

The following comments were submitted by
the Fisheries Survival Fund.

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[REDACTED]

April 20, 2007

VIA ELECTRONIC MAIL

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

Re: Magnuson-Stevens Fishery Conservation and Management
Reauthorization Act Environmental Review Procedures

Dear Sir/Madam:

In response to the call for comments on the environmental review provision revisions required by the Magnuson-Stevens Fishery and Conservation and Management Reauthorization Act, P.L. 109-479 ("Reauthorization Act") we are pleased to submit these comments on behalf of the Fisheries Survival Fund ("FSF"), which is joined by the following fishing organizations: Associated Fisheries of Maine, the North Carolina Fisheries Association, the Garden State Seafood Association, and the West Coast Seafood Processors Association. The FSF represents the bulk of the full-time, limited access Atlantic sea scallop fishing fleet from Massachusetts to Virginia. This rulemaking represents an important opportunity to improve and streamline the fisheries rulemaking process while also insuring that the public and regulated community have ample opportunities to participate. FSF appreciates this opportunity to contribute its suggestions and recommendations.

The Reauthorization Act lays out a detailed and ambitious implementation schedule for the National Marine Fisheries Service ("NMFS" or "the agency") and the Council on Environmental Quality ("CEQ") to develop a set of environmental review procedures to guide the development of fishery management plans, amendments, regulations, and other actions taken pursuant to the Magnuson-Stevens Act ("MSA") as amended. More importantly, the Reauthorization Act calls specifically for the agency, CEQ, and the Councils to involve the affected public in the development of the revised procedures. To that end, FSF strongly encourages those in charge of implementing the revisions to the environmental review process to adopt as transparent a process as practicable. The commercial fishing industry has a critical interest in any revisions to the environmental review process and certainly FSF would appreciate to review and comment on any proposals.

In order to help focus public comments during this initial scoping stage, NMFS has asked for comments on ten specific topics. Although there is some overlap among the responses, FSF takes up each of the topics in turn.

1. How should NMFS, in conjunction with the Councils and CEQ, revise and update agency procedures for compliance with NEPA?

The language of the Reauthorization Act lays out a clear mission for the agencies. Congress does not believe the current system of environmental review for fisheries management regulation is working effectively. Specifically the MSA states the new procedures shall:

conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and 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 involve the public.

16 U.S.C. §1854(i). Congress' intent was to streamline the environmental review process by eliminating redundancies, conflicting time schedules, and unnecessary analysis. In implementing this environmental review provision the agencies, in conducting the rulemaking and inter-agency coordination the reauthorization Act requires, should not lose sight of these goals. Under the Reauthorization Act, moreover, NMFS and CEQ have the authority to develop MSA- specific environmental review procedures that better accommodate the timelines and other practicalities of fisheries management, while recognizing the reauthorized MSA requires virtually all the environmental analyses NEPA would require.

2. What new opportunities exist to improve efficiencies in the NEPA process?

MSA Section § 1854(i)(2) states: "The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this Act." Thus, the law is designed to promote increased efficiency by creating a uniform review process and standards that can be specifically tailored to the particular needs of fisheries management. This is a unique and important opportunity that must not be wasted. As recommended

below, NMFS can go a long way to creating a management system that is responsive – a key consideration for the Atlantic sea scallop fishery which harvests a dynamic and fast growing resource under a rotational area management scheme that relies on the ability of managers to react quickly to ever-changing resource conditions. A clear set of standards, particularly with respect to definitions of what constitutes a reasonable range of alternatives and ties the scope of the analysis to the type of action being undertaken, will also help reduce the amount of litigation over purely procedural matters.

3. How should the Councils and NMFS ensure that analysis is conducted on an appropriate scale for various types of fishery management actions? What criteria should be developed?

FSF believes it is absolutely critical to tailor the procedure and level of analysis to the type of action that is being undertaken. Development of fishery management plans (“FMP”) and amendments require ample upfront opportunities for public input and development, from scoping, through refinement of alternatives, to ultimate selection of the conservation and management measures. Likewise, in order to have informed input, the accompanying analysis of the alternatives and their environmental, social, and economic impacts must be comprehensive and clear. By contrast, for actions that are undertaken pursuant to the regulations implementing an FMP, such as framework actions (sometimes called “regulatory amendments”) and setting of annual specifications, it is critical that the process be streamlined so that action can occur in as few as a couple of Council meetings (unless the scale of the framework is such that more time is needed for input and analysis).

To ensure that analysis is conducted on an appropriate scale, the new environmental review regulations must incorporate these distinctions between actions that make adjustments to an FMP as compared to a creation of or amendment to a fishery management plan. In the former case, NMFS should develop criteria that allow for streamlined analysis of frameworks and specifications by allowing Councils and their staffs to “tier off” the major analysis contained in the plan itself. For example, when a Council is merely setting an annual total allowable catch (“TAC”) or allocating days-at-sea and establishing an annual or multi-year rotation schedule, these measures are merely more-or-less applications of the conservation objectives, the impacts of which have already been fully analyzed in the environmental review accompanying the plan or amendment. Thus, minimal additional analysis should be required other than an update of the latest information and an explanation of how the measures meet the goals and objectives of the management regime.

