The following comments were submitted by Earthjustice, Oceana, NRDC, Pacific Marine Conservation Council, Center for Biological Diversity, National Audubon Society, Conservation Law Foundation, Ocean Conservancy, and the National Environmental Trust.)

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VIA E-Mail & U.S. Mail

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Re: Magnuson-Stevens Act Fishery Conservation and Management Reauthorization Act Environmental Review Procedures (Request for Comments)

This letter responds to the February 28, 2007 "DRAFT Proposed 'Revised Procedure' for MSA/NEPA Compliance," a draft proposal submitted by a subcommittee of the Council Coordination Committee ("CCC subcommittee proposal").[1] For additional comments, including specific responses to the ten topics outlined in the NOAA Fisheries' Request for Comments, the undersigned groups refer you to the comments submitted by the Marine Fish Conservation Network.

The CCC subcommittee proposal misreads the language and intent of Congress' recent amendment to Section 304 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act ("MSRA") and is contrary to the National Environmental Policy Act ("NEPA") and its implementing regulations. While the CCC subcommittee proposal concedes that fishery management actions must continue to comply with NEPA, it ignores the clear direction provided by Congress and fundamentally misunderstands what such compliance requires.

The CCC subcommittee proposal is unlawful and if implemented would lead to inefficient and unwise results. Accordingly, it must be rejected.

Fishery Management Actions Must Comply with NEPA and the CEQ Regulations

Compliance with NEPA requires both compliance with the statutory provisions of the Act and compliance with the Council on Environmental Quality ("CEQ") regulations, which are applicable to and binding on all federal agencies.[2] In the MSRA, Congress did not exempt fishery management actions from the statutory provisions of NEPA, and did not exempt fishery management actions from the CEQ regulations. Rather, Congress made clear that NEPA and the CEQ regulations continue to apply to fishery management actions.

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[1] The CCC is a committee composed of the executive directors and chairs of the eight regional fishery management councils. There is no indication that the CCC has endorsed the CCC subcommittee proposal.
[2] See, e.g. 40 C.F.R. § 1500.3 ("The provisions of the Act and these [CEQ] regulations must be read together as a whole in order to comply with the spirit and letter of the law.").

In the MSRA, Congress stated explicitly that revised procedures are to be established "for compliance with" NEPA. The CCC subcommittee proposal recognizes, as it must, that the revised procedure is bound by NEPA's statutory provisions. The CCC subcommittee proposal, however, contemplates wholesale amendment of the CEQ regulations as they apply to fishery management actions, contrary to Congress' intent.[3]

The legislative history of the MSRA makes clear that Congress intended for the new procedures to comply with existing CEQ regulations. A Senate Report describing the NEPA language enacted into law states: "The intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation."[4]

Similarly, Congressman Nick Rahall (D-WV) clearly explained that the MSRA amendment would not affect existing CEQ regulations and guidance:

> Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but these new procedures will not supercede existing NEPA regulations and guidance issued by the Council on Environmental Quality.[5]

Finally, earlier versions of the MSRA which were not enacted into law contained language which would have limited either NEPA's or the CEQ regulations' applicability to fishery management actions. Congress rejected that language. The CCC subcommittee proposal, nevertheless, seeks to resurrect an approach specifically renounced by Congress.

The CCC subcommittee proposal mirrors a proposal specifically rejected by Congress.

The CCC subcommittee proposal resurrects a "functional equivalency" proposal made in failed legislation sponsored by former Representative Richard Pombo (R-CA). That legislation proposed that any fishery management plan, amendment to fishery management plans, or regulations prepared in accordance with the MSA, be deemed to satisfy the requirements of NEPA. The CCC subcommittee proposal seeks to resurrect this failed proposal in its assertion that "[f]or MSA actions, the newly developed, integrated procedure defined here is the functional equivalent of the procedural provisions of NEPA as identified in the CEQ regulations."[6] As described further below, the CCC's proposed procedure manifestly is not equivalent, functionally or otherwise, to

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[3] See CCC subcommittee proposal at 1, 2.
[4] Senate Report 109-229, April 4, 2006 at 8 (emphasis added).
[5] Statement of Rep. Rahall, December 8, 2006 (emphasis added), 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks).
[6] CCC subcommittee proposal, op. cit., p. 3.

the procedure detailed in the CEQ regulations. More importantly, Congress rejected sufficiency language and instead passed legislation clearly stating that the new procedure must comply with NEPA and the existing CEQ regulations.

