The following comments were submitted by the Marine Conservation Alliance.

Marine Conservation Alliance

promoting sustainable fisheries to feed the world

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The National Marine Fisheries Service ("NMFS") has requested comments regarding the environmental review provisions set forth in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, P.L. 109-479. The Marine Conservation Alliance ("MCA") offers the following comments in response to that request.

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

Overview

At the outset, it is important to keep in mind that the National Environmental Policy Act ("NEPA") is not a substantive statute dictating the selection of a particular course of action. Rather, NEPA is a procedural statute designed to insure that Federal decision makers have available to them an adequate analysis of the environmental implications of the proposed action so that a well reasoned decision can be made.[1] Thus, the Magnuson-Stevens Fishery Conservation and

[1] In the early years of NEPA, a debate raged over whether NEPA was a substantive statute requiring an agency to adopt the least damaging environmental alternative or whether NEPA was a procedural statute requiring that an agency evaluate and be aware of the environmental consequences of its action so that those consequences can be taken into account during the agency's decision making process. A series of four Supreme Court decisions resolved the debate by finding that NEPA is a procedural statute. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Strycker's Bay Neighborhood Council,*

Management Act ("MSA") is the controlling substantive statute, and NEPA is simply the analytical tool used to evaluate the impacts of MSA management actions.

Congress, in adopting the language in P.L. 109-479 directing the Secretary to develop new environmental review procedures, acknowledged that there have been problems and inconsistencies with the application of NEPA to MSA actions. To address these problems, Congress instructed the Secretary of Commerce ("Secretary") to consult with the Regional Fishery Management Councils ("Councils") and with the Council on Environmental Quality ("CEQ") to develop new procedures for integrating the NEPA and MSA processes. It was Congress' intent that these procedures integrate NEPA's environmental analytical procedures with the procedures for preparing and approving fishery management plans ("FMPs") and amendments under the MSA such that the timelines for complying with NEPA would conform to the timelines for review and approval of FMPs and amendments. It was also Congress' intent that the Council MSA process (for plans and amendments adopted by Councils) is to be the vehicle for identifying the conservation and management problem to be addressed, identifying the reasonable alternatives to address that problem, identifying the preferred alternative, and evaluating the environmental consequences of the alternatives, including the preferred alternative. Congressional Record, H9233, December 8, 2006.

To meet Congressional intent, the new procedures must:

1) strengthen and complement the MSA process, especially as they affect FMPs or amendments prepared by the Councils;

2) specify that scoping is conducted within the Council MSA process such that it is the Council that identifies the problem to be addressed and the alternatives to be considered for addressing that problem, and such that the Council selects the preferred alternative;

3) improve the timeliness of decisionmaking and streamline the process without shortchanging the public since Congress specifically directed that MSA timelines control the review process; and

4) be legally defensible under both MSA and NEPA, which means the new procedures must be codified in a manner that complies with the statutory and regulatory requirements of both the MSA and the Secretary's regulations, and with NEPA and CEQ's regulations.

Inc. v. Karlen, 444 U.S. 223 (1980); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). As a result of these four decisions, it is well established that if an agency has taken a hard look at the environmental consequences of its proposals and at appropriate alternatives, courts will not substitute their judgment for that of the agency in determining the appropriate final agency action, even if that action is not the least environmentally damaging alternative.

The problems leading Congress to direct the Secretary to develop these new procedures came about largely in response to NMFS' overly zealous application of NEPA provisions. For example, NMFS is requiring Councils to undertake analyses not required by the statute or by NEPA regulations promulgated by CEQ. NMFS freely and openly admits it is demanding that the Councils meet requirements not contained in the statute or in CEQ's regulations. NMFS' position is that prior to requiring these extra and unnecessary analyses NMFS often lost NEPA challenges to FMPs brought by FMP opponents, but, after requiring these additional analyses, NMFS began winning more lawsuits. NMFS concluded that it must be doing something right and continued to require these extra analyses. NMFS' decision to impose on the Councils' standards not set forth in CEQ's regulations or the statute in order to "insure" court victories is an overreaction to prior litigation.