Framework actions may, of course, sometimes require more new analysis, depending on the scope of the measures being considered. The touchstone should be whether the effects of the action have been adequately considered in existing analyses and whether or not conditions have changed so as to render it prudent to supplement these analyses. Generally speaking, FSF believes that frameworks that require significant conservation

sacrifices or impose greater social or economic burdens on the fishing industry should require more analysis of the projected impacts, and a reasonable range of alternatives that may minimize the impacts of such measures. In those instances, however, it is likely the conditions have changed in ways they were not anticipated, so the general rule stated above would likely also apply.

In summary, FSF strongly believes that it is critical for agencies to clearly articulate within the regulations the distinction between adjustments to an FMP and the amendment of an FMP, if the agencies are going to fulfill the Congressional intent of this provision of law. Currently, an overwhelming amount of environmental analysis is conducted for even the simplest of yearly adjustments to management measures. This onslaught of environmental analysis is currently paralyzing the fishery management process and it prevents the timely release of fishing regulations. The agencies will only solve this problem if it is made clear that all fishery management actions do not require the same level of environmental analysis.

4. Should the distinction between an Environmental Assessment and an Environmental Impact Statement be abolished?

A change in nomenclature of the environmental analysis will have no real effect on fisheries management unless there is a corresponding change, discussed above, which distinguishes between minor and major actions and results in the appropriate level of environmental review. FSF would support the creation of an integrated environmental impact analysis if within the integrated process the regulations establish criteria that allow tiering of analysis. The ability to tier-off the major substantive analysis in an FMP would allow NMFS and the Councils to distinguish between fishery management actions and apply a correspondingly appropriate level of analysis. However, making more clear the distinctions between when various levels of review under the new standards are appropriate and could go a long way to halting NEPA-based litigation relating to when an EIS should be prepared instead of an EA.

5. How should a "reasonable" range of alternatives be defined?

This is perhaps one of the most critical issues that NMFS must address in this process. Currently, due to a barrage of NEPA litigation and a risk averse attitude it has engendered, the "reasonable" range of alternatives considered during environmental review of a fishery management action is often quite unreasonable. The result is often unwieldy and complex matrices of alternatives that defy understanding and rational analysis. One of the major symptoms of this problem is the heavy reliance on "bookend" alternatives; for example, and exaggerating only slightly, should the plan contain no habitat closures or should the entire fishing grounds be closed or something on the infinite scale in between?

Conversely, FSF has a strong interest in seeing a robust set of alternative management alternatives which in fact provide a distinct set of choices while still meeting the objectives they are designed to achieve. The other end of the scale from "bookends" are the actions that present virtually no alternatives. The best current example we can think of is the Omnibus Standardized Bycatch Reporting Methodology ("SBRM") Amendment currently being promulgated by the New England and Mid-Atlantic Councils in conjunction with NMFS' Northeast Regional Office. The major

element of this amendment is the scale at which NMFS and the Councils will seek to establish observer coverage in order to achieve precise and accurate data. As to this element, however, the amendment provided no alternatives other than the status quo, which, it was pointed out, does not comply with the law.¹

In the case challenging Amendment 13 to the New England Multispecies FMP, Judge Huvelle enunciated the judicial standard for determining what constitutes a reasonable range of alternatives that deserves consideration in this process. She stated, "In evaluating a NEPA challenge, the Court makes two inquiries: '[1] whether an agency's objectives are reasonable, and [2] whether a particular alternative is reasonable in light of these objectives.' . . . [W]hat is a reasonable range will vary depending on the facts of each case and the nature of the proposal."² This statement is in essential agreement with the position taken by the Council Coordinating Committee.

Given that in most instances, the objectives will be reasonable, usually because they are driven by the requirements of the MSA, the question becomes how to define reasonableness "in light of the objectives." When the objective is ending overfishing, FSF suggests that a reasonable range of alternatives would encompass at least two distinctly different management approaches. However, in setting an annual TAC that is derived by applying the target fishing mortality rate to the best scientific estimate of stock size, two alternatives may be enough (one of which may be a "no action" or "status quo" alternative, although where they differ usually specifying each is not terribly instructive),

¹ This was decided before public comment was even solicited on the amendment. As a result the only "alternative" is to divide the managed fisheries into tens of hundreds of fishing "modes" for purposes of establishing levels of observer coverage—a decision which results in unduly high numbers of apparently required observer days. During public comment, FSF recommended that levels of precision be set at the level of each fishery, as recommended by NMFS's national guidance on SBRMs in its "Evaluating Bycatch" report. Although Council members have been assured that this facially reasonable alternative remains viable, this episode points out (1) the necessity of public input earlier in the regulatory process before the door closes on consideration of different approaches and (2) the need to clearly spell out which elements of an FMP or amendment are so essential that meaningful alternatives must be considered and analyzed.

