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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD124

National Environmental Policy Act Compliance for Council-Initiated Fishery Management Actions under the Magnuson-Stevens Act

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

ACTION: Notice of availability.

SUMMARY: The purpose of this notice is to notify the public that NOAA/NMFS has finalized revisions to the NOAA policy and procedures for complying with the National Environmental Policy Act (NEPA) in the context of Magnuson-Stevens Act (MSA) fishery management actions. This notice provides a summary of the public comments received and the agency's responses. The final revised and updated NEPA procedures for MSA actions are available online at <http://www.nmfs.noaa.gov/msa2007/nepa.htm>.

DATES: The final policy is effective [*insert date of publication in the Federal Register*].

FOR FURTHER INFORMATION CONTACT: Steve Leathery, 301- 427-8014.

SUPPLEMENTARY INFORMATION:

Background

On February 19, 2013, in compliance with section 304(i), NMFS issued an internal policy pertaining to complying with NEPA in the context of MSA fishery management actions. This policy, entitled "Policy Directive 30-132: National Environmental Policy Act Compliance

for Council-Initiated Fishery Management Actions under the Magnuson-Stevens Act” (the policy): clarified roles and responsibilities of NMFS and the Regional Fishery Management Councils (Councils); explained timing and procedural linkages; provided guidance on documentation needs; and provided guidance for fostering partnerships and cooperation between NMFS and the Councils on NEPA compliance.

After consulting with the Councils and with the Council on Environmental Quality (CEQ) on proposed revisions to the 2013 NMFS NEPA policy, NMFS proposed using this policy as a basis for issuing revised and updated NEPA procedures for MSA actions in the form of a line-office supplement to NOAA Administrative Order (NAO) 216-6), which contains NOAA’s policies and procedures for complying with the NEPA. On June 30, 2014, NMFS published a notice in the **Federal Register** inviting public comments for a 90-day period on a proposed supplement to the NAO (NAO supplement) intended to satisfy fully the requirements of section 304(i) of the Magnuson-Stevens Act (MSA). Section 304(i) requires NMFS, in consultation with the Councils and Council on Environmental Quality (CEQ), to revise and update agency NEPA procedures to conform to the timelines for review and approval of fishery management plans and to integrate applicable environmental analytical procedures. 16 U.S.C. 1854(i). After careful consideration of the public comments received in response to the 2014 notice, NOAA/NMFS has decided to finalize the NAO supplement with editorial, but no substantive, changes to the June 30, 2014 draft.

NMFS received comments from 5 environmental non-governmental organizations and 2 fishery management councils. The key issues are summarized below along with NMFS’s responses. We note that many comments are similar to those raised previously either as comments on a proposed rule (73 FR 27998, May14, 2008), (which was subsequently withdrawn

(79 FR 40703, Jul. 14, 2014)), or as comments on the 2013 NMFS NEPA policy. When NMFS issued the 2013 NMFS NEPA policy directive, it developed a background document that addressed many of these comments. A copy of the background document for 2013 Policy Directive can be viewed and downloaded at the following site:

http://www.nmfs.noaa.gov/sfa/laws_policies/msa/nepa.html.

In this notice, we will limit our discussion to those comments that specifically address issues pertaining to the NAO supplement. Many of these comments pertain broadly to transparency in the NEPA process. NMFS is supportive of these comments and will explore ways to improve public access to NEPA documents and information on the status of ongoing NEPA analyses. However, NMFS believes that, given the limited purpose of the draft NAO supplement -- to revise and update agency NEPA procedures to conform to the timelines for review and approval of fishery management plans and to integrate applicable environmental analytical procedures -- the NAO supplement is not the appropriate vehicle for addressing all such issues. As NOAA generally works to revise and update its NEPA procedures through the NAO, the agency will continue seeking ways to enhance public access, participation and process transparency through all appropriate mechanisms.

KEY ISSUES RAISED IN COMMENTS: NMFS notes that since the initiation of efforts to comply with section 304(i), commenters have expressed widely divergent opinions on how best to proceed. When introducing Policy Directive 30-132, “National Environmental Policy Act Compliance for Fishery Management Actions under the Magnuson-Stevens Act (2/19/2013) ,” NMFS provided a background document that summarized NMFS’s consideration of key issues and concerns, “Introduction to NMFS Policy Directive: National Environmental Policy Act Compliance for Fishery Management Actions under the Magnuson-Stevens Act.” Some of the

same issues and concerns were re-introduced as comments on the draft Supplement. For additional context regarding NMFS's treatment of these concerns, please see the background document, available at:

http://www.nmfs.noaa.gov/sfa/management/councils/ccc/2013/2013_md_agenda.htm.