These unnecessary procedures and analyses required by NMFS as part of a NEPA defense litigation strategy are contrary to NEPA's purposes and undermine its objectives when Councils are prevented from addressing fishery management issues in a timely fashion. Fishery management occurs in a dynamic environment of change. Proper management of our fishery and ocean resources often requires reacting to problems in something less than two or three years. Sadly, because of the unnecessary and cumbersome NEPA standards imposed upon the Councils by NMFS, the Council's ability to respond to fishery management issues in a timely fashion is often compromised.

For example, the North Pacific Regional Fishery Management Council ("North Pacific Council") was faced with the prospect of doing an environmental impact statement ("EIS") on its long established (thirty years) process of setting total allowable catch ("TAC") levels, a process that is recognized around the world as a model for science-based decisionmaking. This would have meant that instead of using the most recent and reliable biological data as is the current practice, the North Pacific Council would have to rely on year-old data to set harvest levels. The result would be a significant undermining of that Council's science-based management programs.

Related problems lie with the time it takes for a problem to be identified, the analysis accomplished, the preferred alternative selected, a recommendation made to the Secretary, a final decision from the Secretary, publication of a final regulation, and eventual implementation of a management action. Under the present system, this process often consumes two or more years. Sometimes this unnecessary NEPA-related delay can take so long that the Secretary rejects a Council recommendation because the underlying data have become so "stale" as to render the decision unacceptable under MSA rules. Often, this delay occurs between the time of final Council action and review by the Secretary.

Perhaps the most egregious example of problems with the way the NEPA process is now being applied by NMFS occurred when the North Pacific Council was considering a programmatic review of management measures for the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish FMPs. In this case, NMFS' instructions for NEPA compliance were that a "no fishing alternative" had to be included in the NEPA analysis. However, this is a fishery (1) where the Acceptable Biological Catch ("ABC") levels total four million metric tons and have consistently totaled that amount for over thirty years, (2) where the TAC levels total only half the ABC, and (3) which supplies half of this nation's seafood production on a consistent and

sustainable basis with no overfished stocks. Under no set of circumstances given these biological facts would a no-fishing alternative be considered a reasonable alternative.[2] Nevertheless, NMFS insisted that this, and a myriad of other alternatives, be analyzed in this NEPA document, and in all future such analyses. NMFS explained that imposing these analytical requirements on the Council was part of NMFS' litigation avoidance and defense strategy. In fact, NMFS demanded an analysis of virtually every conceivable alternative which resulted in approximately 100 alternatives being considered. The result was a 7,000 page Programmatic Supplemental Environmental Impact Statement. The analysis of the no fishing alternative alone consumed 300 pages, the amount CEQ's regulations indicate should be the maximum length for an entire EIS for a proposed action of "unusual scope of complexity." 40 C.F.R. 1502.7.[3]

The facts are that NMFS' effort to bulletproof all fishery management actions against NEPA litigation has resulted in a cumbersome, overly complicated, bureaucratic process of never ending legal review and regulatory revisions. Requirements for contrived, often unreasonable, alternatives simply for the sake of having multiple alternatives, coupled with unending lines of regulatory and legal reviews cause even the most simple management actions to take years from conception to final implementation. Neither the resource nor the public benefits from such a process. Simply put, NEPA should be used to insure proper environmental analyses of reasonable alternatives. It should not be used to dictate the substantive outcome of decision making, nor should it be used to obstruct decision making processes through the time consuming analysis of alternatives that are unreasonable.

A Framework For Implementing P.L. 109-479

The MSA vests the Councils with the authority to develop and to recommend to the Secretary FMPs and amendments thereto. The MSA imposes specific timeframes within which the Secretary must approve or disapprove such recommendations. Given that statutory structure, the Councils are the entities which (1) identify the proposed action, including the reasonable alternatives thereto, and (2) analyze each to determine the final preferred action to recommend to the Secretary for approval or disapproval.