² *Oceana v. Evans*, 2005 U.S. Dist. LEXIS 3959 *113, 115 (D.D.C. 2005) (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999)).

although there ought to be latitude left to consider alternative modeling approaches if new information or techniques are available.

In sum, FSF suggests specifying a reasonable range along the lines outlined by Judge Huvelle, and illustrating what constitutes a reasonable range through several different examples. This approach is employed with respect to certain of the National Standard Guidelines, and would seem most useful to managers and the public.

6. What opportunities exist for creating a more efficient scoping process?

FSF believes that Council meetings can usefully serve as a vehicle through which to hold scoping sessions and the council meeting agenda notices could serve the functions of a traditional Notice of Intent. Most interested members of the public and the regulated fishing industry receive council notices. However, with the advent of the internet, Federal Register notices have become generally available and increasingly relied upon by the industry. FSF, therefore, proposes two caveats: one, that councils accept written comments during the scoping process and do not rely solely on the public testimony at the meeting, and, two, that the Federal Register notice of any meeting at which scoping sessions are to be held prominently announce that fact.

FSF also notes that the procedures and protocols for public comment vary widely among the eight regional fishery management councils. Thus, in order to insure that all members of the public get equal and adequate opportunities to comment, we would suggest that NMFS establish a basic set of standards for such scoping sessions that enumerate the needed elements but provide some latitude for regional procedural variation.

7. Should the environmental analysis for different types of fishery management actions be developed on a different scale based on the action's duration or effect?

As stated above in response to Question Three, FSF strongly believes that environmental analysis for different types of fishery management actions should be developed on a different scale based upon the action's duration or effect. As noted, one of the current problems with the environmental review process that Congress intended to fix with this provision of law is overwhelming unnecessary environmental review that takes place for minor adjustments to fishery management regulations.

As an additional point, this process should make clear that cooperative research conducted under an existing FMP or implementing regulations should not require an independent NEPA analysis. This is consistent with other reauthorization Act provision promoting cooperative research.

8. What key features of current process or regulations should be modified?

The key features in need of revision in the new procedures are: the institution of consistent timelines especially between NEPA, the MSA, and the Administrative Procedure Act; the creation of an accurate and helpful definition of reasonable alternatives; ensuring the level of environmental analysis is commensurate with the level of action being proposed; and ensuring the environmental analysis and the analyzed alternatives are reflective of the proposed action, eliminating any redundant or unnecessary environmental analysis.

9. How should emergency actions be treated under the new procedures?

FSF believes the new environmental review procedures should continue to allow emergency and interim actions to go forward under the conditions prescribed in them MSA. The management flexibility interim and emergency measures provide is still necessary. That said, where emergency actions are undertaken by the Secretary and the Administrative Procedure Act requirements of prior notice and comment and the 30-day cooling off period are waived, FSF believes that provision should be made for post-effectiveness comment. Such rules are often referred to as "interim final rules" or "final rules with comment." The advantage of such an approach is that the public may be able to raise issues which have not been adequately considered, and this process allows for revision to the emergency rule if the agency believes such changes are merited. Also, there should be some form of analysis and justification for the action that is widely available to the public upon publication of the emergency rule.

10. To what extent does the public feel that shorter comment periods could affect the ability to effectively participate in the NEPA process?

Generally speaking, a 30-day comment period for most proposed fishery management actions is sufficient, and in most instances 60 days is far too long. T

he 30-day comment period may be extended upon request if the public is faced with a complex proposal that requires more time for analysis. The most important issue for the timelines, is that they are consistent and there is not undue delay of a fishery management action due to a an environmental review timeline.

In addition, perhaps the maximum period of time for comment should be 45 days in cases where the FMP or amendment is particularly complex, so there is ample time for the post-comment reviews to allow for timely implementation prior to the fishing year for which it is effective. The key is that the agency have the flexibility to establish an appropriate time frame, 15, 30 or 45 days, for example, to meet the exigencies of the particular fishery and the complexity of the plan, amendment, regulation, or other action.

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
April 20, 2007
Page 8

KELLEY DRYE
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Finally, timelines should run concurrently according to an integrated process. Sometimes, there will be separate comment periods for a NEPA EIS, the management measures, and the implementing regulations, all on a different time table. These processes need to be integrated to reduce complexity and confusion and to promote efficiency.

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This scoping process is the first in a series of important steps in the implementation of environmental review provision of the Magnuson Stevens Reauthorization Act. FSF appreciates this opportunity to comment on the environmental review provisions required by the Magnuson-Stevens Fishery and Conservation and

Management Reauthorization Act and is hopeful these comments will guide the agency in implementing the Act. Please do not hesitate to contact us if you require any further information.

Sincerely,

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Attorneys for the Fisheries Survival Fund