Comments and Responses

Comment 1: Ultimate Responsibility for NEPA lies with NMFS

Comment: Commenters expressed support for the position emphasized in the NMFS NEPA procedures that NMFS retains ultimate responsibility for NEPA compliance. Some comments requested that the procedures be revised to indicate that NMFS must remain primary author of the NEPA documents, that NMFS must oversee the NEPA process, and that the Councils should not conduct NEPA scoping during Council meetings.

Response: The NAO supplement clearly states that "ultimate legal responsibility for NEPA lies...with NMFS." However, for reasons stated in the final NAO supplement, NMFS believes that either NMFS or Council staff may draft NEPA documents as long as NMFS participates early, provides information or advice as needed, conducts appropriate outreach with other agencies and constituents, and independently evaluates each NEPA document's adequacy prior to using it in some fashion to satisfy its NEPA responsibilities. Further, for reasons stated in the draft NAO supplement, NMFS believes that the MSA and NEPA requirements for timelines, format, and public participation are compatible and may be conducted jointly as long as all responsibilities are fulfilled. Using a Council meeting to satisfy any requirement of NEPA for a public meeting or public outreach, such as scoping, enhances both the NEPA and MSA processes by infusing the NEPA activities and information into the council forum. As long as NMFS ensures that the procedures required by NEPA are satisfied, this arrangement can enhance

NEPA's effectiveness. Where Council meetings will be used to conduct NEPA scoping, NMFS will work closely with Councils to ensure all requirements are met.

Comment 2: Supplemental Information Reports (SIRs) and Advanced Planning Procedure

Comment: Some commenters opposed the proposed option of using a "NEPA Advanced Planning Procedure" (NAPP), a Supplemental Impact Report (SIR), or other "non-standard documentation," and in their comments, cited to CEQ regulations on programmatic EISs and tiering (40 CFR 1502.20-1502.21).

Response: The CEQ regulations do not preclude use of other documentation to support advanced planning on what actions may need NEPA analyses and/or to consider whether existing analyses are sufficient. Recently, the Ninth Circuit upheld NMFS' use of an SIR to conclude that a supplemental Environmental Assessment was unnecessary. *Humane Society of the United States v. Pritzker*, 548 Fed. Appx. 355, 360 (9th Cir. 2013). *See also, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 383-85 (1989) (upholding the Army Corps of Engineers' use of a SIR to analyze the significance of new reports in determining whether to supplement existing NEPA analysis). NMFS believes that the optional use of these forms of documentation offers a potential means to improve the efficiency of the NEPA process without sacrificing substantive obligations under NEPA. Therefore, NMFS retains these provisions in the final NAO supplement.

Comment 3. Conflict of Interest Guidance and Financial Disclosure Requirements

Comment: Citing to 40 CFR 1506.5, one commenter suggested development of conflict of interest and financial disclosure procedures for Council members and staff involved in the NEPA documentation process. Those regulations require that when an agency relies on contractors to prepare NEPA documents, those contractors must execute a disclosure statement

specifying that they have no financial or other interest in the outcome of the project. *Id.*
§ 1506.5(c).

Response: Council members and Council staff are not “contractors” and therefore the contractor-specific provisions of § 1506.5 are inapplicable. The MSA establishes financial disclosure and recusal requirements for Council members (16 U.S.C. 1852(j)). These requirements are developed further and an explanation of the obligations on council staff are provided by regulation at 50 CFR 600.225. As explained in the regulations, council members and council staff are subject to most Federal criminal statutes covering bribery, conflict-of-interest, disclosure of confidential information, and lobbying with appropriated funds. The conflict of interest and other conduct rules applicable to Council members and Council staff are summarized in Regional Fishery Management Councils - Rules of Conduct for Members (2014) (http://www.nmfs.noaa.gov/sfa/management/councils/training/2014/e_h1_members_conduct_rules.pdf) and Regional Fishery Management Councils - Rules of Conduct for Employees and Advisors (2014) (http://www.nmfs.noaa.gov/sfa/management/councils/training/2014/e_h2_employee_conduct_rules.pdf). While NMFS acknowledges that the scope of the CEQ NEPA regulations is not co-extensive with the applicable council staff conflict of interest regulations, given that council staff are not analogous to contractors, and that the existing regulations act to prevent conflicts of interest, NMFS does not believe that additional financial disclosure requirements will enhance or improve the MSA NEPA process or the quality of NEPA documents developed.

Comment 4. The Procedures Merely Capture the Status Quo

Comment: NMFS received a comment that the draft NAO supplement does not represent “revisions,” as required by MSA section 304(i), because it merely captures the status quo.