The practical effect of P.L. 109-479 is that the Secretary cannot comply with the timeframes specified in the MSA for approving or disapproving Council FMP recommendations if the Secretary commences the NEPA process only upon receiving the Council's proposed plan.

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[2] NMFS' demand that a no fishing alternative be examined appears to violate CEQ's regulatory guidance. When the proposed action is not a new action but a continuation or a change in an existing situation, the no-action alternative is not the cessation of the existing action but the continuation of the present action until it is changed. Council on Environmental Quality, 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("CEQ Memorandum"), 46 Fed. Reg. 18026, 18027 (Question 1b) (1981).

[3] CEQ's regulations provide that the text of a final EIS shall normally be less than 150 pages unless the proposal is one of unusual scope or complexity, in which case the length of the document should normally be less than 300 pages. 40 C.F.R. 1502.7. A 7,000 page EIS somewhat exceeds this limitation.

Therefore, as a practical matter, to implement the requirement set forth in P.L. 109-479 that the NEPA and MSA timeframes be consistent, the Council FMP development process will need to be the primary vehicle for identifying the management alternatives and for conducting the requisite analysis of the benefits and detriments of each alternative.

While the Secretary retains final authority to determine whether NEPA has been complied with, there is ample precedent for the Secretary to delegate the preparation of the requisite analyses, provided the Secretary takes a hard look at the submitted documents to determine NEPA compliance. Since the MSA has vested the Councils with authority for FMP preparation, the NEPA delegation concept is the appropriate conceptual framework.[4]

MCA believes that the revised NEPA procedures mandated by P.L. 109-479 should incorporate the following governing principles and procedures for Council prepared plans.

- The Council process is the sole vehicle for conducting scoping. The Council shall complete a scoping process to identify the range of reasonable alternatives to accomplish the Council's management objective and to identify the issues which should be examined to evaluate the merits of those alternatives. In completing the scoping process, the Council shall solicit public comment.

- The Council identifies the range of alternatives for consideration. After completing the scoping process, the Council shall identify a range of reasonable

[4] CEQ's regulatory guidance specifically permits an agency to delegate authority for the preparation of an EIS, provided the agency conducts a review of any delegated statement such that the statement is verified by the agency for completeness and compliance with NEPA. Thus, an agency may require an applicant to submit environmental information for use in preparing an EIS. 40 C.F.R. 1506.5(a). Further, an agency may specifically permit an applicant to prepare an environmental assessment ("EA"), provided that the agency makes its own evaluation of the delegated statement and takes responsibility for the scope and content of the EA. 40 C.F.R. 1506.5(b). CEQ's regulations go on to state that even an EIS may be prepared by a contractor selected by the lead agency, or even a cooperating agency, provided that the responsible Federal official independently evaluates the statement prior to its approval and takes responsibility for its scope and contents. 40 C.F.R. 1506.5(c). Indeed, CEQ allows the hiring of a consultant to prepare an EIS, even one hired by a permit applicant, provided that the responsible Federal agency fully reviews and takes responsibility for the scope and content of the final document. CEQ Memorandum, 46 Fed. Reg. 18026, 18031 (Question 16) (1981). As a result of these regulatory principles and guidance, the delegation of responsibility to prepare the EIS is fully consistent with NEPA. Courts have generally allowed Federal agencies to delegate the preparation of EISs and EAs to consultants, contract applicants, and state agencies, provided the Federal agency retains responsibility for the preparation process and the final document. *See, e.g., Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2nd Cir. 1975). The cases, regulations, and CEQ guidance regarding delegation provide a conceptual framework and foundation for implementing the provisions of P.L. 109-479. The procedures to be adopted should constitute adequate guidance to the Councils such that the responsible agency's "supervision" is fully contained therein. Further, the responsible agency, here NMFS, will retain final responsibility for the scope and content of the document with full authority to disapprove that which is prepared by a Council.

alternatives to accomplish the Council's objectives. The Council shall explain its reasons for selecting those alternatives and for rejecting any other alternatives which may have been identified in the scoping process.