The CCC subcommittee proposal also attempts to resurrect other language that was rejected by Congress. Representative Pombo proposed language in a "Managers Amendment" that would have explicitly empowered the regional fishery management councils to serve as the entities responsible for selecting the alternatives to be analyzed under NEPA and evaluating the environmental impacts of those alternatives. The Managers Amendment, however, was never approved by the House and never was enacted into law.

The two versions of House language that would have amended Section 304 in ways consistent with the CCC subcommittee proposal were completely rejected in favor of Senate language. If asked to review the evolution of the language that was finally enacted into law, courts would note that neither version of the House language was adopted by Congress and would assign them no weight in interpreting the meaning of the statute. The legislative history establishes clearly that the Congress rejected all versions of the language that would have made NEPA inapplicable or elevated the role of the councils in implementing NEPA.

The amendments to MSRA provide neither the direction nor the authority to amend the CEQ regulations. In our view, the agency has done the CCC and the public a great disservice by posting the CCC subcommittee proposal without any recognition of its unlawful nature. The CCC subcommittee proposal should be rejected in its entirety due to its lack of legal foundation. Examples of specific violations of NEPA and the CEQ regulations are described below.

The CCC subcommittee proposal for environmental review violates NEPA and existing CEQ regulations.

The CCC subcommittee proposal introduces the idea of an "environmental impact assessment" ("EIA") as a "single analytical process" for complying with NEPA.[7] In describing the content of EIAs, the proposal states that "the EIS model will be the default, though range of alternative and level of analysis would depend on the issue at hand and the information at hand."[8] The suggestion that the level of analysis and range of alternatives would depend on information "at hand" violates both NEPA and existing CEQ regulations and guidance.

As discussed above, Congress made clear that the revised procedures are to be consistent with existing CEQ regulations. Those regulations call for the preparation of Environmental Assessments and Environmental Impact Statements, not EIAs. There are well-established standards and case law for determining when an EA or an EIS is required and for each document's scope and content. For the new type of NEPA

[7] Ibid, p. 3.
[8] Ibid, p. 3.

document proposed by CCC, there are no clear standards of adequacy and this would lead to more uncertainty and inevitably to more litigation (see below).

NEPA's statutory text requires that every federal agency use a systematic, interdisciplinary approach to develop a detailed statement on the environmental effects of a proposed action, any adverse environmental effects which cannot be avoided, alternatives to a proposed action, and any irreversible and irretrievable commitments of resources that would be involved should the proposed action be implemented. In NEPA, Congress assigned this task to federal agencies. Congress required that federal agencies devote close attention to the analysis of alternatives to the proposed action.[9] The duty to develop and describe alternatives is central to NEPA's purpose "to encourage productive and enjoyable harmony between man and his environment" and "to promote efforts which will prevent or eliminate damage to the environment."[10] The CEQ regulations echo the importance of rigorous analysis of alternatives by describing the alternatives section as "the heart of the environmental impact statement."[11]

NEPA's text also makes clear that there is an affirmative duty to go beyond the information that is "at hand" when analyzing the effects of a proposed action. The statute requires all federal agencies to "identify and develop methods and procedures, in consultation with the Council on Environmental Quality…, which will insure that presently unquantifiable environmental amenities and values may be given appropriate consideration in decisionmaking…." 42 U.S.C. § 4332(B). This responsibility is reinforced by the CEQ regulations which make clear that agencies must develop information where possible and that they should explain situations where information is unavailable or uncertain.[12]

The CCC subcommittee proposal unlawfully displaces the responsible federal agency from its statutory role, fundamentally undermining Congress' purposes in enacting NEPA and making it applicable to all federal agencies.