Response: The final NAO supplement establishes national-level guidance which adopts best practices currently in use by some region-council pairs. While these approaches may seem like status quo to some parties, due to regional variations in practices, the guidance does represent changes for others. NMFS believes that the MSA NEPA process has been substantially improved and refined over the past decade or more, and the draft NAO supplement builds on that success and can help NMFS and the Councils achieve greater consistency for MSA NEPA implementation. Establishing a uniform framework applicable to all parties effectuates a reasoned change that institutionalizes lessons-learned and best practices for the development of expeditious and useful NEPA processes.

Comment 5. The Procedures Should Facilitate Transparent Public Involvement

Comment: NMFS received comments indicating that the procedures should facilitate and enhance public involvement and transparency. Some comments provided specific suggestions pertaining to mandatory use of websites to provide greater public access to NEPA information.

Response: NMFS agrees that the procedures should promote transparency and public participation. Encouraging the application of NEPA as much as practicable via the council process should enhance meaningful public participation and promote transparency. Most Councils currently provide online access to NEPA documents that were completed or that are being developed for fishery management actions. NMFS will continue to work with Councils to

improve accessibility and ease of navigation of these sites to promote transparency and improved public participation in the MSA NEPA process.

Comment 6. MSA Section 304(i) Requirements

Comment: NMFS received comments that the draft NAO supplement satisfies fully the requirements of MSA section 304(i) and conversely, that it does not satisfy those requirements.

Response: The NAO supplement satisfies the requirements of MSA section 304(i) by establishing national-level guidance and by adopting best practices currently in use by some region-council pairs, thereby revising and updating agency NEPA procedures to conform to the timelines for review and approval of fishery management plans while integrating applicable environmental analytical procedures. NMFS consulted extensively with the Councils and with CEQ over the course of several years, held public hearings and a public workshop as authorized by Congress, issued a proposed rule and received over 150,000 public comments that were carefully analyzed and considered, developed and implemented an internal NMFS Policy Directive on MSA NEPA procedures, and released the draft NAO supplement for public comment. During this process, the Councils and stakeholders expressed a broad range of views regarding what MSA section 304(i) required and what improvements to the process were needed. MSA section 304(i) did not change or eliminate any existing MSA or NEPA requirements, but required development of revised and updated NEPA procedures that conformed to the timelines for FMP review and approval and integrated applicable procedures. NMFS has carefully considered all input received to date and believes the final NAO supplement fully satisfies requirements as mandated by Congress under MSA section 304(i).

Comment 7. Compliance with NEPA, CEQ Regulations, and Other Guidance

Comment: Several comments suggested that the draft NAO supplement should include various NEPA requirements established by CEQ regulations, guidance or other sources, such as avoiding the use of stale documentation, addressing new information, considering an adequate scope of alternatives, and identifying when an EIS is required.

Response: NMFS is cognizant of the requirements of NEPA and the CEQ regulations, as well as other sources of Guidance such as CEQ's "Forty Most-Asked Questions." The intent of the final NAO supplement is not to reiterate existing guidance and requirements, but to clarify how NMFS and Councils can work together to effectively comply within the context of MSA management and regulatory requirements. In addition, the main body of NAO 216-6 provides additional guidance on the types of NEPA documentation and how to use them.

Comment 8. Requirement for Council Usage

Comment: The policy should require that the NEPA analysis must be completed prior to Council deliberations so that Councils can rely upon that analysis to inform their deliberations.

Response: NMFS and the Councils work cooperatively and collaboratively to address NEPA requirements for MSA fishery management actions while continually assessing new information and emerging fishery conservation and management issues.

NMFS agrees that both the NEPA and MSA processes are enhanced by integrating NEPA into the Council process. The final NAO supplement encourages NMFS and the Councils to prepare and make available as much NEPA documentation as practicable (given timelines and resource needs) during the Council's development of its management recommendation. This approach recognizes that the Council-proposed alternative, and thus final development of the NEPA analysis, may not occur until after a Council takes final action on its management recommendation.

The final NAO supplement recognizes that there will be variations regarding the extent to which NEPA can be completed during council deliberations because of the need to take timely management action to address conservation and management needs as new information becomes available. To better integrate NEPA into the iterative and deliberative processes of the Councils while allowing enough flexibility so that the fishery management system can respond effectively in time-constrained situations and still comply with NEPA, the final NAO supplement identifies factors to consider and establishes a procedural nexus setting forth the minimum requirements for completeness in the Council process.

Dated: February 11, 2016.

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