- The Council conducts a thorough analysis consistent with the scope of the action. After selecting the range of reasonable alternatives, the Council shall evaluate the ecological, social, economic, health, aesthetic and cultural effects of each alternative, and of a no-action alternative, on the affected environment. The Council shall also evaluate the cumulative impact on the environment of each such alternative. In developing the required analyses, the Council shall solicit public comment regarding the effects of each alternative, including both written comments and oral testimony at Council meetings.

- The Council selects the preferred alternative. After completing the evaluation provided for above, the Council shall review the analysis and select a preferred alternative, or combination of alternatives, to accomplish the Council's objective. The Council shall explain the purpose of, and need for, the action and the reasons for selecting the alternative adopted by the Council. The Council shall solicit public comment on the analysis and the alternatives, including the preferred alternative.

- The Council will complete the NEPA documentation and submit its recommendation when the Council determines that the requirements of the MSA and the new procedures have been met. After considering the analysis and public comments, the Council shall select a preferred alternative for recommendation to the Secretary for approval pursuant to the MSA. The Council shall prepare the NEPA documents required pursuant to 40 C.F.R. Part 1500 and submit those documents to the Secretary once the Council determines that the MSA and NEPA documentation is complete.

- Secretarial Review. The Secretary shall review the FMP and NEPA documents to determine if the substantive and procedural requirements of the MSA, and procedural requirements of NEPA, have been satisfied. If not, the Secretary shall disapprove the FMP or FMP amendment.

NMFS' Ten Questions

MCA believes that the preceding governing principles and associated discussion already address many of the ten specific questions contained in NMFS' request for comments. Nevertheless, MCA will address each of the ten questions in the order presented by NMFS.

Question No. 1. In the context of fishing management actions, how should NOAA Fisheries, in consultation with the Councils and CEQ, revise and update agency procedures for compliance with NEPA?

Answer. MCA refers NMFS to the discussion immediately above setting forth the framework for implementing P.L. 109-479 with respect to Council prepared plans. The new procedures need to establish that these steps are performed within MSA timeframes, and be codified in NOAA and CEQ regulations as appropriate to ensure that they are legally defensible under both the MSA and NEPA.

Question No. 2. What opportunities exist to improve efficiencies to the NEPA process that may not have been applied in the past?

Answer. MCA submits there are numerous opportunities to improve efficiencies in the NEPA process, as illustrated by the examples set forth above. The most significant opportunity to improve the process is for NMFS to return to the purposes for which NEPA was established rather than to insist upon a process driven by litigation defense strategy.

Question No. 3. How should the Councils and NOAA fisheries insure that analysis is conducted on an appropriate scale for various types of fishery management actions? What criteria should be developed and applied to insure that the level of analysis is commensurate with the scope of the action?

Answer. The difficulty with this question is that the appropriate level of analysis will depend upon the action itself and its factual context. There is no precise answer which can be provided to NMFS' question without knowing the nature of the action and its surrounding facts. Therefore, any criteria which are developed will necessarily be so general that they will effectively be meaningless, or worse yet, could provide fertile ground for future controversy and litigation. It is an unhelpful truism to state that more complicated issues will require more complicated analyses. Rather than attempting to develop general scaling criteria, it would be more appropriate to identify the factors which need to be included in any environmental analysis, factors which are included in every NEPA analysis. By applying the facts to those factors, the analysis will be commensurate with the scope of the action.

Question No. 4: Should NOAA fisheries consider eliminating the distinction between an EA and an EIS and, instead, rely solely on an integrated environmental impact analysis?

