principles set forth in NOAA Administrative Order (NAO) 216-06 section 6.02, shall determine whether the proposal is one which normally requires an IFEMS, including:

(1) Development of new fisheries management plans;

(2) Amendment of existing fisheries management plans that have significant environmental effects; and

(3) Other actions determined to be significant in accordance with the criteria set forth in subpart E of this part.

(b) If the proposed action is not covered by paragraph (a) of this section and is not covered by a category of actions that NMFS has found normally do not require either an environmental impact statement or an environmental assessment (categorical exclusion § 700.702), NMFS or the relevant FMC shall prepare an environmental assessment (§ 700.102). NMFS and the FMCs where relevant, shall involve environmental agencies and the public, to the extent practicable, in preparing assessments required by § 700.102.

(c) NMFS, working with the FMC where relevant, shall ensure that either NMFS or the FMC begins the scoping process (§ 700.108) if an IFEMS will be prepared.

**§ 700.104 Utilizing a memorandum of framework compliance pursuant to a framework implementation procedure.**

(a) An FMP may establish a Framework Implementation Procedure which provides a mechanism to allow actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis, as provided in this section. Such a procedure:

(1) Shall allow for an evaluation of whether a fishery management action taken pursuant to a Framework Implementation Procedure falls within the scope of a prior environmental document;

(2) Shall specify criteria that would trigger a requirement to supplement the prior analysis or would require an IFEMS or EA for the fishery management action taken pursuant to a Framework Implementation Procedure; and

(3) May specify criteria that would permit actions under revision or review to continue during supplementation or revision of the prior document, and, if so, establish criteria for determining when this is appropriate.



(b) A fishery management action taken pursuant to a Framework Implementation Procedure established under an FMP does not require additional action-specific analysis if NMFS determines through a Framework Compliance Evaluation that the management measures in the action and their environmental effects fall within the scope of a prior analysis. A Framework Compliance Evaluation shall:

(1) Identify the prior EIS, IFEMS, or EA that analyzed the impacts of the fishery management action proposed to be taken pursuant to the Framework Implementation Procedure;

(2) Identify new information, if any, relevant to the impacts of the fishery management action proposed to be taken pursuant to a Framework Implementation Procedure; and

(3) Evaluate whether the fishery management action proposed to be taken pursuant to a Framework Implementation Procedure falls within the scope of the prior analyses and whether new information, if any, requires supplementation.

(c) If the Framework Compliance Evaluation results in a determination that supplementation is not required, a Memorandum of Framework Compliance must be prepared for the file. A Memorandum of Framework Compliance is a concise (ordinarily 2 pages) document that briefly summarizes the fishery management action taken pursuant to a Framework Implementation Procedure, identifies the prior analyses that addressed the impacts of the action, and incorporates any other relevant discussion or analysis for the record.

(d) If the Framework Compliance Evaluation results in a determination that supplementation is required, appropriate supplemental analyses shall be conducted.

#### **§ 700.105 Using a Categorical Exclusion.**

(a) A fisheries management action may qualify for a Categorical Exclusions (CE) if NMFS determines that the action does not have the potential to pose individually and cumulatively significant effects to the quality of the human environment. NMFS will make this determination in accordance with 700.701.

(b) *Determination of Categorical Exclusion.* NMFS must document a determination that an action qualifies for a CE in a Determination of Categorical Exclusion (DCE). The DCE must state the specific rationale behind why the action qualified for a categorical exclusion. For FMC-initiated actions, the DCE must be included in

the record available for public comment on the action. In addition, NMFS must include the DCE in its final decision documents for the action.

#### **§ 700.106 Lead agencies.**

NMFS shall be the lead Federal agency for the purpose of preparing the IFEMS and shall, where applicable, designate co-lead agencies consistent with the provisions of 40 CFR 1501.5.

#### **§ 700.107 Cooperating agencies.**

Upon request of NMFS, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement, may be a cooperating agency upon request of NMFS. An agency may request NMFS to designate it a cooperating agency.

(a) NMFS shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time;

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency; and

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency has the same responsibilities under this part it does under 40 CFR 1501.6.

#### **§ 700.108 Scoping.**

(a) NMFS and each FMC shall ensure that the MSA fishery management process includes an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping.

(1) *FMC-initiated actions.* Scoping shall be based on the MSA's public process for the development of fishery management actions by FMCs and shall be initiated by a publication in the **Federal Register** of a scoping notice. NMFS shall publish a scoping notice as soon as practicable after the decision to initiate development of a fishery management action. NMFS and FMCs may conduct scoping hearings as independent scoping hearings, or as part of an FMC's public meetings. If scoping is conducted as part of an FMC meeting, a scoping notice must, at a minimum, be included as a component of the appropriate FMC's next meeting agenda (MSA section 302(i)(2)(C)) and must be titled and formatted in a manner that provides the public with adequate

notice of the NEPA-related scoping process.

(2) *NMFS-initiated actions.* For any fishery management action initiated by NMFS, as soon as practicable after its decision to initiate development of a fishery management action and/or prepare an IFEMS, NMFS shall publish a scoping notice in the **Federal Register**. The **Federal Register** notice shall be titled and formatted in a manner that provides the public with adequate notice of the NEPA-related scoping process and scoping activities conducted in conjunction with meetings of advisory panels.

(b) As part of the scoping process for FMC-initiated actions:

(1) NMFS, working with the appropriate FMC, shall ensure that affected Federal, State, and local agencies, any affected Indian tribe, the proponents of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds) are invited to participate. NMFS, working with the appropriate FMC, shall ensure that the scoping process meets the purposes of scoping as set forth in 40 CFR 1501.7.

(2) NMFS and the appropriate FMC shall cooperate to determine the scope (40 CFR 1508.25(a)) and the significant issues to be analyzed in depth in the environmental document.