The CCC Subcommittee Proposal is Inefficient

The CCC subcommittee proposal, which would unlawfully empower the Councils to make many if not most key decisions with regard to environmental analysis and which contemplates that a new Environmental Impact Assessment would replace the use of Environmental Assessments and Environmental Impact Statements, is inefficient for a variety of reasons.

> **The CCC subcommittee proposal initiates an improper delegation of authority to an advisory body and usurps the decision-making authority of the Secretary of Commerce.**

[9] 42 U.S.C. § 4332(2)(C) and (E)
[10] 42 U.S.C. § 4321.
[11] 40 C.F.R. § 1502.14
[12] 40 C.F.R. § 1502.22

The CCC subcommittee proposal states that "the Council FMP development process (MSA) needs to be the primary vehicle for identifying alternatives and conducting the requisite analyses" in order to make NEPA and MSA timelines consistent.[13] This approach would shift significant authority to the regional fishery management councils to determine the final outcome of the environmental analyses without adequately accounting for the legal requirement that the Secretary of Commerce is solely obligated to comply with all applicable laws, including NEPA. The MSA clearly vests authority for decision-making with the Secretary of Commerce, while the regional fishery management councils are established as advisory bodies with no legal authority to promulgate fishery management plans, amendments to fishery management plans or regulations implementing such plans.

The CCC subcommittee proposal would place the regional fishery management councils wholly in control of all of the critical decisions and analysis required for NEPA compliance, contrary to the Act's terms making federal agencies responsible for environmental analysis and compliance with CEQ regulations. NEPA and the CEQ regulations anticipate that the agency proposing an action and the decision-making agency are one and the same. The Secretary should affirm the current procedure that recognizes that the agency is the decision-maker, and is responsible for signing the Record of Decision and complying with NEPA, the MSA and all applicable law.

The CCC subcommittee proposal illegally limits the scope and quality of public participation.

The CCC subcommittee proposal violates NEPA and CEQ regulatory requirements designed to notify the public, solicit public comment and respond to public comment. For example, the CCC subcommittee proposal states that there would be no notice of intent published in the Federal Register to notify the public of rulemaking.[14] The CCC subcommittee proposal would limit public comment opportunities to "written letters to RFMC or oral testimony at RFMC meeting[s]" and "RFMC meeting will provide opportunity for public input"[15] contrary to CEQ requirements.[16] Furthermore, the CCC subcommittee proposal skirts the requirement for a formal scoping period initiated by the notice of intent,[17] the requirement for the lead agency to invite the participation of interested persons,[18] the requirement for the lead agency to request comments from the public,[19] and specific publication requirements designed to notify and inform the public.[20]

The CCC subcommittee proposal diminishes the quality of public input as well. The proposal states that "RFMC/NMFS will solicit public comment on proposed analysis in

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[13] CCC subcommittee proposal, op. cit. p. 2.
[14] Ibid, p. 8.
[15] Ibid, p. 4.
[16] 40 C.F.R. § 1501.7
[17] 40 C.F.R. § 1501.7
[18] 40 C.F.R. § 1501.7
[19] 40 C.F.R. § 1503.1
[20] 40 C.F.R. § 1506.6

RFMC newsletter and on website."[21] Contrast this to NOAA Administrative Order 216-6 which calls for "comprehensive public involvement."[22] As stewards of our public natural resources, Congress charged NOAA Fisheries with soliciting, considering, and responding to the views of the broad general public. Permitting public comment through RFMC meetings cannot substitute for NEPA's broad command to involvement the public in decisions about public resources.

The CCC subcommittee proposal reduces the scope of environmental analysis.

The CCC subcommittee proposal violates CEQ regulations by proposing to identify a range of reasonable alternatives during the informal "scoping process" by which input is solicited through the regional fishery management council's newsletter and website, instead of through the legally prescribed scoping process where the scope of issues to be addressed can be fully developed. The CEQ regulations outline a process where the lead agency, through the invitation to the public, determines the scope of the significant issues to be analyzed in depth.[23]

The CCC subcommittee proposal would result in more, not less, litigation.