Answer. NFMS should not eliminate the distinction between an EA and an EIS. There are fishery management decisions which are generally routine and which should not automatically rise to the EIS level. For example, assume there is an annual adjustment of harvest based on a procedure already embedded in, and approved pursuant to, the underlying FMP. An adjustment pursuant to such a procedure would, in ordinary circumstances, not require a complete EIS, particularly if there is an established and accepted procedure for gathering and analyzing the applicable data. Similarly, if there is an approved framework and procedure for establishing TAC levels which, because of the established procedures, is a routine formulaic process, then a full EIS would not be necessary. Another example would be if there is a rollover of a quota that is not used in one timeframe or geographic area. Implementing such a rollover would not require a complete EIS under normal circumstances. However, for significant new management issues, such as major allocation decisions or habitat protection measures, an EIS style analysis will be required. Retaining the EA/EIS distinction utilizes already existing and

well understood procedures, and avoids the problems identified under question 3.

Question No. 5: How should a "reasonable" range of alternatives be defined for purposes of the new procedures?

Answer. Pursuant to CEQ regulations and existing legal precedent, a reasonable range of alternatives is all that is required for analysis. Further, those alternatives must fulfill the objective of the proposed action. It is inappropriate and unnecessary for NMFS to insist upon a range of alternatives which is infinite in its scope. Rather, the selected range of alternatives should be sufficient to bracket the outer boundaries of the proposed action, and reasonable internal points between, such that the Council can formulate a preferred alternative based on a complete analysis. The determination regarding what constitutes a reasonable range of alternatives is not subject to a hard and fast rule because that determination depends on the proposal at issue. CEQ Memorandum, 46 Fed. Reg. 18026 (Question 1b) (1981).

In the leading Supreme Court case on the alternatives requirement, the Court found that "the concept of alternatives must be bound by some notion of feasibility." Thus, remote or speculative alternatives need not be considered. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978). Many courts have also held that for an alternative to be reasonable it must meet the goals of the proposed action. *See, e.g., Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990), *rehearing denied*, 940 F.2d 435 (9th Cir. 1991); *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1485 (D.C. Cir. 1990).

Not only must the alternatives considered be reasonable and limited by feasibility, but the number of alternatives considered is also bounded by the test of reasonableness. CEQ's guidance provides that if there are a large number of alternatives possible, only a reasonable number of examples representing the possible spectrum of alternatives need to be examined. CEQ Memorandum, 46 Fed. Reg. 18026 (Question 1b) (1981). CEQ proceeds to provide an example of a proposal to designate wilderness areas within a national forest, which could involve an infinite number of alternatives from 0 to 100% of the forest. CEQ asserts that an appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100% of the forest to wilderness, noting that what constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case. *Id.* at 18027. Thus, if a Council selects a range of alternatives that reasonably bound the options available to carry out the Council's purpose and objective, there is no need for NMFS to insist upon the analysis of other alternatives simply to cover every conceivable base. Indeed, in one of the examples above, NMFS' guidance that the no action alternative had to include the cessation of fishing would appear to be contrary to CEQ's guidance and to legal precedent. Thus, when the proposed action is not a new action, but a continuation or a change in an existing situation, CEQ indicates that the no-action alternative is not a cessation of the existing action but to continue the present action until it is changed. *Id.* at 18027 (Question 3).

An important related question is whether the Council, having chosen a reasonable range of alternatives bounding the possible actions, is precluded from adopting an alternative within that range simply because the specific alternative was not analyzed, or whether the Council is

prohibited from adopting a modified alternative simply because the modification was not specifically listed as an analyzed alternative. CEQ has responded to this circumstance, finding that if a comment on a draft EIS proposes a reasonable change in one of the analyzed alternatives, or a reasonable variant, that is "within the spectrum of alternatives that were discussed in the draft" then that change or variant can be adopted without a new analysis if the final document discusses the comments. *Id.* at 18035 (Question 29(b). Thus, Councils are not required to do an entirely new environmental impact analysis just because they have modified one of the alternatives analyzed in the draft EIS, provided that the newly crafted alternative is roughly identical to the alternative considered in the draft. *See, e.g., California v. Block*, 690 F.2d 723, 758 (9th Cir. 1982). Indeed, a possible response to public comments and information received during the comment period on the draft EIS includes the modification of alternatives or the consideration of new alternatives.