(3) NMFS and the appropriate FMC shall cooperate to identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 700.110), narrowing the discussion of these issues in the environmental document to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) NMFS and the appropriate FMC shall allocate assignments, with NMFS retaining responsibility for the final environmental document.

(5) NMFS and the appropriate FMC shall indicate any public environmental assessments, environmental impact statements, IFEMS, and other environmental documents which are being or will be prepared that are related to but are not part of the scope of the environmental document under consideration.

(6) NMFS and the appropriate FMC shall identify other environmental review and consultation requirements in order to integrate them with the environmental document as provided in § 700.223.

(7) NMFS and the appropriate FMC shall indicate the relationship between the timing of the preparation of environmental analyses and NMFS' and

the FMC's tentative planning and decisionmaking schedule.

(c) As part of the scoping process for a NMFS-initiated action, NMFS shall:

(1) Ensure that affected Federal, State, and local agencies, any affected Indian tribe, the proponents of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds) are invited to participate and ensure that the scoping process meets the purposes of scoping as set forth in 40 CFR 1501.7.

(2) Determine the scope (40 CFR 1508.25(a)) and the significant issues to be analyzed in depth in the environmental document.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 700.110), narrowing the discussion of these issues in the environmental document to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments, with NMFS retaining responsibility for the final environmental document.

(5) Indicate any public environmental assessments, environmental impact statements, IFEMS, and other environmental documents which are being or will be prepared that are related to but are not part of the scope of the environmental document under consideration.

(6) Identify other environmental review and consultation requirements in order to integrate them with the environmental document as provided in § 700.223.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and NMFS' tentative planning and decisionmaking schedule.

(d) As part of the scoping process NMFS or an FMC may:

(1) Set page limits on environmental documents (§ 700.205).

(2) Set time limits (§ 700.109).

(3) Hold an early scoping meeting or meetings which may be integrated with any other FMC meeting or other early planning meeting convened by NMFS or the FMC.

(e) For FMC-initiated actions, NMFS and the FMC shall cooperate to revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts. For NMFS-initiated actions, NMFS shall revise determinations made

under paragraphs (a) and (c) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

#### **§ 700.109 Time limits.**

(a) For FMC-initiated actions, NMFS and FMCs shall cooperate to set time limits or targets appropriate to individual actions (consistent with the minimum time periods required by § 700.604) provided that the limits and targets are consistent with the purposes of NEPA and other essential considerations of national policy. For NMFS-initiated actions, NMFS shall set such time limits or targets.

(b) NMFS and the FMCs may:

(1) Consider the following factors in determining time limits or targets:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or targets for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an IFEMS (if not already decided).

(ii) Determination of the scope of the IFEMS.

(iii) Preparation of the draft IFEMS.

(iv) Review of any comments on the draft IFEMS from the public and agencies.

(v) Preparation of the final IFEMS.

(vi) Review of any comments on the final IFEMS.

(vii) Decision on the action based in part on the IFEMS.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request that NMFS set time limits.

#### **§ 700.110 Adoption.**

(a) NMFS may adopt a Federal draft or final environmental assessment, environmental impact statement, IFEMS, or portion thereof provided that

the assessment or statement or portion thereof meets the standards for an adequate environmental document under these regulations.

(b) If the actions covered by the original environmental document and the proposed action are substantially the same, NMFS is not required to recirculate the other agency's final environmental document except as a final environmental document. Otherwise NMFS shall treat the environmental document as a draft and recirculate it.

#### **§ 700.111 Combining documents.**

Any environmental document in compliance with NEPA may be combined with any other NMFS or FMC document to reduce duplication and paperwork.

#### **§ 700.112 Assignment of tasks.**

For the purposes of this part, where the language provides that NMFS and/or an FMC must take action, or where the language does not specify a particular entity to take action, NMFS and the appropriate FMC must establish which entity shall carry out such action. This clarification may be established through a Memorandum of Understanding for each environmental document individually or for classes of environmental documents, but in no case should scoping activities be considered complete until such clarification is made.

### **Subpart C—Integrated Fishery and Environmental Management Statement**

#### **§ 700.201 Purpose of the IFEMS.**

A primary goal of the Integrated Fishery and Environmental Management Statement (IFEMS) is to better integrate the consideration of environmental impacts into the MSA's process for FMC and NMFS development of fishery management recommendations and actions, to more effectively align these considerations with the points in time where alternatives are being considered. The IFEMS will meet the policies and goals of NEPA and shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. NMFS and the FMCs shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. IFEMS shall be concise, clear, and to the point, and shall be supported by evidence that

the agency has made the necessary environmental analyses. An IFEMS is more than a disclosure document. It shall be used by NMFS and the FMCs in conjunction with other relevant material to plan actions and make decisions.

#### § 700.202 Implementation.

To achieve the purposes set forth in § 700.201, NMFS and the FMCs shall prepare IFEMSs in the following manner:

(a) An IFEMS shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues.

(c) An IFEMS shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA, the MSA, and other applicable requirements. Length and level of detail should be proportional to potential environmental problems and the scope of the fishery management action under consideration.

(d) An IFEMS shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and other environmental laws and policies.

(e) The range of alternatives discussed in an IFEMS shall encompass those to be considered by the Secretary.

(f) NMFS shall not commit resources prejudicing selection of alternatives before making a final decision (§ 700.601).

(g) An IFEMS shall serve as the means of assessing the environmental impact of proposed fishery management actions, rather than justifying decisions already made.

