



**Western
Pacific
Regional
Fishery
Management
Council**

March 10, 2020

Mr. Edward A. Boling, Associate Director for NEPA
Ms. Victoria Z. Seale, Chief of Staff and General Counsel
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Dear Mr. Boling and Ms. Seale:

The Western Pacific Regional Fishery Management Council appreciates the opportunity to provide comments on the Council on Environmental Quality's (CEQ) proposed revisions to its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA).¹ Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Council is responsible for management of fisheries within the US Pacific Islands region seaward of the jurisdictions of the State of Hawaii, Territory of Guam, Territory of American Samoa, Commonwealth of the Northern Mariana Islands, and the US Pacific remote island areas. The Council has extensive experience with NEPA, as each of its actions to establish or amend fishery management plans is subject to NEPA. We envision that the proposed revisions could result in more efficient management of the nation's fisheries by eliminating prolonged rule-making resulting from federal duplication.

The Council appreciates the inclusion of provisions recognizing that analyses prepared under other statutory authorities may serve as a functional equivalence to NEPA analyses. Under the MSA, the Council is required to develop a fishery impact statement in its fishery management plans (FMPs) and amendments. The development of conservation and management measures under the FMPs is inherently an environmental review process, as such measures must prevent overfishing, rebuild overfished stocks, and protect, restore, and promote the long-term health and stability of the fishery. The FMPs must also be consistent with the MSA National Standards, which require consideration of environmental effects such as the reduction of impacts on bycatch species, and with other applicable law such as the Endangered Species Act and Marine Mammal Protection Act. Additionally, MSA provides for public input and sets forth a transparent process throughout the development of conservation and management measures.

The provisions regarding functional equivalency would provide the opportunity for the Council to work with the National Marine Fisheries Service (NMFS) to revisit MSA §304(i),

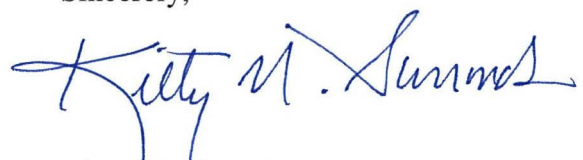
¹ 85 FR 1684 (January 10, 2020)

which directed the Secretary of Commerce, in consultation with the regional fishery management councils and the CEQ, to revise and update agency procedures for NEPA compliance that was intended to eliminate duplication of MSA and NEPA analyses. As outlined in our letter to CEQ dated August 20, 2018 (see enclosure), NMFS' 2013 Procedural Directive, which according to NMFS complied with §304(i), fell short of addressing Congressional intent of that provision under the MSA. We believe that the flexibility provided under the proposed procedures for recognizing analyses prepared under other statutory authorities would allow the full Congressional intent under MSA §304(i) to be fulfilled.

CEQ's recognition of functional equivalency, and NMFS' ability to apply that provision for MSA fishery management actions are critical, as some of the provisions in the procedural revision would be otherwise impractical for the Council. In particular, CEQ's proposed time limits of one year for environmental assessments, and two years for environmental impact statements would be problematic. The MSA fishery management development process entails an extensive public deliberation process through the Council and its advisory body meetings, which typically spans a period of 6-12 months or longer, depending on the complexity of the management issue at hand. During this period, the Council NMFS develops management alternatives and associated analyses in coordination with NMFS to meet MSA and NEPA requirements, such that the development of MSA-NEPA integrated documents may start 1-2 years in advance of Council recommending final action. Following the Council decision-making process, analysis documents are finalized prior to transmittal to NMFS, during which time the action undergoes various reviews to ensure consistency with applicable law, including NEPA. Once transmitted, MSA sets a 95-day Secretarial review and rulemaking period prior to a final agency decision to approve, disapprove, or partially approve the Council-recommended action. These timelines would therefore make the CEQ's proposed time limits impractical for the MSA process.

The Council looks forward to working with CEQ and NMFS on applying the functional equivalency provision to the MSA fishery management process.

