

Policy Directive 09-103: National Environmental Policy Act Compliance for Actions Taken Under the Magnuson-Stevens Fishery Conservation and Management Act

I. Introduction

The purpose and policies of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) serve as guiding principles and policy for the National Marine Fisheries Service (NMFS) in fulfilling its mission to provide stewardship and management of our nation's Federal marine resources; NMFS additionally adheres to the policies and considerations set forth in its specific resource management mandates, including the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

II. Objective

Section 101 of NEPA sets forth the Congressionally-declared national environmental policy. Section 102 directs agencies to apply their authorities in furtherance of that policy. These two sections augment the requirements of more specifically-focused stewardship mandates and support the philosophical basis for the agency's approach to consideration of environmental impacts of its actions.

NMFS is required to comply with NEPA and other related authorities, including, but not limited to, regulations promulgated by the Council on Environmental Quality (CEQ), other guidance from the White House, and the National Oceanic and Atmospheric Administration's (NOAA's) Administrative Order (NAO) 216-6A, and its Companion Manual.

NMFS implements the MSA, the primary law that governs marine fisheries management in United States (U.S.) Federal waters. Section 2 of the MSA provides the findings of Congress and the purpose of the Act; this section in particular serves as the philosophical basis for the agency's operations in the realm of domestic fishery management. Section 304(i) of the MSA guides the agency in how to comply with NEPA in context of the MSA and it states:

The Secretary shall, in consultation with the Councils and the Council on Environmental Quality, revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.). The procedures shall—

- (A) conform to the time lines for review and approval of fishery management plans and plan 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 involve the public.*

NMFS strives to integrate compliance with applicable mandates to the greatest extent possible to maximize efficiency and best meet our mission.

III. Authorities and Responsibilities

The MSA establishes the basis for Federal management of U.S. fisheries and vests primary management responsibility to the Secretary of Commerce (Secretary). The Secretary has delegated this responsibility

to NMFS within NOAA. The MSA establishes eight regional fishery management councils (FMCs) and directs them to prepare fishery management plans, amendments to those plans, and proposed regulations for those fisheries under their authority that require conservation and management. The MSA also authorizes Atlantic Highly Migratory Species (HMS) fisheries to be managed directly by the Secretary, rather than through an FMC (16 U.S.C. 1852(a)(3)). That authority was also delegated to NMFS. The Atlantic HMS Management Division within NMFS' Office of Sustainable Fisheries develops and prepares the management plans and regulations for Atlantic HMS fisheries. Management plans and regulations must comply with all applicable laws including NEPA. Although the FMCs may develop environmental analyses to inform and support their recommendations, NMFS is responsible for the scope, content, and integrity of NEPA compliance for purposes of final Secretarial action. NMFS recognizes the significant expertise and wealth of knowledge that the FMCs contribute to the fishery management process and compliance with NEPA.

IV. Measuring Effectiveness

The NMFS Office of Policy will review and update this policy if necessary in accordance with the NMFS Policy Directive System.

V. References

Procedural directives will be issued to implement this policy as needed.

Signed: _____ xx/xx/xxxx _____
Janet Coit Date
Assistant Administrator for NMFS

Procedural Directive 09-103-01: NEPA Procedures for Actions Taken Under the Magnuson-Stevens Fishery Conservation and Management Act

I. Introduction

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) establishes the basis for Federal management of United States (U.S.) fisheries and vests primary management responsibility with the Secretary of Commerce (Secretary). The Secretary has delegated this responsibility to the National Marine Fisheries Service (NMFS) within the National Oceanic and Atmospheric Administration (NOAA). The MSA establishes eight regional fishery management councils (FMCs) and gives them special responsibilities for recommending management plans and regulations. The MSA also authorizes Atlantic Highly Migratory Species (HMS) fisheries to be managed directly by the Secretary, rather than through a fishery management council (16 U.S.C. 1852(a)(3)). That authority was delegated to NMFS. The Atlantic HMS Management Division within NMFS' Office of Sustainable Fisheries develops and prepares the management plans and regulations for Atlantic HMS fisheries. Management plans and regulations must comply with all applicable laws including the National Environmental Policy Act (NEPA).

NOAA provides procedures for agency compliance with NEPA in NOAA Administrative Order (NAO) 216–6A¹ and its Companion Manual². In addition, NMFS provides detailed guidance on the development, review, and implementation of Federal fishery management plans (FMPs), amendments, and regulations in the context of MSA fishery management actions in Policy Directive 01-101-03³, *Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process*, revised October 25, 2017 (Operational Guidelines). Section 304(i) of the MSA requires the Secretary to establish agency procedures for compliance with NEPA in the context of fishery management actions developed pursuant to the MSA, and provides that these procedures shall be the sole environmental impact assessment procedures for fishery management plans, amendments, regulations, and other actions taken or approved pursuant to the MSA.

In 2023, amendments to NEPA through the enactment of the Fiscal Responsibility Act imposed new requirements, including new deadlines for completing environmental assessments (EAs) and environmental impact statements (EISs). These procedures have been updated to conform to the statutory requirements of NEPA, as amended. NMFS' procedures for NEPA compliance under MSA consist of Policy Directive 09-103, *National Environmental Policy Act Compliance for Actions Taken Under the Magnuson-Stevens Fishery Conservation and Management Act*, this procedural directive (09-103-01), and those parts of NAO 216-6A, its Companion Manual, and NMFS Policy Directive 09-101⁴ that are consistent with 09-103 and 09-103-01.