#### § 700.203 Timing.

(a) In general, preparation of an IFEMS shall be commenced as close as possible to the time that NMFS or an FMC is developing fishery conservation and management measures and actions and considering alternatives so that the IFEMS can serve practically as an important contribution to the FMC deliberations and NMFS decisionmaking process and will not be used to rationalize or justify decisions already made. For recommendations initiated by an FMC, the FMC must use the draft IFEMS in its deliberations. Both the draft and final IFEMS, and the public comments thereon, inform the Secretary's final decision.

(b) *IFEMS for fishery management actions developed by an FMC.* (1) NMFS shall publish a Notice of Availability (NOA) of a draft IFEMS in the **Federal**

**Register** no later than public release of the FMC's meeting agenda notice. NMFS shall ensure that the draft IFEMS is made available to the public at least 45 days in advance of the FMC meeting (unless this time frame is reduced under § 700.604(b)).

(2) The public shall have an opportunity to comment on the draft IFEMS both by attending the FMC meeting and by submitting written comments to the FMC.

(3) The FMC shall review the draft IFEMS and consider all public comments on the draft IFEMS prior to making the final FMC recommendation on a fishery management action.

(4) The FMC shall deliberate and vote in accordance with procedures adopted in accordance with § 700.501.

(5) After the FMC's vote, the IFEMS shall be revised as necessary to reflect the FMC's action and any necessary changes to the analysis. The final IFEMS must address all public comments and modifications that occurred through the council process and must be submitted with the recommended management measure or action to begin Secretarial review. If necessary, the FMC or NMFS shall supplement the draft IFEMS in accordance with § 700.207(c). In its final vote to recommend an action, an FMC may select combinations of parts of various alternatives analyzed in the draft IFEMS or a new alternative within the scope of those analyzed in the draft IFEMS. NMFS may accept this recommendation without further analysis or supplementation by the FMC.

(6) The final or supplemental IFEMS shall be transmitted to NMFS along with the FMC's proposed action.

(i) *Final IFEMS submitted with transmittal package.* NMFS shall publish in the **Federal Register** an NOA of the final IFEMS as part of the appropriate notice of proposed rulemaking or NOA of a proposed FMP or FMP amendment as required by MSA sections 304(a)(1)(B) and 304(b)(1)(A), and shall solicit public comment on the IFEMS along with public comment on the FMC's recommended action. Publication of the NOA initiates the 30 day period set forth at § 700.604(c).

(ii) *Supplemental IFEMS submitted with transmittal package.* NMFS shall publish in the **Federal Register** an NOA of any supplemental IFEMS as part of the appropriate notice of proposed rulemaking or notice of availability of a proposed FMP or FMP amendment as required by MSA sections 304(a)(1)(B) and 304(b)(1)(A), and shall solicit public comment on the supplemental IFEMS along with public comment on the FMC's recommended action. Prior to

making a final decision on the proposed action, NMFS shall publish a final supplemental IFEMS that responds to public comments in accordance with § 700.604. Publication of the NOA initiates the 30 day period set forth at § 700.604(c).

(7) NMFS shall prepare and issue its Record of Decision (ROD) on the final IFEMS concurrently with its decision on the FMC-recommended action as provided for in § 700.502.

(c) *Fishery management actions developed by NMFS.* For FMPs, FMP amendments, and regulations developed by the Secretary pursuant to MSA sections 304(c), (e), and (g) (including HMS), and 305(d) the draft IFEMS shall be circulated for public comment in accordance with § 700.604(b).

The Final IFEMS shall respond to public comments received on the Draft and shall be published prior to the decision on the proposed action in accordance with § 700.604(c).

#### § 700.204 Interdisciplinary preparation.

IFEMSs shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 700.108).

#### § 700.205 Page limits.

To the extent practicable, IFEMS shall comply with the non-binding page limits established for Environmental Impact Statements by 40 CFR 1502.7; NEPA-related text of final IFEMSs (e.g., paragraphs (d) through (g) of § 700.208) should be less than 150 pages (excluding maps, charts, and graphic displays of quantitative information), but may be up to 300 pages for proposals of unusual scope or complexity. NMFS and the FMC may use tiering, cross-referencing, and appendices to help minimize the size of the IFEMS. NMFS shall consult with CEQ on a programmatic basis if these page limits are regularly exceeded.

#### § 700.206 Writing.

NMFS and the FMC must develop the IFEMS based on the best scientific information available, including analysis and supporting data from the natural and social sciences. Each IFEMS should use all appropriate techniques to clearly and accurately communicate with the public and with decisionmakers, including plain language, tables, and graphics, with particular emphasis on making complex

scientific or technical concepts understandable to the non-expert.

**§ 700.207 Phases of analysis: Draft, final, and supplemental IFEMSs.**

IFEMSs shall be prepared in two stages and shall be designed to be supplemented as necessary to address substantial changes in fishery conservation and management actions and significant new circumstances or information.

(a) *Drafts.* Draft IFEMSs shall be prepared in accordance with the scope decided upon in the scoping process. NMFS, and the FMC as appropriate, shall work with any cooperating agencies and shall obtain comments as required in subpart D of this part. The draft IFEMS must fulfill and satisfy to the fullest extent possible the requirements established for detailed statements in section 102(2)(C) of NEPA. If a draft IFEMS is so inadequate as to preclude meaningful analysis, a revised draft of the appropriate portion shall be prepared and circulated. All major points of view on the environmental impacts of the alternatives including the proposed action must be included in the draft IFEMS to the extent practicable.

(b) *Final.*—(1) *In general.* A Final IFEMS shall respond to comments as required in subpart D of this part. The IFEMS shall discuss at appropriate points any responsible opposing view which was not adequately discussed in the draft and shall indicate both NMFSs' and, for those actions initiated by an FMC, the FMC's response to the issues raised.

(2) *FMC-initiated actions.* For fishery management actions being developed through the FMC process, the final IFEMS will also: describe the public comments received through the FMC public process; describe any changes made through the FMC public process either to the analysis or to the proposed action; and describe any additional modifications to the alternative recommended as the proposed action by the FMC.

