Operational Guidelines for the Fishery Management Process [DRAFT September 2015]

APPENDICES

Operational Guidelines for the Fishery Management Process [September 2015] Appendices

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APPENDIX 1

Appendix 1. General Terminology and Abbreviations

A. Abbreviations.

The following list of abbreviations includes abbreviations used in the OGs as well as abbreviation that appear in other NMFS and Councils documents.

AA– Assistant Administrator for Fisheries
APA– Administrative Procedure Act
AR – Administrative Record
ARA - Assistant Regional Administrator
BA– Biological Assessment
BO – Biological Opinion
BiOp - Biological Opinion
CE– Categorical Exclusion
CEQ– Council on Environmental Quality
CFR – Code of Federal Regulations
COP -- Council Operating Procedures
CPE – Comment Period Ends
CZMA– Coastal Zone Management Act
CZMP – Coastal Zone Management Plan
DEIS – Draft Environmental Impact Statement
DOC – Department of Commerce
DOC/GC –Department of Commerce Office of General Counsel
EA– Environmental Assessment
EIS – Environmental Impact Statement
EFH – Essential Fish Habitat
EO– Executive Order
EPA– Environmental Protection Agency
ESA– Endangered Species Act
FEIS – Final Environmental Impact Statement
FEP - Fishery Ecosystem Plan
FOIA– Freedom of Information Act
FMAT – Fishery Management Action Team
FMP– Fishery Management Plan
FONSI – Finding of No Significant Impact
FRFA Final Regulatory Flexibility Analysis
GC – General Counsel
IPT – Interdisciplinary Plan Team
IQA – Information Quality Act
IRFA– Initial Regulatory Flexibility Analysis

MRFSS - Marine Recreational Fisheries Statistics Survey
MRIP - Marine Recreational Information Program
MMPA – Marine Mammal Protection Act
MSA – Magnuson-Stevens Fishery Conservation and Management Act
NAO – NOAA Administrative Order.
NEPA– National Environmental Protection Act
NID – Negligible Impact Determination under the MMPA
NMFS – National Marine Fisheries Service
NMSA – National Marine Sanctuaries Act
NOA– Notice of Availability
NOAA– National Oceanographic and Atmospheric Administration
NOI – Notice of Intent (notice that an environmental impact statement will be prepared and considered)
OAL - Other Applicable Law
OFR – Office of the Federal Register
OGs– Operational Guidelines for the Fishery Management Process
OLE - NOAA Fisheries Office of Law Enforcement
OMB – The White House Office of Management and Budget
OPR – Office of Protected Resources (Headquarters)
OSF– Office of Sustainable Fisheries (Headquarters)
OSP/PPI – The NOAA Office of Strategic Planning/Program Planning and Integration (NOAA's NEPA Office, currently vested with responsibility to sign off on EISs)
PD – NMFS Policy Directive
PDT – Plan Development Team
PRA– The Paperwork Reduction Act of 1980
RA– Regional Administrator
RFA– Regulatory Flexibility Act
RID - Regulatory Information Data
RIN - Regulation Identifier Number
RIR – Regulatory Impact Review
ROA– Regional Operating Agreement
ROD – Record of Decision
SBA– Small Business Administration
SOPP – Statement of Organization, Practices, and Procedures
SSC -- Science and Statistical Committee
TIA– Takings Implication Assessment

B. Terminology

Action Plans. An "action plan" is a planning tool that many Council/Region pairs use to organize tasking and scheduling, as well as facilitate frontloading, for any particular action. Where relevant, Regional Operating Agreements (ROAs) provide specific details of how each Council/Region pair uses action plans. Action plans may include some or all of the following: description of the problem or objective, the proposed action, and potential alternatives; timelines

for steps in developing the action and complying with OALs; Council and agency staff designated to work on the issue; and early identification of resources and analyses required. These plans provide a realistic, mutually-agreed upon path for the development and completion of Council actions. They may be working documents that are updated frequently.

Fishery Management Action Teams (FMATs), Plan Development Teams (PDTs), and Interdisciplinary Plan Teams (IPTs). FMATs, PDTs, and IPTs are additional mechanisms that Council/Region pairs may use to promote frontloading. The structure and functions of these teams vary by Council and are further described in the ROAs. Depending on their purpose, these teams may include various mixtures of Council staff, NMFS staff, NOAA General Counsel, and, in some cases, Council members. Their functions vary, but may include development of alternatives, development of information for scoping, and development of technical information or analysis in support of specific Council actions.

Framework Action. A Council may plan ahead to allow for creating future efficiencies by structuring a "framework," i.e. placing certain parameters within an FMP or Regulation, and providing that when certain new data come in, they can be addressed through a less cumbersome process. Frameworks vary in their structure from FMP to FMP.

Frontloading. Frontloading is the practice of involving relevant reviewers and contributors, and identifying legal and policy considerations, as early in the process as possible. Frontloading may require more investment of time upfront, but should help identify potential problems early and prevent them from becoming bigger problems in later stages of review and implementation.

Other Applicable Law (OALs). Various laws, administrative orders, and other directives must be addressed in the context of fishery management action development, approval, and implementation. The relevant other applicable laws, some of which provide for consultations with for States and Indian Tribes, are described in section X.

Scoping. "To scope" means to assess or investigate an issue or problem, or to look at it carefully. In a fisheries context, this typically involves public outreach and input from stakeholders. Although the MSA does not use the term "scoping," Councils engage in scoping activities to support their MSA mission. They continually review incoming information and conduct public meetings (often called "scoping meetings"), to gather information about needs for conservation and management. Once a management need has been identified, Councils may gather more focused input regarding potential responses through other open public meetings. In terms of NEPA compliance, the term "scoping" has a specific legal meaning. CEQ regulations at 40 CFR 1501.7 describe a specific scoping process that must be completed as part of the process for development of an environmental impact statement. It is important for the Councils and Regions to be clear and inform the public when scoping activities pertain specifically to the NEPA-related requirements.

APPENDIX 2

Appendix 2. Description of the Fishery Management Process

A. Overview

This Appendix provides information on various aspects of the fishery management process, including Regional Operating Agreements (ROAs), other applicable law (OALs), and rulemaking authorities under the MSA. While most of these materials are focused specifically on the Council-initiated fishery management actions, the sections on OALs and rulemaking authorities provide information that may be relevant to fisheries managed by the Secretary under the "Highly Migratory Species" (HMS) provisions of the MSA.

As described in this Appendix, the fishery management process for Council-managed fisheries consists of five basic phases.[1] Section C of this Appendix 2 provides detailed information about phases 5 phases, but, in general, they are as follow:

1. Planning
2. Document Drafting.
3. Public Review and Council Action to Recommend a Measure
4. Post Council Action to Recommend a Measure
    (a) Preparation for Transmittal
    (b) Secretarial Review and Implementation
5. Ongoing Management (additional regulatory activity, monitoring, need identification, and response – feeds back into phase1).

While the ROA's provide for NMFS/Council cooperation and sharing of workloads, it is important to note that the MSA and other applicable laws assign different responsibilities to each entity. Therefore, both NMFS and the Councils must ensure they fulfill their required roles.