Sincerely,

A handwritten signature in blue ink that reads "Kitty M. Simonds". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Kitty M. Simonds
Executive Director

Enclosure: Council letter to CEQ dated August 20, 2018

Cc: Chris Oliver
Sam Rauch
Regional Fishery Management Council Executive Directors



**Western
Pacific
Regional
Fishery
Management
Council**

August 20, 2018

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

To Whom It May Concern:

The Western Pacific Regional Fishery Management Council (Council) appreciates the ability to comment on the Council on Environmental Quality's (CEQ) regulations implementing the National Environmental Policy Act (NEPA) and commends CEQ for providing the public this opportunity. Pursuant to the Magnuson-Stevens Fisheries Conservation and Management Act (MSA), the Council is responsible for management of fisheries within the US Pacific Islands region seaward of the jurisdictions of the State of Hawaii, Territory of Guam, Territory of American Samoa, and Commonwealth of Northern Mariana Islands. The Council has extensive experience with NEPA over the last several decades, as each of our actions to establish and/or amend fishery management measures are subject to NEPA.

- 1) **The Council's main comment is that the MSA's analytical and public participation requirements for fisheries management actions are largely duplicative with NEPA. MSA actions and MSA environmental review process should be deemed consistent with the NEPA environmental review process.**

In 2006, the Magnuson Stevens Reauthorization Act (MSRA) included Section 304(i) which requires the Secretary of Commerce, in consultation with the fishery management councils (FMCs) and CEQ, to revise and update its agency procedures with respect to NEPA. Below is Section 304(i) extracted from the MSRA. Congress set the deadline for final procedures to be established no later than 12 months after MSRA was enacted (2006).

Section 304 (i): ENVIRONMENTAL REVIEW PROCESS

(1) PROCEDURES.—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. 4231 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.

(2) USAGE.—The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this Act.

(3) SCHEDULE FOR PROMULGATION OF FINAL PROCEDURES.—The Secretary shall— (A) propose revised procedures within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006; (B) provide 90 days for public review and comments; and (C) promulgate final procedures no later than 12 months after the date of enactment of that Act.

(4) PUBLIC PARTICIPATION.—The Secretary is authorized and directed, in cooperation with the Council on Environmental Quality and the Councils, to involve the affected public in the development of revised procedures, including workshops or other appropriate means of public involvement.

MSA Section 304(1) Timeline

The following provides a timeline activities and proposals related to implementing MSA 304(i).

February 2007- FMCs developed conceptual approach and draft guidelines and presented to the National Marine Fisheries Service (NMFS) at Council Coordination Committee (CCC) meeting. The conceptual draft was not accepted and NMFS said they would lead process to develop new procedures.

May 14, 2008- NMFS publishes proposed rule on new environmental review procedures for MSA actions. The rule would have established (unfunded) requirements on FMCs to complete NEPA documentation (EISs/EAs) prior to Council final action, which would have bogged-down the decision-making process. MSA/NEPA documents would have been termed Integrated Fishery Environmental Management Statement (IFEM). FMCs not supportive of proposal, and there was opposition from other interested parties.

December 19, 2008- NMFS withdrawals proposed rule on new MSA/NEPA procedures citing that OMB wanted clean slate with the incoming new administration.

May 2009- FMCs become aware that NOAA was tinkering with existing NEPA compliance procedures (NOA 216-6) and question (in a letter to NOAA Administrator Lubchenco) whether or not MSA 4 actions will be addressed in new order.

August 2009- FMCs receive response from Lubchenco stating that NOAA's revisions to NOA 216-6 are to update the policy to better reflect NOAA activities including facilities, research, operations. Lubchenco further stated in her letter that the 216-16 revisions and the Section 304(i) environmental review process are on two separate development paths.

February 19, 2013- NMFS announces at CCC meeting in Washington DC that they have finalized new MSA/NEPA procedures in the form of a policy directive, but without consultation from the FMCs, as required under MSRA.