(c) *Supplements.* (1) NMFS or an FMC shall prepare supplements to a draft or final IFEMS if:

(i) There are substantial changes in an action that are relevant to environmental concerns (either prior to the Secretary's approval of the recommended proposal for agency action or during its implementation); or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the action or its impacts.

(2) NMFS or an FMC may also prepare supplements when NMFS or the FMC determine that the purposes of NEPA

and the MSA will be furthered by doing so.

(3) NMFS or an FMC shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) A supplement to an IFEMS shall be prepared, circulated, and filed in the same fashion (exclusive of scoping) as a draft and final IFEMS.

(5) Preparation of a supplement to an IFEMS does not require suspension of ongoing fishery management actions, such as implementation of an FMP, covered by the IFEMS during the supplementation process.

(6) In the event that an FMC modifies the proposal and votes to recommend an alternative not within the range of alternatives analyzed in the draft IFEMS, the affected portions of the IFEMS shall be amended to include an analysis of the effects of the recommended action prior to transmission of the proposal for initiation of Secretarial review pursuant to the MSA. The supplemental draft IFEMS shall be available for public comment as specified in § 700.203(b).

**§ 700.208 Recommended format.**

NMFS and the FMCs shall use a format for IFEMSs which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for IFEMSs should be followed unless NMFS determines that there is a compelling reason to do otherwise:

- (a) Cover sheet.
- (b) Summary.
- (c) Table of contents.
- (d) Purpose of and need for action.
- (e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of NEPA).
- (f) Affected environment.
- (g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA and additional requirements of the MSA and other applicable law as appropriate).
- (h) List of preparers.
- (i) List of Agencies, Organizations, and persons to whom copies of the IFEMS are sent.
- (j) Index.
- (k) Appendices (if any).

**Note to § 700.208:** The IFEMS will consist of, at a minimum, items outlined in paragraphs (d) through (g) of this section; shall be presented in a format which will encourage good analysis and clear presentation of the alternatives including the proposed action; and may also include such other elements as may be necessary to fulfill the requirements of the MSA and other applicable law. If a different format is used,

it shall include paragraphs (a), (b), (c), (h), (i), and (j) of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 700.208 through 700.216, in any appropriate format.

**§ 700.209 Cover sheet.**

The cover sheet shall not exceed one page. It shall include:

(a) Reference to NMFS as lead agency and the applicable FMC, as appropriate, and the list of cooperating agencies if applicable.

(b) The title of the proposed action that is the subject of the IFEMS (and if appropriate the titles of related cooperating agency actions), together with the geographic location where the action is located.

(c) The name, address, and telephone number of the person at the agency or FMC who can supply further information.

(d) A designation of the IFEMS as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the IFEMS.

(f) The date by which comments must be received, calculated in accordance with § 604 of this part.

**§ 700.210 Summary.**

Each IFEMS shall contain a summary which adequately and accurately summarizes the IFEMS. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary should not exceed 15 pages.

**§ 700.211 Purpose and need.**

The IFEMS shall briefly specify the underlying purpose and need to which the proposed fishery management actions and alternatives are responding.

**§ 700.212 Alternatives including the proposed action.**

In this section NMFS, and as appropriate, the FMCs shall:

(a) Based on the information and analysis presented in the sections on the Affected Environment (§ 700.213) and the Environmental Consequences (§ 700.214), present in the IFEMS the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the Secretary, NMFS, the FMCs and the public.

(b) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. For fishery management

actions, "reasonable alternatives" are those derived from the statement of purpose and need of the action, in context of the MSA's National Standards and requirements and requirements of other applicable laws, and which satisfy, in whole, or substantial part, the objectives of the proposed federal action. Alternatives that are impractical or would not achieve stated purposes and needs are not "reasonable alternatives."

(c) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(d) Include reasonable alternatives not within the jurisdiction of the lead agency.

(e) Include the alternative of no action. "No action" means continued management of the fishery as it is being prosecuted at the time development of the IFEMS is initiated, taking into account the underlying management regime with assumptions as to how it would continue being prosecuted into the future. "No action" does not mean the literal fishery management regime that would result in the absence of a Federal action.

(f) Identify the preferred alternative or alternatives, if one or more exists, in the draft IFEMS and identify such alternative in the final IFEMS unless MSA or other applicable law prohibits the expression of such a preference.

(g) Include appropriate mitigation measures not already included in the proposed action or alternatives.

#### **§ 700.213 Affected environment.**

The IFEMS shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. This description shall be no longer than is necessary for the Secretary and the public to understand the effects of the alternatives. Data and analyses incorporated in an IFEMS shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or incorporated by reference to existing descriptions of the affected environment that NMFS regularly maintains and makes available to the public. NMFS shall avoid useless bulk in IFEMS and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an IFEMS.

#### **§ 700.214 Environmental consequences.**

This section forms the scientific and analytic basis for the comparisons under

§ 700.212. It shall consolidate the discussions of those elements required by sections 301 and 303 of MSA and sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the IFEMS and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of the fishery and other affected aspects of the human environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should the proposed fishery conservation and management measures be implemented. This section should not duplicate discussions in § 700.212. It shall include discussions of:

(a) Direct effects and their significance.

(b) Indirect and cumulative effects and their significance.

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, tribal and local plans, policies and controls for the area concerned. (See § 700.602(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 700.212 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Historic and cultural resources, and reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 700.212(f)).

#### **§ 700.215 List of preparers.**

The IFEMS shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the IFEMS or significant background papers, including basic components of the IFEMS (§§ 700.204 and 700.206). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified.