B. Regional Operating Agreements

Details of how each Council/Region pair implements MSA and OAL requirements throughout the process are set forth in the ROAs.

1. Background and Purpose

The ROAs describe the planning tools, processes, products, roles, and responsibilities designed to maximize frontloading during each of the main rulemaking phases outlined in this Appendix. The ROAs confirm the mutual interests of and describe the working relationships between a

[1] This description of phases is founded upon the description of the MSA process that was set forth in the 1997 Operational Guidelines, with clarification regarding the activities that occur between the Councils vote to recommend an action and the declaration of "transmittal." For a complete description of the phases, see Appendix 2, section C, below.

NMFS Region and the Council, and may also include the corresponding NMFS Science Center and NOAA Office of Law Enforcement. Over the course of time, each Council/Region pair had developed systems to assign and track tasks and responsibilities that were documented in different formats. Documenting these systems in ROAs is intended to give NMFS and the Councils a platform to specify coordination mechanisms, roles and responsibilities in the fishery management plan process, and identify necessary tasks and ensure they are appropriately assigned and completed. NMFS and the Councils also recognized that the development of ROAs would help the public better understand the fishery management decision making process, thus making NMFS and Council actions more transparent. The intended effect is to promote early planning, cooperation, and open communication in the development of fishery management documents, with the objective of streamlining the review and approval process, and ultimately, improving the quality and transparency of fishery management decision making. These OGs encourage NMFS and the Councils to use their ROAs to communicate the roles and obligations of all responsible contributing parties, including the Science Centers, NOAA Office of Law Enforcement, and General Counsel, to the maximum extent possible.

2. Scope and Use

The ROAs should be considered by all parties as "living documents", which can change over time in response to learned or improved best practices, changing management needs and conditions, or new statutory requirements. The ROAs are not intended to limit or prevent staff from devising alternative processes on an ad hoc basis in response to specific needs or concerns. The ROAs are intended to document the specific roles and responsibilities of the Council and NMFS in developing, approving, and implementing fishery management actions under the MSA. These agreements have all been signed by the Council and the NMFS Regional Office. Individual ROAs may include other agency signatories where it was deemed appropriate. At all times the ROA is meant to make transparent the procedures and processes of developing a proposed Council action and facilitates "frontloading" as much as practicably possible.

3. Content

The preparation, review, approval, and implementation of the fishery management actions and the implementing rules and regulations under the MSA comprise a complex process in which the Councils and NMFS have distinct, yet overlapping roles. Each ROA specifies the frontloading procedures used to ensure the processes and documentation associated with fishery management proposals are adequate, timely, documented with a complete record, and provide a basis for decision making. Each ROA is unique for the NMFS Region and Council for whom it was developed. While unique, each ROA includes the following sections as basic content:

a. Acronyms and Abbreviations

The ROAs include a section on Acronyms and Abbreviations which provides NMFS, Councils, and the public with a quick overview of the terminology used by NMFS and the Council when developing analysis and conducting rulemaking. While there is some overlap between the Councils, there are some terms that may be unique to the Council/Region pair that developed the ROA.

b. General Overview/Background

This section briefly describes the scope of the agreement, including the objectives of the ROA and a short background on why it was developed. This section also provides brief information on how to navigate the document.

c. Roles and Responsibilities

This section briefly describes the products and roles and responsibilities during each of the main rulemaking phases for fishery management actions. These Phases are described in detail in the next section of these OGs. The Roles and Responsibilities section of the ROAs describe the primary roles of the Councils, Council planning teams, NMFS, the NMFS Science Centers, NOAA General Counsel and NMFS Office of Law Enforcement in developing fishery management plans and implementing regulations. In addition to the MSA, a variety of other applicable laws and EOs have analytical and procedural requirements, including NEPA, ESA, MMPA, RFA, PRA, the Information Quality Act, EO 12866 and the APA. The roles and responsibilities pertaining to these separate analyses may be included in the ROA or may be contained in a separate document. These OGs describe the basic responsibilities for the requirements of these other applicable laws in Section XX. While the ROAs are specific to the Council/Region that developed it, these OGs also briefly detail the general roles and responsibilities of Council planning bodies, NMFS, and Regions in Section XX.

d. Description of Action Plans or Phases for FMP and Rule Development

Either in the above section, or included in a separate section is a description of how the Councils and NMFS identify necessary tasks and ensure they are appropriately assigned and completed for each phase of the fishery management process. Some ROAs describe how Action Plans are used to provide a path for development and completion of major actions. Other ROAs detail each phase, describe how each phase is completed, and identify who is responsible for products or documents in those phases. No matter the approach, this has the intended effect of informing internal and external stakeholders of how each phase of the process is initiated and completed.

4. Final Regional Operating Agreements

The current signed versions of these ROAs are appended to these OGs. The ROAs, besides including the above sections, also include a diagram for each Council. These diagrams show the structure and function of Council committees, planning bodies, and other Council created entities. How these Council bodies work may be reviewed in the ROAs, or they may be briefly described within these OGs.

C. Detailed Description of the Council Fishery Management Process under the MSA

1. General Overview of Roles and Responsibilities

The MSA and OALs set forth specific analytical and procedural requirements that interact with NMFS's and the Councils' decision-making processes under the MSA. The mandates on NMFS, as the federal action agency, are distinct from the requirements pertaining to the activities of the Councils, in their role as advisory bodies. Nothing precludes a Council's development of analyses and documentation to support compliance with the OALs, and in fact this practice is

recommended. However, ultimate legal responsibility for most requirements lies with NMFS. It is good practice to have as complete analysis and documentation as possible available during Council deliberations.

a. MSA Role of the Councils

As set forth in sections 302(h), 303, and 304 of the MSA (see also the policy directives entitled "Procedures for Initiating Secretarial Review of FMPs and Amendments (3/01/91) (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-01.pdf) and "Revised Operational Guidelines," May 1997, (http://www.nmfs.noaa.gov/op/pds/documents/01/101/01-101-03.pdf), Councils are responsible for:

- Conducting public hearings to allow for public input into the development of FMPs and amendments,
- Reviewing pertinent information,
- Preparing fishery management plans and amendments for fisheries requiring conservation and management
- Drafting or deeming regulations to implement the plans or amendments
- Developing ACLs,
- Identifying research priorities, and
- Transmitting complete packages containing documentation necessary for NMFS to initiate a review of compliance with all applicable laws including NEPA.

b. MSA Role of NMFS

As set forth in section 304(a) of the MSA, the role of NMFS with respect to fishery management plans and plan amendments developed by the Councils is to review – and approve, disapprove, or partially approve –those plans and amendments in accordance with specified procedures, including:

- Immediately upon transmittal of the FMP or FMP amendment publish a plan or amendment in the Federal Register for a 60-day comment period.
- Approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period on the plan or amendment. Disapproval must be based on inconsistency with the MSA or other applicable law. In addition, disapprovals must provide guidance on what was inconsistent and how to remedy the situation, if possible (see MSA section 304(a)(3)(A)-(C)).