Question No. 6: What opportunities, if any, exist to develop a more effective scoping process? Should scoping occur at Council meetings, and should Council meeting agenda notices serve as a traditional Notice of Intent to prepare an EA?

Answer. The question assumes the existing Council process is inadequate as a scoping process in the NEPA sense. MCA would challenge that assumption within the context of the North Pacific Fishery Management Council, which is the Council with which we are most familiar. We believe the NEPA scoping process can, and must, occur through the Council process in order to fulfill the purposes of P.L. 109-479 and the MSA. For NMFS to conduct a separate scoping process violates the purpose and intent of the MSA. To effectuate the purposes of that statute and P.L. 109-479, the only feasible alternative is to use the Council process for scoping. Thus, the Council meeting agenda should serve as a traditional Notice of Intent to prepare the EA.

Question No. 7: Should the EA for different types of fishery management actions be developed on a different scale based on the actions, duration, or effect?

Answer. This question appears to be similar in scope to Questions 3 and 4 above and is addressed there.

Question No. 8: What key features of the current NOAA NEPA process or of CEQ's regulations should be modified in the new procedures?

Answer. We believe this question is answered in our comments above regarding the framework for implementing P.L. 109-479. Rather than repeat those principles here, suffice it to say that NOAA's NEPA implementing procedures and CEQ's regulations should be amended to specifically provide that the Council process will be the process by which the preferred alternative, and the reasonable range of alternatives thereto, are selected, and within which the NEPA analysis is completed. This is not to suggest that actions taken by the Council are deemed sufficient. Rather, it is to recognize that the only way in which the intent of P.L. 109-479 can be implemented is to utilize the Council process. The Secretary, as is the case in any delegation of authority to prepare the EIS or EA under NEPA, will reserve final authority to determine

whether NEPA has been complied with.

Question No. 9: How should emergency actions be treated under the new procedures?

Answer. There should be an expedited procedure in emergency circumstances, and the MSA establishes procedures for the issuance of emergency regulations and interim measures that should suffice. 16 U.S.C. 1855(c). Specifically, the MSA requires the publication of emergency regulations upon unanimous vote of a Council. In that circumstance, and assuming specificity in the Council's request, it can be argued that NEPA compliance is superceded by a statutory imperative giving the Secretary no discretion to weigh alternatives. *See, e.g., Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976); *Pacific Legal Foundation v. Andrus*, 627 F.2d 829 (6th Cir. 1981); *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). Where the Secretary's authority to issue emergency regulations is discretionary and the Secretary decides to act, then an EA should be sufficient given the prospect of an EIS accompanying any long-term regulatory decision.

Question No. 10: To what extent does the public feel that shorter comment periods (*e.g.*, a minimum of thirty days) could affect your ability to participate effectively in the NEPA process?

Answer. MCA is comfortable with a possible shorter minimum comment period. As everyone knows, traditional rulemaking under the Administrative Procedure Act often involves only a thirty-day comment period on proposed regulations. MCA believes the public is accustomed to such a comment period and can adapt within that comment period. However, this raises an issue not presented in the NMFS list of questions which must be addressed. That issue is when is a document considered to be transmitted to the Secretary? It is not uncommon for a Council to take action, complete the analysis and required documentation, and for NMFS to then decide when the document is, in fact, transmitted. This results in unnecessary and inappropriate delays. As part of the revised NEPA procedures, it should be clear that when the Council certifies an action as ready for transmittal that it is considered to be, and is, transmitted to the Secretary for review.

The Marine Conservation Alliance appreciates the opportunity to submit these comments and looks forward to working with both NMFS and CEQ.

Sincerely,

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