#### **§ 700.216 Preparation of an appendix.**

If NMFS or an FMC prepares an appendix to an IFEMS the appendix shall:

(a) Consist of material prepared in connection with an IFEMS (as distinct from material which is not so prepared and which is incorporated by reference (§ 700.219)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact assessment.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the IFEMS or be readily available on request.

#### **§ 700.217 Circulation of the IFEMS.**

NMFS shall ensure that the entire draft and final IFEMS, except for certain appendices as provided in § 700.216 and an unchanged IFEMS as provided in § 700.304, are circulated in a format that is readily accessible to decision-makers and the public.

#### **§ 700.218 Tiering.**

NMFS and the FMCs shall tier their environmental documents to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (40 CFR 1508.28). Whenever a broad IFEMS has been prepared (such as for a program, policy, or fishery management plan or amendment) and a subsequent IFEMS or environmental assessment is then prepared on an action included within the entire program, policy, or fishery management plan or plan amendment, the subsequent IFEMS or environmental assessment need only summarize the issues discussed in the broader IFEMS, incorporate discussions from the broader IFEMS by reference, and shall concentrate on the issues specific to the subsequent action. NMFS shall ensure that the broader IFEMS is maintained in locations and in a format that is readily accessible to decision-makers and the public, and the subsequent document shall state where the earlier document is available.

#### **§ 700.219 Incorporation by reference.**

NMFS and the FMCs shall incorporate material into an IFEMS by reference when the effect will be to reduce the length or complexity of the IFEMS without impeding agency and public review of the action. The incorporated material shall be cited in the IFEMS and its content briefly described and instructions on how the public can access the incorporated material provided in the IFEMS. Material that is incorporated by reference must be maintained in locations and in a format

that is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

**§ 700.220 Incomplete or unavailable information.**

When NMFS or an FMC is evaluating reasonably foreseeable significant adverse effects on the human environment in an IFEMS and despite a review of the best available scientific information, there is incomplete or unavailable information, consistent with MSA section 303(a)(8) and National Standard 2, NMFS or the FMC shall make clear that such information is lacking.

(a) NMFS or the FMC shall identify incomplete information that is relevant to reasonably foreseeable significant adverse impacts and that is essential to a reasoned choice among alternatives and determine the overall costs and benefits of obtaining it. If NMFS finds that the overall costs, including the costs of delay, of obtaining the information are not exorbitant, NMFS shall ensure that the information is obtained and include the information in the IFEMS.

(b) If NMFS finds that the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the IFEMS shall include:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) A summary of the best available scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

(4) An evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) Any time an IFEMS considers and addresses incomplete or unavailable information, subsequent actions relating

to the same uncertainties may reference the initial assessment or evaluation.

**§ 700.221 Cost-benefit analysis.**

To the extent that a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the IFEMS as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of NEPA the IFEMS shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with NEPA, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis. The IFEMS should separately indicate qualitative considerations that are not monetized and are likely to be relevant and important to a decision, including factors not related to environmental quality.

**§ 700.222 Methodology and scientific accuracy.**

NMFS and the FMCs shall insure the professional integrity, including scientific integrity, of the discussions and analyses in IFEMSs. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources upon which they relied for facts or conclusions in the IFEMS. Discussion of methodology may be placed in an appendix.

**§ 700.223 Environmental review and consultation requirements.**

(a) To the fullest extent possible, NMFS and the FMCs shall prepare draft IFEMSs concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft IFEMS shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft IFEMS shall so indicate.

**Subpart D—Public Participation**

**§ 700.301 Public outreach.**

For fishery management actions developed through the FMC process, NMFS and the FMCs shall solicit public involvement, including through the MSA's public FMC process. For fishery management actions developed by the Secretary, NMFS shall conduct similar outreach, including through existing MSA public processes. NMFS and the FMCs where applicable, shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures for fishery management actions.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases NMFS shall ensure that notice is mailed to those who have requested it on an individual action.

(2) In the case of an action identified by NMFS as having effects of national concern, notice shall include publication in the **Federal Register**, notice by mail to national organizations reasonably expected to be interested in the matter, and outreach via the Internet. When engaged in rulemaking, NMFS shall provide notice to national organizations who have requested that notice regularly be provided. NMFS shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses.

(ii) Notice to Indian tribes where tribal resources may be affected.

(iii) Notice following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons particularly in the major fishing ports of the region and in other major fishing ports having a direct interest in the affected fishery.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(x) Outreach via the Internet.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft IFEMS is to be considered at a public hearing, NMFS or the FMC should make the document available to the public at least 45 days in advance of FMC action. This time period may be reduced in accordance with criteria specified in § 700.608.

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental documents and other elements of the NEPA process.

(f) Make environmental documents, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552(a)(2)), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including CEQ.

#### § 700.302 Inviting comment on the IFEMS.

(a) After preparation of a draft IFEMS and before preparation of a final IFEMS, NMFS shall ensure that NMFS or the FMC:

(1) Obtains the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards affecting fishery conservation and management.

(2) Requests the comments of:

(i) Appropriate State, tribal, and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes that may be affected or have special expertise;

(iii) Any agency which has requested that it receive environmental documents on actions of the kind proposed; and

(iv) Any affected FMC (as provided by MSA sections 304(c)(4) and 304(g)(1)).

(3) Requests comments from the public, affirmatively soliciting comments from those persons or organizations that may be interested or affected.

(b) *Comments on final.* NMFS shall request comments on a final IFEMS before making a final decision on whether to approve a proposed action except as provided in §§ 700.608 (minimum time periods) and 700.701 (emergencies). In any case, other agencies or persons may make comments before the Secretary makes a final decision under MSA Section 304. Public comment on the final IFEMS may address the sufficiency of compliance with NEPA to inform the Secretary's decision whether to approve, disapprove, or partially approve a fishery management plan, or amendment pursuant to MSA section 304(a)(3), or promulgate regulations pursuant to MSA section 304(b), as applicable.