¹ <https://www.noaa.gov/organization/administration/nao-216-6a>

² <https://www.noaa.gov/sites/default/files/2021-10/NOAA-NAO-216-6A-Companion-Manual-03012018%20%281%29.pdf>

³ <https://media.fisheries.noaa.gov/dam-migration/01-101-03.pdf>

⁴ <https://media.fisheries.noaa.gov/dam-migration/09-101.pdf>

II. Objectives

Consistent with MSA section 304(i), the objectives of this procedural directive are to:

- conform to the timelines for review and approval of MSA fishery management plans and plan amendments;
- integrate applicable environmental analytical procedures with the procedure for the preparation and dissemination of MSA fishery management actions, including the time frames for public input;
- comply with the requirements of NEPA, including statutory deadlines for EAs and EISs; and
- provide for timely, clear, and concise analysis that is useful to decision makers and the public, reduces extraneous paperwork, and effectively involves the public.

To achieve these objectives and recognize the important contributions of the FMCs, this procedural directive:

- clarifies roles and responsibilities;
- provides guidance on timing of NEPA compliance, including documentation of extensions;
- describes the MSA fishery management process;
- provides guidance on issues pertaining to NEPA documentation, including the statement of purpose and need, identifying alternatives, content of decision documents, page limits, and the use of integrated documents; and
- provides guidance on techniques for improving partnerships and efficiencies.

III. Guidance

A. *Applicability*

These NEPA procedures have been developed specifically to address the unique timing and procedural requirements of the MSA for both FMC-initiated actions as well as NMFS-initiated actions (including Secretarial and emergency actions).

Regarding FMC-initiated actions, NMFS and the FMCs may also utilize FMC processes in the development of fishery management measures to implement other laws (*e.g.*, the Pacific Halibut Act, the Western and Central Pacific Fisheries Convention Implementation Act, etc.). To the extent that NEPA applies to these activities, the respective NEPA-related roles of NMFS and the FMCs are the same as described in this document, and early coordination and cooperation are likewise encouraged.

To the degree that NMFS collaborates with the FMCs when implementing the MSA, these procedures also link to the activities of the FMCs in their roles as advisory bodies. These procedures do not preclude an FMC from developing draft analyses that may be incorporated into NEPA documents, as is the practice in some regions. Instead, these procedures clarify where ultimate legal responsibility for NEPA lies – and that is with NMFS, the Federal action agency. While NEPA does not specify at what point in the FMC process an environmental analysis must be available, it is good practice to have as complete an analysis as practicable available during FMC deliberations.

To the extent they are consistent with this procedural directive, the provisions set forth in NAO 216-6A and its Companion Manual should be used in conjunction with these procedures.

B. *Roles and Responsibilities*

NEPA established a national policy for protecting our environment. NEPA's primary tenet is to ensure that all agencies of government give proper consideration to the environment prior to undertaking any major Federal action that significantly affects the environment. This includes specific analytical and procedural requirements that intersect with NMFS' decision-making processes under the MSA.

NMFS and the FMCs have different roles with respect to NEPA and MSA implementation. The NEPA and MSA requirements (statutory and regulatory) for schedule, format, and public participation may be compatible and conducted jointly, as long as all responsibilities are fulfilled. However, in some cases it may be necessary to conduct the two statutes' procedures and documentation separately in order to ensure compliance with all requirements.

1. *FMC-Initiated Actions*⁵

For MSA fishery management actions, the FMCs prepare and submit fishery management plans (FMPs), amendments to those plans, and proposed regulations to NMFS for review and, if appropriate, implementation. NMFS reviews FMC recommendations for consistency with applicable law, including but not limited to NEPA, MSA, and MSA national standards.

Because policy recommendations are developed and alternatives may be created and narrowed through the forum of public FMC meetings, NEPA is best served by integrating the analysis of alternatives and impacts with the FMCs' development of recommended management measures and actions when possible. Completing as much of the environmental review process as practicable during FMC development of an action enhances good decision-making. It is also important to bear in mind the ongoing and iterative nature of fishery management under the MSA. The FMCs recommend amendments, framework actions, specifications, and other FMC-initiated actions individually, and NMFS evaluates each action in the context of existing management plans, the fishery, and the environment, as well as reasonably foreseeable future actions and changes. However, changes can occur frequently for some FMPs as the fishery resources and fishery utilization change frequently, requiring continual evaluation of the impacts of actions and a specific fishery on the human environment. Consistent with the chief purpose of NEPA as described above, the information presented in any particular environmental analysis may also inform NMFS in its ongoing stewardship responsibilities under the MSA and other resource management authorities.

a. *MSA Roles*

i. *Role of NMFS*

(A) *For FMC-Initiated FMPs and Amendments*

As set forth in section 304(a) of the MSA, NMFS reviews FMPs and FMP amendments recommended by the FMCs and approves, disapproves, or partially approves those plans and amendments in accordance with specified procedures.

⁵ In this document, "FMC-initiated actions," refers to FMPs, FMP amendments, or proposed regulations, developed by FMCs pursuant to sections 302(h)(1), and 303(c) of the MSA.

(B) *For FMC-Initiated Regulations*

In addition, as set forth in section 304(b), NMFS reviews FMC-recommended proposed regulations for consistency with the FMP or FMP amendment, the MSA, and other applicable laws and, if consistent, publishes proposed regulations or, if not consistent, notifies the FMC and provides recommended revisions to make them consistent. NMFS also consults with the FMC before making any revisions to the proposed regulations and promulgates final regulations as NMFS deems appropriate.

ii. *Role of FMCs*

As set forth in sections 302(h), 303, and 304 of the MSA⁶, FMCs are responsible for:

- conducting public hearings to allow for public input into the development of FMPs and amendments;
- reviewing pertinent information;
- preparing FMPs and amendments for fisheries requiring conservation and management;
- drafting or deeming regulations to implement the plans or amendments;
- transmitting recommended FMPs, amendments, and regulations to the NMFS for review⁷;
- developing annual catch limits; and
- identifying research priorities.

b. *NEPA Roles for FMC-Initiated Actions*

NEPA requires Federal agencies to undergo an environmental analysis when proposing to take a major Federal action. Fishery management actions, such as NMFS' approval of FMPs and their amendments, are typically considered major Federal actions requiring some level of NEPA review. NMFS is the Federal action agency for fishery management actions. Because of the close relationship between NMFS' actions and the FMC's recommendations, compliance with NEPA will be most effective if NMFS and the FMCs coordinate the NEPA and MSA activities closely.