In addition, as set forth in section 304(b) the role of NMFS with respect to Council-recommended draft regulations is to:

- Immediately upon transmittal of the proposed regulations initiate an evaluation of whether they are consistent with the fishery management plan, plan amendment, the MSA, and other applicable law.

- Within 15 days make a determination of consistency, and—
  - if that determination is affirmative, publish the regulations for a public comment period of 15 to 60 days; or,
  - if that determination is negative, notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent.
- Consult with the Council before making any revisions to the proposed regulations,
- Promulgate final regulations within 30 days after the end of the comment period and publish in the Federal Register an explanation of any differences between the proposed and final regulations.

The MSA, at section 304(c), also authorizes NMFS to prepare a fishery management plan or amendment if:

> (a) the appropriate Council fails to develop and submit to NMFS, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;
> (b) NMFS disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment; or
> (c) NMFS is given authority to prepare such plan or amendment under the MSA.

NMFS may also develop regulations to implement Secretarial plans and amendments. (MSA section 304(c)(6), (7)).

c. OAL Roles for NMFS and COUNCIL

As described in section D of Appendix 2, the OALs set forth a variety of requirements for analysis, documentation, determinations, and procedures. Because of the close relationship between NMFS's actions and the Council's recommendations, compliance with the OALs will be most effective if NMFS and the Councils coordinate closely. The ROAs explain how these relationships work for each Council/Region pair. Council staff can often be responsible for drafting supporting analyses and documentation; however, it is NMFS's responsibility to ensure the resulting documents fully comply with all law.

2. Detailed Description of the Phases

a. Applicability

This section describes the general process for development of an FMP or FMP amendment. These phases can also apply to council-initiated regulations. However, as described in Phase V below, some FMPs or amendments can be designed in a manner that allows more rapid implementation of regulations in certain circumstances. This approach, called "Frameworking," would be designed via the process set forth below, but then could allow for more rapid

implementation during Phase V if certain criteria are met. See the discussion at Phase V for more information on Frameworking.

b. Phases

i. Phase I–Planning and Scoping. Phase I includes scoping activities such as initiation of problem description and potential solutions under the MSA. As noted in the section on terminology, Councils conduct a variety of activities considered to be generic scoping such as regular hearings, and information gathering, and early review of public input. In addition, scoping activities that are prescribed by NEPA may be conducted during this phase. When NEPA scoping is occurring it should be clearly identified as such.

As part of the scoping process, regulatory analysis and information collection requirements may be examined and preliminary estimates may be made of the costs and benefits of regulations. Concerns of affected States, including potential Coastal Zone Management Act (CZMA) impacts, and Indian tribes are identified and public participation is encouraged. Consideration of potential impacts to protected species pursuant to the ESA (see Policy Directive 01-117) and MMPA (e.g., take reduction plans), essential fish habitat (EFH), environmental justice, and social impacts of the FMP also begins.

Many Council/Region pairs develop action plans and convene IPTs or FMATs at this point.

ii. Phase II - Document Development. Phase II can include general frontloading activities and communications. It results in the development of draft analytical documents to inform the Council, NMFS, and the public. Under the ROAs, the Councils and NMFS typically agree to use a standardized analytical format within each region. Each regional format typically includes the requirements of MSA, NEPA, and other applicable laws and may include analyses relevant to ESA. The Council, NMFS Regional Office, and NOAA GC collaborate, through their plan teams where applicable, to identify, synthesize, review, and analyze data needed to support fishery management proposals or actions.

iii. Phase III – Public Review and Council Action to Recommend a Measure. Once the draft documents have been prepared, the Council shares them with the public and considers them publically. Depending on individual Council practices and variations in management issues, the range of activities that take place during Phase III can vary widely, in some cases encompassing years of iterative drafting, public hearings, public comment, and multiple options papers and whitepapers; in other cases consisting of a single staff-level draft. During Phase III, bearing in mind MSA and other relevant legal authorities, the Councils have broad discretion to explore alternatives and develop recommendations. In many instances, the bulk of Council activity may take place during Phase III. Phase III is also critically important for the frontloading of ESA as encouraged by PD 01-117 and EFH information and otherwise addressing OALs.

Phase III concludes when the Council votes to make a management recommendation to NMFS.

iv. Phase IV. Post Council Action to Recommend a Measure.[2] After the Council votes to recommend an action, two things must happen: (a) the package of supporting materials (such as analyses, proposed regulations, letters to States, etc.) must be finalized, then transmitted to NMFS; and then (b), once transmittal occurs, NMFS must review and take final action on the recommendation pursuant to the MSA formal review process.

(A)Phase IV(a). Preparation for Transmittal. While NMFS and the Councils strive to complete as much supporting documentation as possible early in the process, for various reasons, it is not always feasible to finalize all materials prior to the Councils vote. In the case of ESA section 7 consultations, formal consultation cannot begin until there is a defined action.[3] Likewise, CZMA consistency letters cannot be completed prior to identification of a proposed action. Thus, after the Council's vote, NMFS and Council staff conduct additional work to prepare documents for transmittal. Each Council/Region pair has its own working relationship governing who finalizes these documents – these are explained further in the ROAs described in section B of this Appendix. The degree of complexity of a recommended measure could affect the amount of time necessary to finalize a package. For instance, if regulatory text must be completed or revised in order to be "deemed" after the Council has taken final action, a significant amount of time could be necessary to complete this task.[4] Pursuant to PD 01-101-01 ("Procedures for Initiating Secretarial Review of FMPs and Amendments"), the RA determines when the supporting documentation is adequately complete to support an agency decision on the Council's recommendation, and establishes the transmit date. The transmit date initiates the statutory review periods and initiates Phase IV(b).

[2] The 1997 Operational Guidelines described Phase III as concluding with the Council's adoption of a recommendation, and Phase IV beginning with transmittal. There was little discussion of activities required to complete the package for "transmittal." The 2005 Draft Revised Operational Guidelines attempted to address this issue by characterizing Phase III as Council Final Action, and Phase IV as Secretarial Final action, and then discussing the post-vote activities that each party might need to undertake to prepare the package for transmittal. Partially as a result of this approach and partially as a result of the 2005 Draft's suggested check-point system, the 2005 outlined up to 16 specific steps that could take place within the main 4 phases. This 2015 version recognizes the reality that via frontloading, FMATs, and general cooperative tasking and staffing, there is no real separation of roles during the post-vote preparation process. Rather, the key procedural distinction should be between what happens after the council vote and prior to transmission regardless of which party performs any particular task. In this 2015 document, these activities are sorted into Phases IV(a) (after vote/prior to transmittal) and (b) (after transmittal). We note that some of the ROAs refer to the 16 steps set forth in the 2005 draft. This is not inconsistent with these 2015 OGs. Rather, it is just another way of characterizing the sequence of events. In addition, the specific tasking and scheduling associated with each action is further clarified within an action plan or other planning tool.