#### § 700.303 Opportunity to comment.

(a) *Comments of other agencies.* Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards are required (by 40 CFR 1503.2) to comment on IFEMSs within their jurisdiction, expertise, or authority. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the IFEMS, it should reply that it has no comment.

(b) *Comments of the interested public—(1) Fishery Management Actions developed by the FMCs.* For fishery management actions being developed through the FMC process, the interested public must provide any comments it may have relevant to the draft IFEMS, such as comments on the statement of purpose and need, range of alternatives, and evaluation of environmental impacts, to the FMC during the public comment period on the draft IFEMS by submitting written comments or during the appropriate FMC meeting by providing oral testimony.

(2) *NMFS actions.* For fishery management actions developed by NMFS, the interested public must provide any comments it may have relevant to the draft IFEMS, such as comments on the statement of purpose and need, range of alternatives, and evaluation of environmental impacts, to NMFS either through NMFS' scoping process or during the comment period on the draft IFEMS to allow NMFS to

meaningfully consider and address all comments.

#### § 700.304 Specificity of comments.

(a) NMFS and FMCs shall seek comments on an IFEMS that are as specific as possible and may address either the adequacy of the IFEMS or the merits of the alternatives discussed or both.

(b) NMFS and the FMC shall request that, when a commenting agency criticizes the predictive methodology used in the IFEMS, the commenting agency should describe the alternative methodology which it prefers and why.

(c) NMFS shall request that a cooperating agency specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it is required to specify any additional information it needs to comment adequately on the draft IFEMS' analysis of significant site-specific effects associated with any grant or approval decision for applicable permit, license, or related requirements or concurrences by that cooperating agency.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation is required (by 40 CFR 1503.3(d)) to specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

#### § 700.305 Response to comments.

(a) Comments received on the draft IFEMS shall be addressed in the final IFEMS as follows. The final IFEMS shall assess the comments both individually and collectively, shall document how both the FMC and NMFS considered them collectively and individually, and shall describe how both the FMC and NMFS responded. Possible responses are to:

(1) Modify the alternatives including the proposed action to the extent consistent with the MSA.

(2) Develop and evaluate alternatives not previously given serious consideration.

(3) Supplement, improve, or modify the analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further response, citing the sources, authorities, or reasons which support this position and, if appropriate, indicate those

circumstances which would trigger reappraisal or further response.

(b) All substantive comments received on the draft IFEMS should be attached to the final IFEMS whether or not the comment is thought to merit individual discussion in the text of the IFEMS. In the event that multiple copies of the same comment are submitted, such as a form letter, it will suffice to attach one representative copy of the comment and include one representative response.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, they may be written on errata sheets and attached to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 700.217). The entire document with a new cover sheet shall be filed as the final statement (§ 700.603).

(d) *Responses to comments on the final.* In the record of decision (ROD), NMFS will respond to comments received on the Final IFEMS as provided in § 700.502(b). NMFS is not required to 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 § 700.302(b).

### Subpart E—Fishery Conservation and Management Actions That Significantly Affect the Quality of the Human Environment

#### § 700.401 Determining the significance of NMFS's actions.

(a) NMFS, in consultation with the relevant FMC, must consider the proposed fishery management action in light of its context and intensity to determine the significance of environmental effects in order to determine whether to prepare a FONSI or IFEMS.

(b) *Context.* Context means that significance of an action must be analyzed with respect to society as a whole, the affected region and interests, and the locality. Both short- and long-term effects are relevant.

(c) *Intensity.* Intensity refers to the severity of the impact. The following factors must be considered in evaluating intensity:

- (1) Impacts may be both beneficial and adverse—a significant effect may exist even if NMFS believes that on balance the effect will be beneficial;
- (2) Degree to which public health or safety is affected;
- (3) Unique characteristics of the geographic area;

(4) Degree to which effects on the human environment are likely to be highly controversial;

(5) Degree to which effects are highly uncertain or involve unique or unknown risks;

(6) Degree to which the action establishes a precedent for future actions with significant effects or represents a decision in principle about a future consideration;

(7) Individually insignificant but cumulatively significant impacts;

(8) Degree to which the action adversely affects entities listed in or eligible for listing in the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historic resources;

(9) Degree to which endangered or threatened species, or their critical habitat as defined under the Endangered Species Act of 1973, are adversely affected; and

(10) Whether a violation of Federal, state, or local law for environmental protection is threatened.

(d) Potentially significant but previously analyzed effects. An FONSI may be appropriate for an action that may have significant or unknown effects, as long as the significance and effects have been analyzed previously.

#### § 700.402 Guidance on significance determinations.

(a) NMFS may, as appropriate, develop guidance regarding criteria for determining the significance of effects on a national or regional level for purposes of informing the determination of whether a FONSI is appropriate or an IFEMS must be prepared.

(1) Such guidance may expand on, but not replace, the general language in § 700.401 of this part.

(2) NOAA and NMFS have developed guidance on the determination of significance of fishery management actions (e.g., NOAA Administrative Order (NAO) 216–6 and NMFS' Guidelines for the Preparation of a Finding of No Significant Impact, NMFS Instruction 30–124–1).

(b) NMFS may develop guidance for a specific region that considers how any of the following specific criteria apply.

(1) The extent to which the proposed action may be reasonably expected to compromise the sustainability of any target species that may be affected by the action.

(2) The extent to which the proposed action may be reasonably expected to compromise the sustainability of any non-target species.

(3) The extent to which the proposed action may be reasonably expected to cause substantial damage to the ocean

and coastal habitats and/or essential fish habitat as defined under the MSA and identified in FMPs.

(4) The extent to which the proposed action may be reasonably expected to have a substantial adverse impact on public health or safety.