For FMC-initiated fishery management actions developed pursuant to the MSA, NMFS and the FMCs have different roles with respect to NEPA and the MSA as described below.

⁶ See also NMFS Procedural Directives 01-101-01 and 01-101-03 entitled *Procedures for Initiating Secretarial Review of FMPs and Amendments* (March 1, 1991; <https://media.fisheries.noaa.gov/dam-migration/01-101-01.pdf>) and *Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process*, (October 25, 2017; <https://media.fisheries.noaa.gov/dam-migration/01-101-03.pdf>) respectively.

⁷ NMFS Procedural Directive 01-101-01 clarifies that, for the purposes of initiating Secretarial review, the recommendations transmitted by Councils must contain the documentation necessary for NMFS to initiate a review of compliance with all applicable laws including NEPA. To the extent that these procedures are consistent with 01-101-01, those guidelines remain in effect. However, where inconsistencies exist, these procedures control.

i. *Roles of NMFS under NEPA for FMC-Initiated Actions*

These procedures recognize that FMC staff may be responsible for drafting content to be included in NEPA documents, and in some cases may prepare draft NEPA documents; however, it is NMFS' responsibility to ensure the resulting documents are adequate for purposes of initiating Secretarial review and are fully compliant with NEPA prior to approval or partial approval. NMFS is not required to make determinations about adequacy of draft environmental analyses during FMC deliberations or used to inform the FMC process. However, NMFS is required to ensure the adequacy of a draft EIS (DEIS) that will be filed with the U.S. Environmental Protection Agency (EPA) and published for the formal comment period required by 40 CFR 1503.1 and 1506.9. In addition, NMFS must ensure the adequacy of EAs/findings of no significant impacts (FONSIs) and categorical exclusions (CEs) used to support NMFS' decision making. If NMFS, through early coordination with an FMC, identifies concerns with preliminary draft environmental analysis, NMFS should discuss these with the FMC as early as possible.

In this context, the NEPA analyses inform two aspects of NMFS' fishery management decision-making activities:

- they inform NMFS' review of fishery management actions developed through the FMC process and NMFS' decision to approve, partially approve, or disapprove a fishery management recommendation and/or implement a regulation; and
- they may inform NMFS' ongoing oversight responsibilities with respect to whether a Secretarial action is necessary pursuant to section 304(c) of the MSA.

NMFS' duties with respect to NEPA compliance include:

- determine whether NEPA applies;
- determine which level of NEPA analysis is necessary for initiation of Secretarial review and for final Secretarial action⁸, *i.e.*, an EIS, an EA, a CE, and determine whether an existing NEPA analysis adequately supports the action for initiation of Secretarial review and for final Secretarial action;
- if an EIS will be prepared, NMFS is responsible for ensuring that the following tasks are completed, bearing in mind that cooperation and utilization of existing MSA processes and venues is encouraged:
 - ensure that NEPA scoping is conducted (including publication of the Notice of Intent to prepare an EIS and solicitation and consideration of scoping comments);
 - ensure that a DEIS is adequate and filed with the EPA;
 - ensure that opportunity for public comment on the DEIS is provided;
 - ensure that an FEIS is adequate and filed with EPA;
 - provide for a 30-day cooling off period prior to making or recording a decision to approve, disapprove, or partially approve a fishery

⁸ Information in the NEPA document contributes to the factual basis on which NMFS relies when determining whether an FMC-recommended action complies with applicable laws. Thus, in some cases the environmental analysis may provide the factual basis for a disapproval. This situation is discussed further in section XX below.

management action (and/or whether to initiate Secretarial action under MSA section 304(c)); and prepare a record of decision (ROD).

- if an EA will be prepared, ensure the EA is sufficient, ensure that if the EA is published as a draft, that public comment is invited and considered, determine whether to issue a FONSI, and ensure that the EA and FONSI are made available to the public; and
- if a CE applies, document the applicability of the CE.

ii. *Roles of FMCs under NEPA for FMC-Initiated Actions*

The FMCs serve an important role in the development of NEPA documentation through partnership and cooperation with NMFS. However, NMFS remains responsible for the accuracy, scope, and content of NEPA documents when determining adequacy for transmittal, and NEPA compliance for purposes of final Secretarial action.

Although there is no statutory requirement to provide a NEPA analysis, it greatly benefits the FMCs to provide environmental analyses along with their recommended actions, so that NMFS can properly develop NEPA documents that consider environmental impacts of the major Federal actions they are taking. The FMCs will work closely with NMFS to ensure that the environmental analyses are robust enough for NMFS' purpose of meeting the requirements of NEPA.

2. *NMFS-Initiated Actions (including Secretarial actions and emergency actions)*

For MSA actions prepared by NMFS, such as management of Atlantic HMS and Secretarial actions pursuant to MSA sections 304(c), 304(g), 304(i), 305(c), or 305(d), NMFS is responsible for compliance with both NEPA and the MSA. To the extent practicable, NMFS works to conduct NEPA procedures concurrently with the development of such fishery management actions⁹.