[3] Technical assistance pursuant to ESA section 7(a)(1), and pre-consultation and informal consultation can be requested to help develop alternatives that conserve ESA-listed species and designated critical habitat. These activities should take place earlier in the process such as during phases 1 – 3. (See PD 01-117)

[4] Section 303(c) of the MSA describes how "proposed regulations which the Council deems necessary or appropriate" to implement an FMP, amendment, or to modify existing regulations shall be submitted to the Secretary for review. The process by which Councils document that a proposed regulation has been deemed necessary or appropriate is often referred to as "deeming." The deeming process can vary depending on the Council/Region pair, and in some instances does not occur until regulatory text has been developed that is consistent with the intent of, but subsequent to, the Council's final action. Additional Information specific to the deeming process for each Council/Region pair is usually described in the SOPPS.

Documentation that is required by OALs should be complete prior to transmission when possible. Failure to complete documentation/procedure required by other laws prior to transmission can affect the Secretary's ability to make determinations under 304(a) that an FMP or amendment is consistent with applicable laws and thus can lead to disapproval.

(B) Phase IV(b)–Secretarial Review and Implementation. During Phase IV(b), the Secretary reviews and approves, partially approves, or disapproves, the Councils' recommendations, and conducts rulemakings to implement regulations. This phase is subject to strict timelines and procedures set forth in the MSA (sections 304(a) and (b)), as well as timing and procedural requirements applicable to agency rulemakings pursuant to the APA. In addition, the MSA restricts the Secretary's discretion to make any changes to Council-submitted recommendations at this point.

NMFS initiates formal public review of the Council's proposed measures by publishing in the *Federal Register* the Notice of Availability (NOA) of an FMP/FMP amendment and/or the proposed rule to implement the Council's recommendation. The MSA requires that, for FMPs and FMP amendments, NMFS must publish the NOA of the FMP immediately (within 5 days) for a 60-day comment period. Within 30 days of the close of the comment period (i.e., by "Day 95" after "transmittal"), the agency must approve, partially approve, or disapprove the Council's recommendation. If NMFS takes no action by Day 95, the FMP or amendment becomes approved under the MSA by operation of law. NMFS will notify the Council of the official start date of the Secretarial review period. After reviewing public comment received on the NOA and/or proposed rule, pursuant to current delegations of authority, the RA makes his/her decision regarding approval/disapproval of the action to the AA, and the AA determines whether to concur.

NMFS may make changes to proposed regulatory text under section 304(b)(3) if it consults with the Council and publishes an explanation of any differences between the proposed and final regulations. The final step for implementing an approved final rule is to send it to the Office of the Federal Register for publication. The published rule specifies the effective date for the measures contained therein.

v. Phase V – Ongoing Management

While NMFS reviews each Council recommendation on an individual basis, these recommendations are typically pieces of a more complex management regime taking place in an ongoing management continuum that must address continually evolving information and needs.

The activities involved in continuing fishery management include monitoring, evaluation, adjustment, and revision. This phase can include performance measurement or review of the regulatory activity to determine the effectiveness or usefulness of the measure. Exercising foresight on the structuring of FMPs and regulations can improve efficiency of continuing management by identifying research, data, and monitoring needs to respond to changing conditions in the fishery and establishing an adaptable management structure that facilitates rapid response to those changing conditions.

Frameworking: In addition, planning ahead can enhance management responsiveness to the dynamic nature of fisheries. Regional fishery management councils may identify in fishery management plans a range of recurrent, routine, or foreseeable actions they anticipate they may want to expeditiously implement in the future. If adequately described and analyzed in the fishery management plan and supporting documents, these actions may be implemented through an abbreviated process. The intent of this process is to provide a mechanism to quickly effect needed changes that are anticipated but cannot always be absolutely predicted early in the decision-making process. When this process is used to amend only the regulations, it does not involve a separate 60-day public comment period on the fishery management plan or amendment, as occurs during standard rulemakings. Also, because framework actions are typically analyzed to some degree when they are first identified as such in fishery management plans, they generally require lesser analyses when implemented or adjusted through the framework or regulatory amendment process.

The framework process is not intended to circumvent the standard rulemaking process required to effect substantial changes, and does not obviate the need to comply with all other applicable laws. Every action must be fully analyzed and subject to public comment at some time prior to implementation. The analysis and public comment period may be conducted at the time the action is identified in the fishery management plan or when the action is actually taken. The extent of analysis, notification and public comment required at the time the action is taken depends on whether, and to what extent, those requirements were satisfied when the framework measure was established.

D. Other Applicable Law

1. Overview

Section 303(a)(1)(C) of the MSA requires federal fishery management plans to be consistent with other applicable laws. NMFS must also review Council-recommended FMPs, Amendments, and regulations to determine whether they are consistent with other applicable law. These other laws impose additional procedural, substantive, and timing requirements on the decision process. The particular laws that apply to any given action must be assessed on a case-by-case basis. This section provides an overview of the other applicable laws and executive orders that most frequently apply, including but not limited to the:

- Administrative Procedure Act
- Coastal Zone Management Act
- Endangered Species Act
- Executive Orders 12630, 12866, 12898, 13089, 13132, 13158, 13175, 13272
- Information Quality Act
- Marine Mammal Protection Act
- National Environmental Policy Act
- National Marine Sanctuaries Act
- Paperwork Reduction Act
- Regulatory Flexibility Act

Table X contains a checklist of key considerations for frequently applied laws and executive orders and briefly describes the purpose and key requirements of each. Table Y lists some additional laws and executive orders that may be applicable to the fishery management process.

This section highlights key considerations but is not intended to address comprehensively all requirements of the above-referenced statutes and their implementing regulations. The statutes with their regulations and associated case law are controlling in the instance of any discrepancy between them and this document.

2. Tables X and Y.

Table X. Other Applicable Laws and Executive Orders

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
		Procedural	**Determinations**	**Timing**		
Administrative Procedure Act	Increasing public involvement during rulemaking; ensuring federal agencies consider relevant factors in decision making	Public notice and comment; delayed effectiveness of final rule; documentation of decision-making process	Whether record shows reasoned decision making; applicability of good cause waiver	Public comment period on proposed rule & 30-day delayed effectiveness for final rule (unless an exception or good cause waiver is applicable). Timing requirements imposed by the MSA rather than the APA, including comment periods, are discussed in section E., *infra*.	Administrative record; good cause waiver or exception documented in rule	Document Drafting Handbook, OFR; NOAA Guidelines for Preparing an Agency Administrative Record
Coastal Zone Management Act	Preserving and enhancing the resources of the nation's coastal zone	State notifications and concurrence	Whether action would affect a state coastal zone; consistency with enforceable policies of approved coastal zone management programs	Notify states 90 days before final decision; infer concurrence by day 60 if no state response	Letters to states, state concurrence	NOAA Federal Consistency Regulations
Endangered Species Act	Ensuring actions are not likely to jeopardize the continued existence of	Analytical, documentation requirements	Whether action may affect listed species or critical habitat; jeopardy and destruction/ adverse modification	If formal consultation, biological opinion must be signed before final decision; allow minimum of 135 days after	Letter of concurrence or biological opinion; incidental take	Section 7 ESA Consultation Handbook; ESA Section 7 Regulations; Integration of