June 30, 2014- NMFS publishes the NEPA policy directive in the Federal Register for public comment. NMFS claims the Policy Directive satisfies the congressional mandate in MSA section

304(1) that directed NMFS to update environmental procedures to streamline MSA and NEPA analyses and that consultation has occurred with FMCs since the 2013 Policy Directive. FMCs disagree as new procedures do not match the intent of Congress in Section 304(i).

2) NMFS should revise the 2014 NEPA policy directive and work with CEQ, the FMCs, and others to develop MSA/NEPA procedures that meet the intent of Congress in Section 304(i).

The MSA's regional fishery management council (FMC) process is an environmental review/decision making process that incorporates many stages of public participation throughout the development of the action. FMCs make management recommendations after considering the impacts from a range of alternatives on, including but not limited to, target and non-target stocks, habitat, protected species, fishery participants, and fishing communities.

NEPA mandates a similar process where a range of alternatives are analyzed for their impacts on the human environment. The MSA/FMC and NEPA processes are analytically duplicative; however, MSA and NEPA require different public review schedules (e.g. *Federal Register* notices, proposed rules, agency actions, etc.) which can lead to severe timing problems in the implementation of fishery management actions. The melding of MSA vs NEPA processes are needed in order to make them more streamlined, reduce duplication, and avoid unnecessary administrative burden.

Due to the existing environmental review requirements under the MSA, as well as the extensive public processes associated Council deliberations and decision making, we request that CEQ work with the Department of Commerce National Marine Fisheries Service to streamline environmental review processes for fisheries management actions to avoid duplication, address confusing public review schedules, and eliminate bureaucratic redundancy.

3) The following provides responses to the questions posed in the June 20, 2018 Federal Register notice.

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?

Yes. An example is provided in our comments above whereby FMCs are mainly focused with satisfying the requirements of MSA, which are largely duplicative to the environmental review processes under NEPA. Fishery management actions often get bogged down in agency drafting and subjective NEPA consistency reviews, when the objectives of the two statutes are largely similar with respect to public participation and environmental review.

2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?

Yes. Incorporating by reference in the digital age should be utilized for utmost efficiency including the use of hyperlinks embedded into documents. Reference material is commonly summarized to extraneous detail in existing NEPA documents; a hyperlink to a source document would be much more efficient.

3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

It is unclear what optimal interagency coordination means; however, if it means streamlining coordination and not adding additional steps, then yes, this should be explored.

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?

Yes, it is common for our staff to draft 200-plus page Environmental Assessments. This is not efficient nor in the best interest of the public, who need concise reviews without extraneous information. This also aligns with the necessity to draft documents using plain language and information that can be understood by the general public.

5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decision makers and the public, and if so, how?

Yes, guidance on what is pertinent to the decision at hand and reviews should be clearer so as to avoid unnecessarily long and repetitive documents. We had experience with a NEPA document that included over 20 alternatives within the range of alternatives, which made the analysis repetitive and difficult to follow.

6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?

No. With respect to the MSA process, there are multiple opportunities for public participation throughout the deliberation and decision making process. In our view, the MSA process is inclusive and efficient and should be deemed to satisfy NEPA public involvement processes.

7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?

- a. Major Federal Action;
- b. Effects;
- c. Cumulative Impact;

Yes. Cumulative effects analyses are often difficult to conduct due to the ambiguity of the requirements in NEPA and associated complexities of ecosystems and environmental effects. Consideration should be provided to revise the definition that will, in turn, result in cumulative impact analyses being more useful and less nebulous.

- d. Significantly;
- e. Scope; and
- f. Other NEPA terms.

8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?

- a. Alternatives;

Deciding on the range of alternatives for NEPA documents is a challenging part of NEPA processes. There are often too many alternatives in a NEPA document and little distinction among those in the range. A new definition that would better clarify alternatives, including what is “status quo” and what is “no action,” is welcomed.

b. Purpose and Need;

Developing concise purpose and need statements is also a challenging endeavor and can be often subjective; however, the purpose and need is critical in forming the appropriate range of alternatives. Improved guidance on the key elements to include in a purpose and need statement should be explored.