IV. Integrating Timing and Applicable Analytical Requirements

This section explains how NMFS will comply with the requirements of MSA section 304(i) and NEPA, by describing a process that:

- conforms to the timelines for review and approval of MSA FMPs and plan amendments;

⁹ The other sections of the MSA authorizing Secretarial fishery management actions are:

- Rulemaking Authority for Secretarial Actions, including Atlantic HMS. (MSA § 304(c) (16 U.S.C. 1855(d))). This section authorizes the Secretary to develop an FMP or amendment outside of the FMC process, either because an FMC has failed to address a need or because there is specific Secretarial authority.
- Emergency Actions and Interim Measures to Reduce Overfishing. (MSA § 305(c) (16 U.S.C. 1855(d))). MSA section 305(c) provides authority for emergency rules (for unanticipated emergencies) or interim measures to reduce overfishing (Emergency Rulemaking, Interim Rulemaking). If such a rule changes an existing FMP, it is considered an amendment to that FMP during the period that it is in effect. The maximum duration of 305(c) rules is limited to 366 days.
- General Rulemaking Authority. (MSA § 305(d) (16 U.S.C. 1855(d))). This section authorizes the Secretary to promulgate regulations in accordance with the Administrative Procedure Act, that are necessary to carry out FMPs or amendments approved or developed by the Secretary or to carry out any other provision of the MSA (16 U.S.C. 1855(d)). There are no special procedural or timing requirements applicable to this authority.

- integrates applicable environmental analytical procedures with the procedure for the preparation and dissemination of MSA fishery management actions, including the time frames for public input;
- complies with the requirements of NEPA including statutory deadlines for EAs and EISs; and
- provides for timely, clear, and concise analysis that is useful to decision makers and the public, reduces extraneous paperwork, and effectively involves the public.

A. *MSA Timelines*

The MSA's timing provisions for development and implementation of fishery management actions differ depending on whether an action is initiated by an FMC (pursuant to MSA section 303(c), and 304(a) and (b)), or by the Secretary (pursuant to MSA section 304(c), 304(g) [*i.e.*, Secretarial actions and Atlantic HMS], 305(c) [*i.e.*, emergency actions and interim measures], or 305(d) [*i.e.*, general authority for carrying out FMPs and the MSA]).

1. *For FMC-Initiated FMPs and Amendments*

The MSA's timelines for review of FMC-recommended fishery management plans and plan amendments are set forth in section 304(a) (16 U.S.C. 1854(a)). These timelines impose a 95-day deadline for NMFS' review and decision making on these actions, and they include a specified period for public review and input. The timeline begins when the FMC "transmits" a recommended FMP/amendment¹⁰.

Upon transmittal of the FMP or amendment, immediately (within 5 days), NMFS must:

- commence a review to determine whether the plan or amendment is consistent with the MSA and other applicable laws;
- publish the plan or amendment in the *Federal Register* for a 60-day comment period; and
- within 30 days of the end of the public comment period, approve, disapprove, or partially approve a plan or amendment.

2. *For FMC-Recommended Proposed Regulations*

The MSA also establishes time periods pertaining to NMFS' review of FMC-recommended regulations deemed necessary to implement an FMP or amendment. NMFS intends for these procedures to apply to the development and implementation of such regulations as well. Section 304(b) (16 U.S.C. 1854(b)), requires that:

- Upon transmission of an FMC-recommended proposed regulation, NMFS immediately (within 5 days) initiates an evaluation of whether it is consistent with the FMP or amendment, the MSA, and other applicable law.
- Within 15 days of initiating the evaluation, NMFS makes a determination of consistency, and:
 - if that determination is affirmative, publishes the proposed regulations in the *Federal Register* for a public comment period of 15 to 60 days; or
 - if that determination is negative, notifies the FMC in writing of the inconsistencies and provides recommendations on revisions that would make the proposed regulations consistent. NMFS must consult with the FMC before making any revisions to the proposed regulations.

¹⁰ Guidance on determining the date of transmittal is set forth in NMFS Procedural Directive 01-101-01.

- Final regulations that NMFS deems appropriate are to be promulgated within 30 days after the end of the comment period.

3. *Secretarial Actions*

The MSA does not specify time periods for the development of Secretarial FMPs, amendments, and regulations¹¹. Thus, NMFS has greater flexibility to plan its timelines for NEPA compliance on Secretarially-initiated actions to fit the needs of the individual actions.

B. *Applicable Analytical Procedures and Opportunities for Public Input*

The MSA and NEPA provide multiple opportunities for public input into development of proposed management actions and require analysis of various types of impacts. In addition to NEPA's required environmental considerations, the MSA requires the consideration of food production, recreational opportunities, and protection of the marine ecosystem, health and status of fish stocks, and effects on other marine resources such as protected species and Essential Fish Habitat. The MSA requires a fishery impact statement for each FMP, assessing the cumulative conservation, economic, and social impacts of fishery management measures. The MSA also requires management actions to comply with other applicable laws, which can require analyses of various potential impacts ranging from effects on tribal treaty rights, small business entities, to effects on state coastal zone resources, and many other topics.

1. *FMC-Initiated Actions*

Although NMFS is the Federal agency responsible for these analyses, the MSA's FMC process is designed to foster public input into the development of fishery management decisions. It is logical to encourage the FMCs to consider as many of the relevant analytical considerations beyond those in the MSA because Congress established the FMC process as the approach for generating the recommended agency actions.

NMFS' Operational Guidelines promote "frontloading" the FMC's MSA process with as much information pertinent to other required considerations as possible, and using the FMC venue to develop and narrow recommendations using as much information as possible and providing as much public input as possible.

Thus, in addition to the MSA's statutory public comment periods on FMC-recommended FMPs/amendments, and NEPA's required public comment period on DEISs, the MSA process provides additional meaningful and intentional opportunities for public input. These procedures are intended to coordinate and streamline the consideration of all relevant factors as early in the process as practicable.