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
	any listed species nor result in the destruction or adverse modification of critical habitat		determinations	description of proposed action for formal consultations	statement if take is reasonably certain to occur; reasonable and prudent alternatives if necessary to avoid jeopardy; accompanying MMPA permit needed to authorize take of ESA-listed marine mammals	Endangered Species Act Section 7 with Magnuson-Stevens Act Processes (Policy Directive 01-117, 2015)
Information Quality Act	Maximizing quality, objectivity, utility and integrity of information disseminated to the public	Pre-dissemination review	Quality, objectivity, utility and integrity of information disseminated to the public	Review must be completed prior to the agency disseminating information; peer review required for "influential scientific information"	Pre-dissemination Review Form	NOAA Information Quality Guidelines; NMFS Policy on the Data Quality Act (Policy Directive 04-108, 2012); NMFS Peer Review Guidance (Procedural Directive 04-108-04); National Standard 2 Guidelines

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
Marine Mammal Protection Act	Maintaining or returning marine mammals to their optimum sustainable population sizes;	Analytical, documentation requirements	Whether action will have adverse impacts on marine mammals; categorizing commercial fisheries based on frequency of incidental mortalities and serious injuries of marine mammals; compliance with any applicable take reduction plans	Potential for adverse impacts on marine mammals resulting from fishery management actions assessed during NEPA process	List of fisheries; marine mammal authorization certificate for Category I or II fisheries; take reduction plans; MMPA section 101(a)(5)(E) permit needed to authorize take of Endangered Species Act-listed marine mammals	MMPA Regulations; List of Fisheries: http://www.nmfs.noaa.gov/pr/interactions/lof/;
National Environmental Policy Act	Including the consideration of effects on the human environment in decision making	Public review, documentation, analysis of environmental impacts and a range of reasonable alternatives	Whether action may significantly affect the quality of the human environment	30-day comment period on notice of intent to prepare Environmental Impact Statement (EIS); 45-day comment period on draft EIS (DEIS); at least 90 days between publication of the notice of availability of the DEIS and record of decision; 30-day cooling off period between publication of the notice of availability of the final EIS and record of decision	Categorical Exclusion; Environmental Assessment (EA) and finding of no significant impact; EIS and record of decision	NEPA Compliance for Fishery Management Actions under the MSA (Policy Directive 30-132, 2013); NAO 216-6; CEQ Implementing Regulations; CEQ 40 Questions; NMFS Guidelines for FONSI Preparation

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
						(Policy Directive 30-124-1, 2005).
National Marine Sanctuaries Act	Identifying and designating, as sanctuaries, areas of the marine environment of national significance; protecting sanctuary resources	Analytical, documentation requirements; preparation of Council-recommended fishing regulations	Whether action is likely to injure sanctuary resources (or "may affect" Stellwagen sanctuary resources); whether Council-recommended fishing regulations, or determination that no regulations are needed, are consistent with proposed sanctuary designation's purpose	If proposed action is likely to injure sanctuary resources (or "may affect" Stellwagen Bank), written statement on effects no later than 45 days before the final approval of the action, unless another schedule is agreed to; additional 45 days from receipt of complete information on the proposed action to develop recommendations to protect sanctuary resources.	Written statement regarding effects of action (can be included in contents of EA/EIS); recommendations to protect sanctuary resources	NOAA's Regulation of Fishing in National Marine Sanctuaries; Overview of Conducting Consultation Pursuant to Section 304(d) of the National Marine Sanctuaries Act
Paperwork Reduction Act	Minimizing the paperwork burden resulting from the collection of information by or for the Federal Government	Documentation, public notice and comment, Office of Management and Budget (OMB) review requirements	Whether action contains a collection-of-information requirement; OMB approval	OMB approval of collection-of-information requirements before effective, e.g., before final rule. Approximately 9 month process to prepare for and obtain OMB approval	Form SF83-I	NOAA PRA Guidance; PRA Regulations; NMFS Standard Operating Procedures for PRA Submissions; PRA Review Checklist

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
Regulatory Flexibility Act	Informing public and decision makers of economic impacts; including the consideration of alternatives that minimize expected significant economic impacts	Economic impact analysis; consideration of significant alternatives; public review requirements; SBA notification requirement	Whether a rule will have a significant economic impact on a substantial number of small entities	If a proposed rule may impose a significant economic impact on a substantial number of small entities, regulatory flexibility analyses prepared at time of proposed and final rules; if certifying that rule will not have a significant economic impact, certification must be included in the proposed rule	Certification or Initial and Final Regulatory Flexibility Analyses (IRFA/FRFA); publication of IRFA/FRFA summary in proposed and final rules, respectively.	Guidelines for Economic Review of NMFS Regulatory Actions; Policy on RFA and RIR Review Process (Policy Directive 01-111, 1997); SBA Compliance Guide; E.O. 13272 (RFA Compliance)
Executive Orders						
E.O. 12866 (Regulatory Planning and Review)	Reforming the regulatory process to increase efficiency and transparency, enhance planning and coordination, and improve regulatory oversight	Consider whether action is "significant" under E.O.; consider costs, benefits, alternatives; OMB review requirement	Whether action is a "significant regulatory action" e.g., annual effect on the economy of $100,000,000 or more	10/90/45-day OMB reviews	Listing document and Regulatory Impact Review; If significant, regulatory impact analysis containing analysis of alternatives, costs/benefits	Guidelines for Economic Review of NMFS Regulatory Actions; Policy on RFA and RIR Review Process (Policy Directive 01-111, 1997); NMFS E.O. 12866 Listing Procedures (Policy Directive 30-102, 2014);

Law	Purpose	Effect on FMP and Regulatory Process			Documentation	Resources
E.O. 13132 (Federalism)	Ensuring that the constitutional principles of federalism guide federal agencies during policy development	State consultation, documentation, OMB review requirements (if federalism implications)	Whether action has federalism implications and will result in substantial state compliance costs and is not required by statute, or whether action would result in preemption of state law	If federalism implications, consult with state and local officials early in the process of developing the proposed regulation	Federalism Summary Impact Statement included with rule	E.O. 13132

Table Y. Additional Laws and Executive Orders that May be Applicable

Law	Purpose	Resources
Congressional Review Act	To notify Congress of rules prior to the effective date, and to indicate whether the rule is "major," e.g., likely to have an annual effect on the economy of $100,000,000. (Notification requirement coordinated with E.O. 12866 submissions)	Congressional Review Act
The Florida Keys National Marine Sanctuary and Protection Act (P.L. 101-605)	Designated the Florida Keys National Marine Sanctuary subsuming the Key Largo and Looe Key national marine sanctuaries that were designated under the NMSA in 1977 and 1981, respectively.	The Florida Keys National Marine Sanctuary and Protection Act
The Hawaiian Islands National Marine Sanctuary and Protection Act (P.L. 102-587)	Designated the Hawaiian Islands Humpback Whale National Marine Sanctuary.	The Hawaiian Islands National Marine Sanctuary and Protection Act