(5) The extent to which the proposed action may be reasonably expected to adversely affect endangered or threatened species, critical habitat of these species, or marine mammals.

(6) The extent to which the proposed action may be reasonably expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species.

(7) The extent to which the proposed action may be expected to have a substantial impact on biodiversity and ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc).

(8) How to assess significant social or economic impacts that are interrelated with significant natural or physical environmental effects.

(9) The degree to which the effects on the quality of the human environment are likely to be highly controversial. Although no action should be deemed to be significant based solely on its controversial nature, this aspect should be used in weighing the decision on the proper type of environmental review needed to ensure full compliance with NEPA. Socio-economic factors related to users of the resource should also be considered in determining controversy and significance.

(10) Whether the action would result in the introduction or spread of nonindigenous species.

### Subpart F—NEPA and Fishery Management Decisionmaking

#### § 700.501 Fishery management decisionmaking procedures.

In addition to the procedures set forth herein, NMFS and the FMCs shall adopt and maintain procedures, consistent with current or future Statements of Organization, Practices, and Procedures, as described in 50 CFR 600.115, to ensure that fishery management decisions are made in accordance with the policies and purposes of NEPA and the MSA.

#### § 700.502 Record of decision.

(a) NMFS shall complete a concise public ROD by the time of its final decision.

(b) The ROD must do the following.

- (1) Describe the decision.
- (2) Describe all alternatives considered by NMFS and the FMCs in developing the recommended action



and reaching the final decision, specifying the alternative or alternatives which were considered to be environmentally preferable.

(i) The description of alternatives may discuss preferences among alternatives based on relevant factors including economic and technical considerations under the MSA and other statutory requirements.

(ii) The description of alternative must also identify and discuss all such factors including any essential considerations of national policy which were balanced in developing the recommended action and in making the final decision and state how those considerations entered into the decision.

(3) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. Where the decision is based upon the existence of mitigation measures, the ROD must include a description of the monitoring and enforcement program adopted or to be adopted, and, if not yet adopted, any obstacles to its adoption.

(4) Contain NMFS's responses to comments received on the final IFEMS, if any. In the event the public identifies similar issues to those previously responded to in the final IFEMS, NMFS shall note in the ROD where the prior response to the same or similar comments can be located and provide additional response, if necessary. If the public fails to submit comments at the appropriate point in the process, as specified in § 700.303, NMFS may, but is not required to, address comments that should have been raised at the draft level.

#### **§ 700.503 Implementing the decision.**

NMFS may provide for monitoring to assure that the decisions are carried out and shall do so for any mitigation adopted to mitigate significant adverse effects or to obtain information for future IFEMSs or fishery conservation and management decisions. Mitigation (§ 700.502(b)(3)) and other conditions established in the IFEMS or during its review and committed as part of the decision shall be implemented by NMFS, the FMC, recipients of permits or licenses, or other agencies if appropriate. NMFS shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of implementing actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which

they have proposed and which were adopted by the Secretary.

(d) Regularly make available to decisionmakers and the public the results of relevant monitoring.

### **Subpart G—Additional Requirements and Limitations**

#### **§ 700.601 Limitations on fishery management actions during MSA-NEPA process.**

(a) Until NMFS issues a record of decision as provided in § 700.502 (except as provided in paragraph (c) of this section), NMFS shall take no action concerning the proposal which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If NMFS is aware that a person is about to take an action within NMFS's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then NMFS shall promptly notify the applicant that NMFS will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required IFEMS is in progress and the action is not covered by an existing IFEMS or other program statement, NMFS shall not undertake in the interim any major Federal action covered by the plan or program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the IFEMS;

(2) Is itself accompanied by an adequate environmental document; and

(3) Will not prejudice the ultimate decision on the IFEMS. Interim action prejudices the ultimate decision on the IFEMS when it tends to determine subsequent development or limit alternatives.

#### **§ 700.602 NMFS responsibility for environmental documents produced by a third-party.**

(a) *Information.* If NMFS requires a non-Federal entity to submit environmental information for possible use by NMFS in preparing an environmental document, then NMFS should assist the non-Federal entity by outlining the types of information required. NMFS shall independently evaluate the information submitted and shall be responsible for its accuracy. If NMFS chooses to use the information submitted by the non-Federal entity in the environmental document, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers. It is the

intent of this paragraph that acceptable work not be redone, but that it be verified by NMFS.

(b) *Environmental assessments.* If NMFS permits an applicant to prepare an environmental assessment, NMFS, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *IFEMSs.* Any IFEMS prepared pursuant to the requirements of MSA section 304(i) and NEPA shall be prepared directly by NMFS, an FMC, or a contractor selected by NMFS or an FMC, or where appropriate under § 700.106(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by NMFS or the FMC, or by NMFS in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.

Contractors shall execute a disclosure statement prepared by NMFS, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the IFEMS prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency. To the extent that members of an FMC are involved in development of an IFEMS, they must comply with the rules regarding conflicts of interest as set forth in section 302(j) of the MSA, 15 CFR 14.42, 15 CFR 24.36(b), and 40 CFR 1506.5(c).

#### **§ 700.603 Filing requirements.**

NMFS shall ensure the timely filing with EPA of IFEMSs together with comments and responses. NMFS shall file IFEMSs with EPA when they are transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each IFEMS to CEQ, which shall satisfy the requirement of availability to the President.

#### **§ 700.604 Minimum time periods for agency action.**

(a) *Calculation of time periods.* NMFS shall publish a notice in the **Federal Register** notifying the public of any draft or final IFEMS available for public comment. The minimum time periods set forth in this section may be calculated from the date of publication

of the notice in the **Federal Register**, in accordance with 40 CFR 1506.10(d).