2. *Secretarial Actions*

When NMFS develops fishery management actions using one of the Secretarial authorities, NMFS relies on public comment periods to obtain public input on relevant information.

¹¹ For the list of these types of actions, *see supra* footnote.

For actions relating to Atlantic HMS, section 302(g)(4) of the MSA requires NMFS to establish advisory panels to assist in the collection and evaluation of information relevant to the development of any FMP or amendment. Under 302(g)(5), the MSA clarifies that any decisions or recommendations by the advisory panel are advisory in nature. As such, consistent with the MSA, when developing an FMP amendment and its regulations, and occasionally for other fishery regulations, NMFS convenes the HMS Advisory Panel. The Advisory Panel provides comments and feedback on the plan and regulations. NMFS then considers those comments and feedback when moving forward.

C. *NEPA Deadlines and Extensions*

NEPA (42 U.S.C. 4336a (Sec. 107 (g)(1))) mandates that EAs and EISs be completed within 1 year or 2 years, respectively. If, prior to that deadline passing, it is clear that the completion deadline will not be met, the NMFS decision maker may establish a new deadline that “provides only so much additional time as is necessary” to complete the environmental review (42 U.S.C. 4336a (Sec. 107 (g)(2))). The decision maker must document the deadline extension, establish a new deadline, and explain why the extension is necessary. Deadline extensions may be necessary to ensure NMFS meets its public engagement or consultation obligations or has the information necessary to complete its EA or EIS. This is particularly true for MSA NEPA documents, where NMFS is simultaneously engaged in more than one statutory process and may experience delays outside of its control.

If the decision maker later determines the revised deadline is insufficient and another new deadline is necessary to provide the time needed to complete the environmental review, prior to exceeding the revised deadline, they may re-extend the deadline by documenting in writing a new deadline that provides only so much additional time as is necessary to complete the review and the basis(es) supporting the new deadline extension.

Noting that extensions of the NEPA deadlines are allowable, fishery managers should plan a schedule that complies with the requirements of both MSA and NEPA.

D. *Timeliness, Useful Analysis, and Public Input*

The intent of these procedures is to infuse NEPA’s considerations and procedures as early as practicable into the processes for development of MSA fishery management actions while maintaining flexibility needed to respond to MSA fishery management needs. This includes meeting the requirements of NEPA and the MSA, while also providing a useful analysis and meaningful public input, and requires managers to carefully consider when to initiate NEPA procedures and documentation.

1. *FMC-Initiated Actions*

Recognizing that each NMFS region/FMC pair frequently works as a team to achieve the fishery management mission with available resources, these procedures are designed to foster continued cooperation and joint prioritization between NMFS and the FMCs. These procedures emphasize the development of timely, useful analyses, building on the approaches set forth in 42 USC 4332(G) (pertaining to documents prepared by States), 40 CFR 1501.2 (directing agencies to integrate the NEPA process with other planning at the earliest possible time and coordinate early with private or non-Federal entities), and 40 CFR 1506.5 (pertaining to preparation of documents by applicants and contractors). While recognizing that the FMCs are not Federal action agencies for the

purposes of NEPA, these procedures also acknowledge that the FMCs are important elements in the MSA statutory scheme and, as such, are an integral part of the Department of Commerce team. Given the unique relationship between NMFS and the FMCs, either NMFS or FMC staff may draft the environmental analyses as long as NMFS participates early, provides information or advice as needed, conducts appropriate outreach with other agencies and constituents, and independently evaluates each document's adequacy prior to using it in some fashion to satisfy its NEPA responsibilities.

a. Identifying Challenges

In planning to align NEPA compliance with the MSA timelines, it is important to bear in mind that NMFS does not control the timelines of the FMC's deliberative processes, and there are several possible ways that timing frictions can arise. In some cases an FMC may need to proceed more rapidly than would allow for a full comment period on a DEIS¹² as described under CEQ's regulations. However, it is more likely that an FMC's process may exceed the maximum time periods allowed for completion of EAs and EISs. It is important to remember that the ultimate responsibility for NEPA compliance rests with NMFS, not an FMC. However, it is also not practicable or desirable to wait until after the FMC has completed its process to initiate NEPA during the MSA's Secretarial review period (95 days)¹³.

b. Factors to Consider

NMFS and the FMCs should engage the public as early as practicable in the development of content to be included in EAs and EISs and, when practicable, actively involve the public in scoping and identifying alternatives that can be included in an EA or EIS. However, these procedures also recognize that there will be variations regarding the extent to which this can happen. These procedures identify relevant considerations pertaining to when and how to initiate NEPA.

¹² The typical FMC process for development of a management recommendation involves an iterative process with the public in which one or more early versions of a draft fishery management measure and draft materials to be included in the NEPA documents are shared, commented on, and modified over the course of several FMC meetings prior to a final FMC vote. However, for a small subset of fishery management recommendations, 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 date when a management measure needs to be effective. In some circumstances, an FMC may need to complete development and selection of a recommendation in as few as two FMC meetings, and sometimes in a single meeting.