The Oceans Act of 1992 (P.L. 102-587)	Designated the Stellwagen Bank National Marine Sanctuary off the coast of Massachusetts.	The Oceans Act of 1992
The National Marine Sanctuaries Preservation Act of 1996 (P.L. 104-283)	Added Stetson Bank to the Flower Garden Banks National Marine Sanctuary.	The National Marine Sanctuaries Preservation Act of 1996
The National Marine Sanctuaries Amendments Act of 2000 (P.L. 106-513)	Gave the President authority to establish a Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, which he did via E.O. 13178 on December 4, 2000.	The National Marine Sanctuaries Amendments Act of 2000
The Antiquities Act	Gives the President authority to protect natural and cultural objects through designation of a national monument; used to designate the Papahanaumokuakea Marine National Monument (Presidential Proclamation 8031) on June 15, 2006.	The Antiquities Act
Migratory Bird Treaty Act	Promotes the conservation of migratory birds and their habitats	Migratory Bird Treaty Act
Executive Orders		
E.O. 12630 (Takings)	Requires federal agencies to prepare a Takings Implication Assessment for regulatory actions that affect, or may affect, the use of any real or personal property.	E.O. 12630
E.O. 12898 (Environmental Justice)	Focuses federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all communities.	E.O. 12898
E.O. 13089 (Coral Reef Protection)	Directs federal Agencies to expand their coral research, preservation, and restoration efforts to preserve and protect the biodiversity, health, heritage, and social	E.O. 13089

	and economic value of U.S. coral reef ecosystems and the marine environment	
E.O. 13158 (Marine Protected Areas)	Strengthens the management, protection, and conservation of existing marine protected areas (MPAs) and encourages establishing new or expanded MPAs	E.O. 13158
E.O. 13175 (Consultation and Coordination with Indian Tribal Governments)	Ensures regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications	E.O. 13175; NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations
E.O. 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds)	Requires some federal agencies to develop and implement a Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service that promotes the conservation of migratory bird populations	E.O. 13186; MOU (agreeing, among other things, to ensure to the extent practicable that environmental analyses required by NEPA evaluate the effects of actions on migratory birds and their habitats)

3. Description of Key Other Applicable Laws

This section, like the tables above, highlights key considerations but is not intended to address comprehensively all requirements of the statutes and their implementing regulations. The statutes, regulations, and appropriate case law are controlling in the instance of any discrepancy between them and this document.

Administrative Procedure Act (APA)
The APA applies procedural requirements to federal rulemakings to increase public access to the federal rulemaking process and to give the public adequate notice and opportunity to comment. It also provides for judicial review of final agency actions.

Under the APA, agencies need to provide a reasonable, meaningful opportunity for comment on proposed regulations. *See also* Executive Order 12866 § 6(a)(referring to "meaningful" opportunity for comment, which in most cases should not be less than 60 days). However, this procedural requirement must be read in conjunction with the procedural requirements of the MSA, which specify time periods for public comment on FMPs and amendments (60 days on FMPs and amendments; 15 – 60 days on regulations). In addition, NMFS can waive the APA's notice and comment requirement as well as the 30-day delay in effectiveness for final rules if good cause exists. The good cause waiver must demonstrate that notice and comment was impracticable, unnecessary, or contrary to the public interest, and an explanation must be published with the rule.

The APA requires that agency decisions be reasonable and based on the facts in the record. To determine whether an agency action was arbitrary and capricious (unreasonable), if challenged in a court of law, a court reviews the agency's administrative record. The administrative record contains all the information that the decision-maker considers and, in court, it provides the evidence that the agency complied with substantive requirements and procedures and that the final decision was not "arbitrary and capricious." However, the APA does not require a particular outcome, as long as the final decision is supported by facts in the record. Thus, when dealing with decisions affected by conflicting priorities or scientific uncertainty, it is important to describe the conflicts and document the rationale for the approach selected, including responding to all comments and acknowledging, even highlighting, areas of contention.

Key Requirements/Considerations:

- Record must support decision
- Public comment requirement applies to most rules, unless an exception or good cause waiver is applicable
- 30-day delayed effectiveness applies to most final rules, unless an exception or good cause waiver is applicable

The APA allows courts to set aside agency actions found to be:

- "arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law"
- "contrary to constitutional right"
- "in excess of statutory jurisdiction"
- "without observance of procedure required by law..."

In addition, the APA allows for any person to petition an agency to issue, amend, or repeal a rule. (See 5 U.S.C. 553(e).) See Appendix 2.E.4.

Coastal Zone Management Act (CZMA)
The CZMA requires federal activities that affect a state's coastal zone to be consistent, to the maximum extent practicable, with the enforceable policies of that state's approved coastal zone management program. Section 307 of the CZMA, also called the "federal consistency" provision, gives states with approved coastal zone management programs a role in federal agency decision making for activities that may affect a state's coastal uses or resources.

Generally, federal consistency requirements apply to federal actions, including rulemakings, within and outside the coastal zone, which have reasonably foreseeable effects on any coastal use (land or water) or natural resource of the coastal zone.

Key Requirements/Considerations:

- A consistency determination must be provided to state agencies at least 90 days before approving the FMP or FMP amendment or publishing the final rule, unless NMFS and the state agency agree to an alternative notification schedule.
- States have 60 days to respond in writing to NMFS' request for concurrence. If no response is received within that time, concurrence is presumed.

Endangered Species Act (ESA)
The ESA requires federal agencies to ensure the activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their critical habitat.

To protect and recover species listed as threatened or endangered, the ESA: (1) Requires federal agencies to use their authorities to carry out programs for the conservation of listed species; (2) Requires federal agencies, through a consultation process, to ensure that their actions are not likely to result in jeopardy or destruction/adverse modification; and (3) Prohibits the "taking" of any endangered species, as well as any threatened species to which the prohibition of take is applied, unless authorized.

It is compliance with this second requirement, known as ESA section 7 consultation, which primarily affects the fishery management process. To demonstrate that an action will not result in jeopardy or destruction/adverse modification, an action agency must engage with NMFS or the USFWS, depending on the species, through an informal or a formal consultation. Informal consultation is documented by a "letter of concurrence," which concludes that the action is "not likely to adversely affect" listed species and their critical habitat. Formal consultation is documented by a biological opinion, which assess whether the action is likely to result in jeopardy or destruction/adverse modification. If the action as proposed is not likely to result in jeopardy or destruction/adverse modification, the biological opinion includes an incidental take statement containing reasonable and prudent measures and terms and conditions that minimize take and must be complied with for otherwise prohibited take to be authorized. If the biological

opinion results in jeopardy or adverse modification determinations, then a reasonable and prudent alternative that would avoid jeopardizing listed species or resulting in destruction/adverse modification of critical habitat is also included. Consultation is not required when an action agency determines an action will have no effect on listed species or their critical habitats.