(b) *Comment period on a draft IFEMS.* NMFS and the FMCs shall integrate the solicitation of public comment on the draft IFEMS with the MSA's existing public processes.

(1) Except as provided in paragraph (b)(2) of this section, NMFS and the FMCs shall provide at least 45 days for public comment on the draft IFEMS in advance of a meeting where the FMC may take action

(2) NMFS may, in consultation with the FMC and EPA, reduce the period for public comment on a draft IFEMS to a period of no less than 14 days if NMFS finds that such reduction is in the public interest, based on consideration of the following factors.

(i) Whether there is a need for emergency action or interim measures to address overfishing;

(ii) The potential long- and short-term harm to the fishery resource;

(iii) The potential long- and short-term harm to the marine environment, including non-target and protected species;

(iv) The potential long- and short-term harm to fishing communities;

(v) The ability of the FMC to consider public comments in advance of a scheduled FMC meeting;

(vi) Degree of public need for the proposed action, including the consequences of delay; and

(vii) Time limits imposed on the agency by law, regulations, or executive order.

(3) NMFS should not reduce the public comment period, even if in the public interest, if the value of public notice and comments outweighs the factors listed in paragraph (b)(2) of this section, based on the consideration of the following factors.

(i) The degree to which the affected communities had prior notice of NMFS' or the FMC's consideration of the proposed fishery management actions;

(ii) The complexity of the proposed action and accompanying analysis;

(iii) The degree to which the proposed action is not related to exigent circumstances; and

(iv) The degree to which the science upon which the action is based is uncertain or missing.

(4) In cases where the public comment period is reduced to less than 45 days, NMFS and the FMCs shall explain the rationale for the reduced time period in the NOA announcing the public comment period. The comment period must be the maximum amount of time consistent with the rationale provided.

(c) *Timing of NMFS Decision.* (1) Except as provided in paragraphs (c)(2)

and (3) of this section, NMFS shall not make a final decision on a fishery management action until the later of the following dates:

(i) Ninety (90) days after publication of the NOA for a draft IFEMS for an FMP or FMP amendment.

(ii) Thirty (30) days after publication of the NOA for a final IFEMS.

(2) NMFS may make a final decision earlier than the times provided in paragraph (c)(1) of this section if the Secretary, in consultation with EPA, determines one of the following.

(i) NMFS is engaged in rulemaking under section 305(c) of the MSA and the Administrative Procedure Act (APA) for the purpose of protecting the public health or safety or is responding to a fishery management emergency, in which case NMFS may waive or reduce the time periods provided in this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final IFEMS; or

(ii) NMFS has published a supplemental IFEMS and has solicited public comment during the review period provided by MSA section 304 and there is not sufficient time to complete the Final IFEMS and provide for the full 30-day cooling off period within the MSA timeframe. In this case the time periods provided for in paragraph (c)(1) of this section may be reduced by up to 15 days.

(3) For regulations published under section 304(b) of the MSA, the time periods provided by paragraph (c)(1) of this section shall be reduced or enlarged to be commensurate with the comment period provided for the review of the proposed rule.

(d) If the exception listed in paragraph (c)(2)(i) of this section applies, NMFS shall take comment on the final IFEMS for 30 days after publication.

#### **Subpart H—Emergencies and Categorical Exclusions**

##### **§ 700.701 Emergencies.**

(a) If NMFS finds that there is a need for an emergency action or interim measure to address overfishing, that the action may have significant environmental impacts, and that there is not sufficient time to finalize the NEPA analysis, NMFS shall develop alternative arrangements for NEPA compliance and consult with CEQ about such alternative arrangements. NMFS and CEQ shall limit such arrangements to actions necessary to control the immediate impacts of the emergency. NMFS may develop programmatic alternative arrangements to ensure that such arrangements are limited to the

actions necessary to control the immediate impacts of the emergency.

(b) If NMFS finds that an emergency exists and that proposed emergency regulations will not result in a significant environmental impact, NMFS shall document such finding in an EA and FONSI. If NMFS finds that the nature and scope of the emergency requires promulgation of emergency regulations prior to the completion of an EA and FONSI, the Secretary shall develop alternative arrangements for NEPA compliance that include promulgation of the emergency regulations with a draft EA and FONSI that shall be finalized prior to the expiration or extension of the effective period of the regulations.

(c) Other actions remain subject to NEPA review in accordance with this part.

##### **§ 700.702 Categorical exclusions.**

(a) The following categories of actions, as found by NOAA in consultation with CEQ for conformity with NEPA and CEQ implementing regulations, normally do not require either an environmental impact statement or an environmental assessment and constitute categorical exclusions:

(1) Ongoing or recurring fisheries actions of a routine administrative nature when the action will not have any impacts not already assessed or NMFS finds they do not have the potential to pose significant effects to the quality of the human environment (apart from those already described in an environmental document) such as: Reallocations of yield within the scope of a previously published IFEMS, FMP or fishery regulation, combining management units in related FMP, and extension or change of the period of effectiveness of an FMP or regulation;

(2) Minor technical additions, corrections, or changes to a Fishery Management Plan or IFEMS; and

(3) Research activities permitted under an EFP or Letter of Authorization where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or Fishing Mortality.

(b) *NOAA and NMFS guidance.* NOAA and NMFS may develop guidance pursuant to 40 CFR 1507.3 on how NMFS will identify categorical exclusions not specified in paragraph (a) of this section.

(c) *Extraordinary circumstances for categorical exclusions.* NOAA and NMFS may develop guidance on how NMFS will determine whether extraordinary circumstances exist such

that an action that normally qualifies for a categorical exclusion requires the preparation of an EA or IFEMS.

(d) *Existing guidance.* NOAA has developed additional guidance on the identification and use of Categorical

Exclusions (NOAA Administrative Order 216-6).

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