¹³ In order to initiate Secretarial review of an FMC-recommended fishery management measure, there must be documentation of compliance with the MSA and other applicable law. Due to NEPA's 30-day cooling off period between the FEIS publication and ROD signature, for actions requiring an EIS, a notice of availability of the FEIS must be published at a minimum 30 days before NMFS' decision on the fishery management action. While it may be technically possible to allow FMC transmittal to occur at the point at which a complete DEIS adequate for filing with the EPA is submitted, this scenario would place serious burdens on staff to complete all requisite steps in time for an approval decision, bearing in mind the statutory and regulatory time requirements of NEPA and the MSA. The MSA requires NMFS to make a decision on FMC-recommended fishery management plans and amendments within 95 days of transmission of that plan or amendment. NEPA requires a 45-day comment period on a DEIS, followed by preparation of an FEIS that responds to comments received on the DEIS, followed by a 30-day cooling off period, which in limited circumstances may be reduced or waived by EPA, prior to making a final decision. These minimum times begin on the dates on which EPA publishes notices of availability of the NEPA documents in the *Federal Register*. Thus, it would be challenging to produce a well-written FEIS within the mandated deadline to allow NMFS to determine the recommendation complies with NEPA by day 95 (*i.e.*, MSA "decision day").

Managers should consider:

- NEPA's deadlines for completion of EAs and EISs;
- the urgency of the management need;
- the need for the FMC recommendation to move through Secretarial review to an ultimate decision in order to respond to real-time fishery management needs;
- 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.

In determining what amount of NEPA process should be completed prior to transmission, NMFS and the relevant FMC will consider these factors and strive to complete as much of the NEPA process as practicable during the FMC's development stage.

2. *Secretarial Actions*

For Secretarial actions, NMFS should develop timelines for NEPA compliance that fit the needs of the individual actions with the goal of achieving the purposes of the MSA, NEPA, and these procedures. NMFS should engage the public as early as practicable in the development of content to be included in EAs and EISs and, when practicable, actively involve the public in scoping and identifying alternatives that can be included in an EA or EIS.

When planning for NEPA compliance, NMFS should consider:

- NEPA's deadlines for completion of EAs and EISs;
- the urgency of the management need;
- the timing of the availability of fishery statistics;
- the timing of the opening of the fishing season;
- judicially-imposed deadlines; and
- whether the non-Council Advisory Panels or Commissions need to meet and when.

V. **Analysis Components**

A. *Identification of the Purpose and Need*

The identification of purpose and need for the NEPA analysis should conform to the fishery management need under consideration. Pursuant to the MSA, NMFS and the FMCs continually review incoming information and monitor the status of the fisheries to identify the need for conservation and management.

For NEPA compliance there must be a clear statement of the purpose and need for the MSA fishery management action. For both FMC- and NMFS-initiated actions, the purpose and need articulated for the NEPA analysis process should be consistent with the need for conservation and management identified pursuant to the MSA. If the FMC identifies its conservation and management needs in broad terms, NMFS should work with the FMC to refine a problem

statement for the MSA activities that will support development of a NEPA statement of purpose and need that is consistent with NMFS' statutory, regulatory, and policy requirements.

The description of the purpose and need should be comprehensive enough to inform the development of the proposed action and the alternatives that will be analyzed during the NEPA process and include information and specifics for meeting other environmental requirements as applicable.

B. *Alternatives*

NEPA requires that the EA or EIS include consideration of alternatives to a proposed action. CEQ's regulations specify that for an EIS, a reasonable range of reasonable alternatives that meet the purpose and need must be identified, as well as the no-action alternative (40 CFR 1502.14). NMFS will apply this standard consistent with relevant case law, which provides for a rule of reason.

1. *Reasonable Alternatives*

With the exception of the no action alternative, an alternative will be considered reasonable, and thus suitable for full consideration, only if it is technically and economically feasible and meets the purpose and need for the proposed action (40 CFR 1508.1(hh)).

For fishery management actions, "reasonable alternatives" are those derived from the statement of purpose and need of the proposed action, in the context of the MSA's national standards 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, that would not achieve the stated purposes and needs, that are contrary to other statutes (*e.g.*, the Endangered Species Act or the Marine Mammal Protection Act), or that do not meet NMFS' statutory, regulatory, and policy requirements, are not "reasonable alternatives."

There is no set number of alternatives that is considered reasonable. This is a determination based on the facts of each scenario and the statement of purpose and need. However, in cases where there would be only two alternatives, the proposed action and the "no action" alternative, if the "no action" alternative is inconsistent with applicable requirements, it is recommended that an additional alternative or alternatives be considered.

2. *No Action*

Every EA and EIS must include an analysis of the "no action" alternative. A "no action" alternative is the scenario in which the proposed action does not take place or there is no change from current, ongoing management. Consistent with CEQ's discussion of the "no action" alternative in the *Forty Most Asked Questions*¹⁴, there are two distinct interpretations of "no action" that may be utilized depending on the nature of the proposal being evaluated:

¹⁴ 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

- If the underlying management action will not sunset (*i.e.*, expire), there is one interpretation of “no action”. In this case “no action” means that current management measures will remain in place, and it is reasonable to use a continuation of the status quo, or baseline, as the “no action.”
- If the underlying management action will sunset, there are two reasonable scenarios for “no action”:
 - Consider continuation of the status quo or baseline as the “no action”;
 - or
 - Consider the fishery without the current management measures in place, a true “no action” alternative.

Which interpretation to use depends on the circumstances and the objective of the comparison; a decision maker should include the “no action” alternative that provides the best baseline for comparing alternatives, but is not restricted from using both interpretations in an effort to present a comprehensive analysis.

C. *Integrated Analyses*

FMPs and FMP amendments, along with their supporting analyses, may be combined with the EA or EIS into one document called a consolidated or integrated document. This may be a reasonable approach to promote concise, analytical EISs that also satisfy the requirements of other legal mandates. While it is important to reduce duplication and paperwork, it is equally important for consolidated documents to be succinct. If the resulting consolidated or integrated document does not meet these objectives, then it could be counterproductive to fostering informed action.