Key Requirements/Considerations when an action is likely to adversely affect listed species or their designated critical habitat:

- Formal consultation resulting in a biological opinion

For a formal consultation, requirements are:

- Biological evaluation/assessment must be included in FMP, FMP amendments or other supporting analyses
- 135-day maximum consultation period (starting from written request including description of proposed action and initiation of consultation)
- Products of formal consultation include:
    - Biological opinion
    - Incidental take statement
    - Reasonable and prudent measures
    - Reasonable and prudent alternatives (if the proposed action would result in jeopardy or destruction/adverse modification)
    - Conservation recommendations

Timing: Formal consultation should be concluded within 90 days of initiation unless the parties mutually agree to an extension. The consulting agency provides a biological opinion containing its official conclusions regarding the effects of the action within 45 days of completing the consultation. Putting this into the context of developing fishery management actions under the MSA, it is important to note that, when consulting on a specific action, the consultation timeline of 135 days does not begin until a preferred alternative (i.e., proposed action) has been identified and consultation initiated. Thus, for council-recommended actions, the ESA consultation cannot typically begin prior to the Council selecting its preferred alternative. Bearing in mind the strict MSA timelines and constraints on Secretarial review once a Council-recommended FMP or amendment is transmitted, it is important to coordinate with NMFS or USFWS as appropriate as early as possible. In the case of ESA-listed marine mammals, a permit under section 101(a)(5) of the Marine Mammal Protection Act is also needed before the incidental take statement of a biological opinion can become effective. Therefore, additional time that may be needed for the MMPA permit should be factored into the process (see Marine Mammal Protection Act section).

Integration of MSA and ESA section 7 processes

NMFS policy for Integration of Endangered Species Act Section 7 with the Magnuson-Stevens Act Processes, PD 01-117, should be considered when working on fishery management actions that may require ESA section 7 consultations as well as when updating ROAs.

Information Quality Act (IQA)
The IQA, which along with "Data Quality Act," is used to refer to section 515 of the Treasury and General Government Appropriations Act for Fiscal year 2001, 44 U.S.C. 3516, requires federal agencies to ensure the information they disseminate to the public is of appropriate quality, objectivity, integrity, and utility. NOAA guidelines implementing the IQA require a pre-dissemination review of the public information products we disseminate in support of fishery management decisions (including statistical information) to ensure and maximize the quality, objectivity, utility and integrity of information NOAA disseminates.

Key Requirements/Considerations:

- Pre-dissemination review
- Quality, objectivity, utility and integrity of information NOAA disseminates to the public

The IQA and the associated OMB Information Quality Peer Review Bulletin also require peer review for "influential scientific information" prior to dissemination. Under section 302(g)(1)(E) of the MSA, NMFS and the Councils may establish a peer review process for scientific information used to advise the Council about the conservation and management of the fishery. That review process can satisfy the requirements of the IQA. The National Standard 2 guidelines contain additional information on the use of the best scientific information available and the peer review process under MSA section 302(g)(1)(E).

Marine Mammal Protection Act (MMPA)
The MMPA requires that all commercial fisheries be categorized based on the relative frequency of incidental mortalities and serious injuries of marine mammals in the fishery:

> Category I designates fisheries with frequent mortalities and serious injuries incidental to commercial fishing;
>
> Category II designates fisheries with occasional mortalities and serious injuries;
>
> Category III designates fisheries with a remote likelihood or no known mortalities or serious injuries.

Owners of a commercial vessel or non-vessel gear engaging in Category I or II fisheries must obtain a marine mammal authorization certificate from NMFS in order to lawfully incidentally take a marine mammal in a commercial fishery. Owners of a commercial vessel or non-vessel gear engaging in Category III fisheries are not authorized to incidentally take a marine mammal in a commercial fishery; however, should a mortality or an injury occur, the owner will not be in violation of the MMPA provided the owner reports the injury as required under MMPA section 118(e).

To help achieve the MMPA's goal of maintaining or returning marine mammals to their optimum sustainable population sizes, take reduction plans for strategic marine mammal stocks that interact with Category I and II fisheries may be developed. The immediate goal of take

reduction plans is to reduce, within six months of implementation, the incidental mortality or serious injury of marine mammals from commercial fishing to less than the potential biological removal level. The long-term goal is to reduce incidental mortality and serious injury of marine mammals from commercial fishing operations to insignificant levels. Take reduction teams, consisting of representatives from the fishing industry, Councils, state and federal resource management agencies, scientific community, and conservation organizations are responsible for developing take reduction plans.

Section 101(a)(5)(E) of the MMPA states that NMFS, as delegated by the Secretary of Commerce, shall for a period of up to three years allow the incidental taking of marine mammal species listed under the ESA) by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the MSA while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental mortality and serious injury will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock. NMFS Office of Protected Resources issues these MMPA section 101(a)(5)(E) permits.

The potential for adverse impacts on marine mammals resulting from fishery management actions is also assessed during the associated NEPA processes.

Key Requirements/Considerations:

- Marine mammal impacts must be assessed/considered in FMP, FMP amendment or supporting analyses

- When take of marine mammals also listed under the ESA is anticipated, an MMPA permit and associated NID are required for prohibited take to be authorized by the incidental take statement included with the biological opinion. The MMPA permit process includes a public comment period (e.g., 30 days).

For fisheries covered by a TRT, NMFS and Councils should strive to maintain communication with the TRT. It would be advantageous for Councils to be represented as members of the relevant TRTs in their fisheries...

National Environmental Policy Act (NEPA)
NEPA requires federal agencies to assess and consider the effects of major federal actions on the quality of the human environment by considering the environmental impacts of proposed actions and reasonable alternatives to those actions. NEPA also requires that the public be provided the opportunity to help identify, review and comment on such effects, particularly in cases where an environmental impact statement (EIS) is being prepared.

Key Requirements/Considerations:

- EIS required for major federal actions that significantly affect the quality of the human environment
    - Analyze environmental impacts; consider alternatives
    - 30-day minimum public comment period on notice of intent to prepare EIS/conduct scoping (per NAO 216-06)
    - 45-day public comment period on draft EIS (per CEQ regulations)
    - 30-day cooling off period between final EIS and Record of Decision (ROD) (per CEQ regulations); or

- Finding of No Significant Impact (FONSI) determination required for major federal actions supported by Environmental Assessments; or

- Categorical Exclusion (CE): If an action falls within the scope of a category of actions the agency has officially determined do not "individually or cumulatively have a significant effect on the human environment," then then a CE may be asserted and the action is excluded from the requirement to prepare an EA or an EIS. NOAA has described the applicability of categorical exclusions in NAO 216-06. If a CE is asserted, then a memo to the file should be prepared describing the basis for the CE.

Timing: At the time of the final decision (and in the case of an EIS, at least 30 days after the FEIS is noticed and at least 90 days after the DEIS is noticed), agencies must have prepared a ROD, FONSI, or determined that a CE applies. It is important to be aware of the interaction of NEPA and MSA timing requirements. For example, the deadline for the Secretary to approve, disapprove, or partially approve a Council-submitted FMP or Amendment (which is 30 days after the close of the comment period on the FMP or Amendment and often referred to as "Day 95") should not occur prior to signing the ROD or the FONSI. If it is an FEIS, the ROD may not be signed sooner than 30 days after noticing the availability of the FEIS.