- c. Reasonably Foreseeable;
- d. Trivial Violation; and
- e. Other NEPA terms.

9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?

- a. Notice of Intent;
- b. Categorical Exclusions Documentation;

The use of CEs should be encouraged when there are clearly no environmental impacts associated with an action or no new information is available with regards to approval of the same action that might have expired (e.g., Annual Catch Limits where there is no new information available).

- c. Environmental Assessments;
- d. Findings of No Significant Impact;
- e. Environmental Impact Statements;
- f. Records of Decision; and
- g. Supplements.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

As discussed above, the timing for MSA and NEPA processes should be melded by deeming the MSA process as equivalent and/or consistent with NEPA.

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

No comments to offer on this issue.

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

Certainly the issue of tiering should be explored and improved. Programmatic NEPA documents often have little utility with respect to follow-on actions as the tiering mechanism often

does not facilitate concise NEPA documents. Related actions readily undergo full NEPA review which deters the use of programmatic NEPA documents.

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

Yes. As stated above, deciding on the range of alternatives for NEPA documents is a challenging part of a NEPA process. There are often too many alternatives in a NEPA document and little distinction among those in the range. New regulations that better clarify alternatives, including what is status quo and what is no action, are welcomed. Also including alternatives not within the jurisdiction of the lead agency are hardly ever incorporated and should be eliminated.

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

We question the utility of the need to send EISs to the EPA for publishing in the Federal Register. It is likely the case that each federal agency now has the experience and capacity to be responsible for publishing their own EISs.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

Examination of the scoping process with respect to new technologies should be explored including the use electronic comments via various communication portals.

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

Yes. As described earlier, the MSA and NEPA are largely duplicative with respect to public participation and analytical documentation. Where appropriate, regulations should encourage integrating such processes to eliminate duplication and reduce public confusion on the various timing requirements among statutes, such as MSA and NEPA.

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

Yes. Mandate page number requirements for EAs and improve the ability to incorporate by reference without unnecessary summation of source documents.

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

We support the involvement and engagement of non-tribal indigenous communities in our region including Native Hawaiians, American Samoans, Chamorro, and Carolinian communities and these groups should also be recognized.

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

Yes. Consistent with our main comment, MSA and NEPA analytical processes should be melded to reduce administrative burden, improve public participation, and eliminate unnecessary delays in the rule making process.

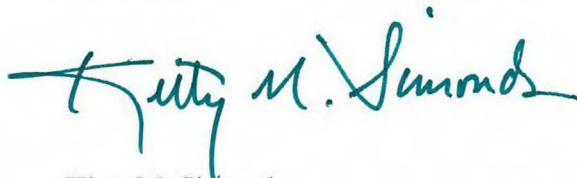
20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

Yes. Mitigation is a powerful concept with regards to agency action and review of appropriate action alternatives. The use of mitigation should be further explored, but it should only be used if potential impacts result in irretrievable consequences that have major effects to, for example, ecosystems or protected species populations.

Conclusion

NEPA is an important process statute; however, it is too often misused and vulnerable to subjectivity of practitioners, and can be abused by agencies to delay actions. Overall, many NEPA documents are so convoluted, that they subvert the intent of NEPA. Moreover, other statutes such as the MSA require similar public participation and environmental review processes that, when combined with NEPA, lead to duplication and misaligned review schedules that can be confusing to the general public. We are encouraged by CEQ's interest in gathering public input on NEPA regulations and hope this process will result in revised regulations that streamline NEPA processes, eliminate duplication, and reduce the administrative burden. Lastly, we are hopeful that this comment process will shed light on the MSA-NEPA issue. In our view, the current NMFS policy directive on NEPA does not meet the intent of Congress in MSA Section 304(i) and needs to be revised.

Sincerely,



Kitty M. Simonds
Executive Director

Cc: Chris Oliver, NOAA Assistant Administrator for Fisheries
Fishery Management Councils