NMFS has the responsibility to ensure the NEPA components of an integrated analysis are adequate for complying with NEPA and the CEQ regulations. In situations where consolidated or integrated documents are developed, it is important that the FMCs and NMFS work in close cooperation to ensure the NEPA analysis is adequate. Under 42 U.S.C. 4336a (Sec. 107(e)), EAs shall not exceed 75 pages and EISs shall not exceed 150 pages, unless deemed to be analyzing a proposed agency action of extraordinary complexity, in which case the maximum page limit shall be 300 pages. Pages do not include citations or appendices. 40 CFR 1508.1(bb) defines a page as 500 words and does not include citations, explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

To the fullest extent possible, NMFS shall prepare NEPA documents concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive Orders applicable to the proposed action (40 CFR 1502.24). Documents prepared for the multiple purposes of complying with MSA, NEPA, and other applicable laws may be longer than the NEPA mandated page limits. NMFS will ensure that the “NEPA parts” of the document (*i.e.*, those that serve the purpose of NEPA – to help decision makers make decisions that are based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment) comply with applicable page limits. NMFS’ intent is to count only those pages required by NEPA and its implementing regulations against the NEPA page limits.

D. *Documenting the Decision*

1. *Purposes of the FONSI*

The FONSI is a document confirming that NEPA does not require preparation of an EIS because the proposed action will not have significant effects, as demonstrated in its associated EA. This concludes the process for an EA.

a. *FMC-Initiated Actions*

For FMC-initiated fishery management actions, NMFS decides whether to approve, disapprove, or partially approve an FMC-recommended FMP or FMP amendment or publish final regulations. Information in the NEPA document contributes to the factual basis on which NMFS relies when determining whether an FMC-recommended action complies with applicable laws. Thus, in some cases an EA may provide the factual basis for a disapproval of an FMP or FMP amendment or a decision not to publish proposed regulations. In these cases, NMFS may provide recommendations concerning the actions that could be taken by the FMC to conform its actions to the requirements of applicable law. Consistent with NEPA's declaration that it is the continuing policy of the Federal government to use all practicable means to maintain conditions in which man and nature can live in productive harmony and utilize ecological information in planning and developing resource-oriented projects, the information presented in any particular NEPA analysis may also inform the potential identification of additional needs for conservation and management to be addressed in future actions for NMFS in its ongoing stewardship responsibilities under the MSA and other resource management authorities.

Thus, a FONSI may serve the dual purposes of documenting a decision on a specific FMC recommendation as well as providing useful information to assist NMFS in its management and oversight roles consistent with the MSA and other applicable laws. The FONSI must include the EA or incorporate it by reference and shall note any other environmental documents related to it.

b. *Secretarial Actions*

The practice for Atlantic HMS actions is to provide a FONSI that accompanies the decision on whether to approve the final rule.

2. *Purposes of the Record of Decision*

The ROD concludes the NEPA process for an EIS.

a. *FMC-Initiated Actions*

For FMC-initiated fishery management actions, NMFS decides whether to approve, disapprove, or partially approve an FMC-recommended FMP or FMP amendment or publish final regulations. Information in the NEPA document contributes to the factual basis on which NMFS relies when determining whether an FMC-recommended action complies with applicable laws. Thus, in some cases an EIS may provide the factual basis for a disapproval of an FMP or FMP amendment or a decision not to publish proposed regulations. In these cases, NMFS may provide recommendations concerning the actions that could be taken by the FMC to conform its actions to the requirements of applicable

law. Consistent with NEPA's declaration that it is the continuing policy of the Federal government to use all practicable means to maintain conditions in which man and nature can live in productive harmony and utilize ecological information in planning and developing resource-oriented projects, the information presented in any particular NEPA analysis may also inform the potential identification of additional needs for conservation and management to be addressed in future actions for NMFS in its ongoing stewardship responsibilities under the MSA and other resource management authorities.

Thus, a ROD may serve the dual purposes of documenting a decision on a specific FMC recommendation as well as providing useful information to assist NMFS in its management and oversight roles consistent with the MSA and other applicable laws. CEQ's requirements for contents of the ROD are set forth at 40 CFR 1505.2.

b. Secretarial Actions

The practice for Atlantic HMS actions is to provide a ROD that accompanies the decision on whether to approve the final rule.

VI. NEPA Related Documents and Approaches

This section describes non-exclusive, non-mandatory approaches that may be used to increase efficiency and utility of the NEPA process or to document whether an existing NEPA document analyzes the proposed action.

A. Incorporation by Reference

NEPA now imposes a 75-page limit for EAs and a 150- or 300-page limit for an EIS (42 U.S.C. 4336a (Sec. 107(e))). To meet this requirement, NMFS and the FMCs may incorporate material into an EA or EIS by reference when the effect will be to reduce the length or complexity of the EA or EIS without impeding agency and public review of the action. The incorporated material must be cited in the EA or EIS, its content and the relevance of the incorporated material to the environmental document briefly described, and instructions on how the public can access the incorporated material must be provided (*e.g.*, via a website link). 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 that is itself not available for review and comment may not be incorporated by reference.

B. Supplemental Information Report (SIR)

A SIR may be used, on a case-by-case basis, to document why further NEPA analysis is not necessary. The SIR is a concise document that contains the rationale for determining if new information, changed circumstances, or changes to the action are not significant and thus why a supplemental analysis is not required. Generally the SIR will have the following parts, or their equivalent:

- title page with date;
- Introduction;
- purpose and need;
- background;
- scope of SIR;

- evaluation of new information;
- conclusions/decision; and
- approval authority signature block and date.

C. *A Model for Utilizing Tiering: NEPA Advanced Planning Procedure*

CEQ's guidance on NEPA promotes the use of tiering as described in 40 CFR 1501.11(b). This section describes a model process for utilizing tiering in a fishery management context. The model is based on the concept of tiering and using advanced planning to promote greater efficiencies in conducting NEPA analyses. Its use is optional, and it does not represent the only approach to tiering or NEPA efficiencies.