The CCC subcommittee proposal will lead to more uncertainty and more litigation over fishery management decision-making. The CCC subcommittee proposal seeks to replace the well-defined and well-tested procedure and standards articulated in the CEQ regulations with an entirely new and undefined procedure. The CCC subcommittee proposal calls for new analytical documents, new division of responsibilities, and other new procedures with no established standards for adequacy. Lacking the foundation of the CEQ regulations and the benefit of the body of caselaw interpreting them, it can be expected that aspects of this entirely new procedure will be subject to legal challenge.

Moreover, delegating greater control over the environmental analysis to the regional fishery management councils will lead to additional confusion, delay and/or litigation because the role of the Secretary – who is the final decision-maker and ultimately responsible for NEPA compliance-- is relegated to the back-end of the process. The Secretary will be faced with the choice of either sending inadequate NEPA documents back to the councils and rejecting the accompanying FMP, FMP amendment or other proposed action, or accepting them and having them rejected in court. If the Secretary takes responsibility from the beginning of the process for its NEPA responsibilities, this result will be avoided.

The CCC Subcommittee Proposal is Unwise

While the law mandates that the Secretary of Commerce retains the ultimate responsibility for NEPA compliance, the CCC subcommittee proposal would shift

[21] CCC subcommittee proposal, op. cit., p.8.
[22] NOAA Administrative Order 216-6 § 5.02c.2.
[23] 40 C.F.R. § 1501.7

significant authority for determining the final outcome of the environmental analysis to the councils, thereby placing the Secretary in an untenable position. For example, the councils would be empowered not only to select the range of alternatives to be analyzed, but also to evaluate the environmental impacts of those alternatives. This represents an unlawful shift of responsibility from a federal agency, staffed by professionals in multiple disciplines and with a broad range of public stewardship responsibilities, to bodies that are widely recognized as subject to conflicts of interest, that are not accountable to the public, and that are charged primarily with developing management measures for the exploitation of commercially-valuable fish species. The broad environmental stewardship purposes of NEPA cannot be accomplished by yielding key decisions to the regional fishery management councils.

It is neither acceptable nor appropriate to delegate responsibility for selecting the range of alternatives and evaluating the impacts of those alternatives to a regional fishery management council. Such an approach would run the grave risk that the purpose of NEPA, to make decisions based on an understanding of the environmental consequences and to take actions to protect, restore and enhance the environment[24] will not be accomplished when managing our public fisheries resources.

Conclusion

The CCC subcommittee proposal violates the MSRA, NEPA, and CEQ regulations. The proposal initiates an improper delegation of authority away from the Secretary of Commerce to the regional fishery management councils and discards established agency guidance and case law, thus opening the door for the possibility of increased litigation.

The CCC's approach is not only inconsistent with the spirit and intent of NEPA and the plain language of the MSRA, but is also counter to the recommendations from the U.S. and Pew Oceans Commissions to broaden our thinking about our oceans and move fisheries towards ecosystem-based management. The proposal takes a step backward at a time when two blue-ribbon ocean commissions, Congress, the President and the public have all exhorted federal managers to move forward and make progress in ocean conservation. The first step in making such progress is to better understand the impacts of our proposed activities on the oceans. The CCC subcommittee proposal seeks to undermine the possibility of enhancing that understanding by eliminating time-tested and honed procedures for environmental analysis. Further, the CCC subcommittee proposal seeks to reduce the opportunities for public participation in the process at a time when public interest in our oceans is at a peak.

For these reasons, the CCC subcommittee proposal must be rejected outright.

Thank you for your attention to these comments. We would be pleased to meet with you and members of your staff to discuss our concerns in greater detail.

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[24] 40 C.F.R. § 1500.1.

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Earthjustice

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Oceana

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Natural Resources Defense Council

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Pacific Marine Conservation Council

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Center for Biological Diversity

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National Audubon Society

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The Wilderness Society

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Conservation Law Foundation

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Ocean Conservancy

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National Environmental Trust