Under this approach, an FMP or an EA/EIS could establish a NEPA Advanced Planning Procedure (NAPP), which would be a mechanism for allowing actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis. Such a procedure would:

- allow for an evaluation of whether a fishery management action taken pursuant to a NAPP falls within the scope of a prior environmental document; and
- specify criteria that would trigger a requirement to supplement the prior analysis or would require development of a new EA or EIS for the fishery management action taken pursuant to a NAPP.

The NAPP could also specify criteria that would permit certain management actions under revision or review to continue during supplementation or revision of the prior NEPA document and, if so, establish criteria for determining when this is appropriate.

A fishery management action taken pursuant to a NAPP would not require additional action-specific analysis if NMFS determines that the management measures in the action and their environmental effects fall within the scope of a prior analysis. This determination would be documented in a document called a NEPA Compliance Evaluation (NCE).

A NAPP would be documented using the following:

1. *NEPA Compliance Evaluation*

An NCE is documentation to determine whether an existing NEPA document remains adequate to support a fishery management action undertaken pursuant to a NAPP. The NCE would result in either a determination that the existing NEPA analysis must be supplemented or preparation of a Memorandum of NEPA Compliance (MNC) for the file.

An NCE must:

- identify the prior EA or EIS that analyzed the impacts of the fishery management action proposed to be taken pursuant to the NAPP;
- identify new information, if any, relevant to the impacts of the fishery management action proposed to be taken pursuant to a NAPP; and
- evaluate whether the fishery management action proposed to be taken pursuant to a NAPP falls within the scope of the prior NEPA analyses and whether new information, if any, requires supplementation.

If the NCE results in a determination that supplementation is not required, an MNC must be prepared and both documents should be made a part of the administrative record. If the NCE results in a determination that NEPA supplementation is required, appropriate supplemental analyses must be conducted and all documents should be made a part of the administrative record.

2. *Memorandum of NEPA Compliance*

An MNC is a concise document (ordinarily two pages) that briefly summarizes the fishery management action taken pursuant to a NAPP, identifies the prior analyses that addressed the impacts of the action, and incorporates any other relevant discussion or analysis for the record.

D. *Partnerships with FMCs*

NMFS regions are encouraged to work cooperatively with their FMC partners to identify additional opportunities for coordination and cooperation. Strategies that may be beneficial include: using new technologies, real-time sharing of documents, and frontloading.

1. *Using Technology and Document Sharing*

Sharing documents throughout the fishery management process facilitates frontloading. These procedures encourage the sharing of documents between relevant NMFS and FMC staff, with time for review and comment, before circulating for public review and again before FMC final action. Documents should be shared using the best available technology to facilitate real-time review and maintain version control.

2. *Frontloading*

Frontloading means working collaboratively early in the process to identify alternatives and issues, and conduct analyses, so that that information is available at each stage of decision making. Frontloading helps prevent important information from only coming to light during Secretarial review.

Effective frontloading involves coordination and communication between NMFS and the FMC early in the process to ensure that all relevant issues are addressed in the document. Key tools for frontloading include:

- strategic planning early in the development of documents to identify the purpose and need, the scope of the analysis, the range of alternatives, the information needed, and the plan to accomplish the analysis;
- whenever possible, identifying an FMC's preliminary preferred alternative for its MSA recommendation prior to its final vote, particularly on larger actions, to facilitate focused review of potential impacts;
- providing adequate time for internal review of the document before it is released to the public, and effectively responding to relevant internal comments in the document; and
- convening an interdisciplinary team early in the process.

NMFS regional offices and each FMC should consider developing processes to achieve frontloading and clarify overall roles and responsibilities in general and on a project-specific basis.

VII. Related Documents

- A. *Operational Guidelines (2017): NMFS Procedural Directive 01-101-03*
The Operational Guidelines provide guidance on the development, review, and implementation of Federal FMPs, amendments, and regulations.
- B. *CEQ NEPA Regulations, Department of Commerce Administrative Order 216-6, NOAA Administrative Order 216-6A, and its Companion Manual*
These procedures do not affect the applicability of the CEQ regulations, 40 CFR 1500-1508, DAO 216-6, NAO 216-6A, its Companion Manual, or of any pertinent Departmental or agency-level guidance.
- C. *NMFS Policy Directive 09-101*
The policy directive provides additional guidance on how NMFS will implement NAO 216-6A and its Companion Manual that should be used in conjunction with these procedures. However, these procedures provide the sole guidance in respect to NEPA compliance for MSA fishery management actions. To the extent that anything in the Policy Directive 09-101 conflicts with these procedures, the procedures here apply.
- D. *NMFS Regional Office Quality Assurance Plans*
Quality Assurance Plans (QAPs) establish regional and program-specific procedures and protocols for the review and clearance of NEPA documents consistent with CEQ, NOAA, and NMFS requirements, as well as quality assurance procedures in place for the relevant agency actions that require reviewed NEPA documentation. To the extent that anything in the QAPs conflicts with these procedures, the procedures here will apply.
- E. *Regional Operating Agreements*
Details of how each FMC/NMFS region pair implements the MSA and other requirements throughout the fishery management process are set forth in Regional Operating Agreements (ROAs). The ROAs confirm the mutual interests and describe the working relationships between a NMFS region and the FMC, and may also include the corresponding NMFS Science Center and Office of Law Enforcement. ROAs give NMFS and the FMCs a platform to specify coordination mechanisms and roles and responsibilities in the FMP process and identify necessary tasks and ensure they are appropriately assigned and completed. To the extent that anything in the ROAs conflicts with these procedures, the procedures here will apply.