National Marine Sanctuaries Act (NMSA)
Under the NMSA, the Secretary is required to provide the appropriate Council with the opportunity to prepare draft regulations for fishing as the Council may deem necessary to implement a proposed sanctuary designation. The Secretary is also required to accept and propose the Council's draft regulations, or determination that regulations are not necessary, unless the Council's action fails to fulfill the purposes of the NMSA and the purposes of the proposed designation. Because the designation document includes determinations about appropriate use and restrictions on use of Sanctuary resources, including fishing, early communication among NOAA offices and Councils is important in ensuring the goals of both MSA and NMSA are met in the most effective way.

The NMSA also requires federal agencies to consult under section 304(d) if a proposed action is likely to injure existing sanctuary resources. A written statement assessing the effects on sanctuary resources (can be included in contents of EA/EIS) must be submitted no later than 45 days before the final approval of the action, unless another schedule is agreed to. If a proposed action is likely to destroy or injure a sanctuary resource, or in the case of Gerry E. Studds Stellwagen Bank National Marine Sanctuary, "may affect" sanctuary resources, the NMSA

provides an additional 45 days from receipt of complete information on the proposed action for the Secretary to develop recommendations to protect sanctuary resources. If the Secretary's recommendations are rejected by the action agency or permit applicant, a written statement explaining the reasons for that decision is required.

Key Requirements/Considerations:

- Council-recommended fishing regulations
- Consultation requirement for actions likely to injure (or may affect) sanctuary resources

Paperwork Reduction Act (PRA)

The PRA requires federal agencies to consider and minimize recordkeeping and reporting burdens when collecting information from the public. OMB approval is required to implement new information collection requirements and clearances expire after 3 years. New collection-of-information approval requests should be submitted at least 30 days prior to the publication of a proposed rule containing a collection-of-information requirement. Once OMB receives the request it has 60 days to review, and except for special emergency submissions, OMB is prohibited from acting for the first 30 days in order to give time for public comment. Accordingly, not including the time necessary to prepare documentation for review, the OMB review process takes from 30-60 days, and 60 days or more if the PRA submission volume is high as is the common.

Key Requirements/Considerations:

- Estimate burden hours, cost and need for action
- OMB review and approval
- Public notice and comment opportunity

Regulatory Flexibility Act (RFA)

The RFA requires federal agencies to describe and analyze the effects of proposed regulations on small entities. If a proposed rule may impose a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) is prepared at the time of the proposed rule and summary of the IRFA is included in the proposed rule. A final regulatory flexibility analysis (FRFA) is prepared for the final rule and a summary is included in the final rule. The IRFA and FRFA are designed to assess the impacts that various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize adverse impacts. However, the RFA does not require that the alternative with the least impact on small entities be selected. If a proposed rule will not have a significant economic impact on a substantial number of small entities, certification of that conclusion is required and must be included in the proposed rule.

Key Requirements/Considerations:

- SBA definitions of small entities
- IRFA for proposed rules that may have a significant economic impact on a substantial number of small entities.

- Analyzing effects of alternatives required for proposed rules that may or will have a significant economic impact on a substantial number of small entities
- Opportunity for public comment
- FRFA required for final rules that may have a significant economic impact on a substantial number of small entities.
- Response to public comments on economic analysis.

    - Small entity compliance guide: for each rule, or group of rules, for which the agency is required to prepare an FRFA, a related law, the Small Business Regulatory Enforcement Fairness Act (SBRFA), requires NMFS to provide a "small entity compliance guide" explaining in "plain English" the requirements of the rule. Failure to do so may be considered by any court reviewing the reasonableness or appropriateness of any proposed fines, penalties or damages in an enforcement action.

    - Periodic review: For all rules that may have significant economic impact on a substantial number of small entities, the agency must periodically review them and determine whether they are still necessary.

  Or

- Certification that the proposed rule will not have a significant economic impact on a substantial number of small entities. SBA concurrence is required when proposed rule is certified.

Executive Orders

E.O. 12866 (Regulatory Planning and Review)
This E.O. on Regulatory Planning and Review requires OMB to review proposed regulatory programs that are considered to be significant; e.g., likely to (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Order.

Key Requirements/Considerations:

- OMB concurrence with significance determination (which NMFS makes in a "Listing Document")
- Analysis of costs, benefits and effective alternatives. (NMFS uses the RIR to document these).
- 90-day + OMB review of significant actions

E.O. 13132 (Federalism)
The E.O. on Federalism requires federal agencies to consult with state and local governments on regulations with federalism implications and to report to OMB on the extent of that consultation, the nature of any state concerns, the need for the regulation, and the extent to which state and local concerns have been met.

Key Requirements/Considerations:

- Consultation requirement for regulations with federalism implications
- Federalism summary impact statements and certifications required for regulations with federalism implications
- OMB review

E.O. 12630 (Takings)
The E.O. on Government Actions and Interference with Constitutionally Protected Property Rights (Takings) requires federal agencies to assess the potential for administrative, regulatory, and legislative policies and actions that affect, or may affect, the use of any real or personal property, to result in a taking.

Key Requirements/Considerations:

- Takings assessment/determination

E.O. 13272 (RFA Compliance)
The E.O. on Proper Consideration of Small Entities in Agency Rulemaking intends to improve compliance with the Regulatory Flexibility Act by requiring federal agencies to notify SBA of rules that may have a significant economic impact on a substantial number of small entities.

Key Requirements/Considerations:

- SBA notification

Other laws and executive orders in addition to those described above also apply to fisheries management actions, including but not limited to: the Congressional Review Act (Congressional notification of rules prior to the effective date); E.O. 12898 (Environmental Justice); E.O. 13089 (Coral Reef Protection); E.O. 13158 (Marine Protected Areas); E.O. 13175 (Consultation and Coordination with Indian Tribal Governments); and E.O. 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds)

E. Rulemaking Details/Types of Rulemakings ((planning in phases 1 and 2, implementing in phases 3 and 4)

1. Overview

To implement a fishery management action, NMFS may need to conduct rulemaking. The MSA provides four different sources of authority for rulemakings and requires different types of procedure depending on the authority used. In addition, the APA requires notice and comment and a delayed effective date on all regulations with limited exceptions. When planning to

develop an MSA fishery management measure, forethought should be given to the available authorities for implementation as well as the standard procedures required.

1. *Standard Rulemaking/Regulations Deemed Necessary By Councils.* MSA sections 303(c) and 304(b) describe the typical scenario for proposed rules prepared to implement an FMP or amendment. As described in section 303(c), a Council submits to NMFS proposed regulations that it "deems necessary or appropriate" for the purposes of— implementing an FMP or amendment (FMP Rulemaking) or modifying regulations that implement an FMP or amendment (Regulatory Amendment). Section 304(b) outlines the procedures for NMFS to review and implement such rules.

2. *Emergency Actions and Interim Measures to Reduce Overfishing.* MSA section 305(c) provides authority for temporary rules to address unanticipated emergencies or reduce overfishing (Emergency Rulemaking, Interim Rulemaking) (Authority: MSA 305(c)). If such a rule changes and existing FMP, it is considered an amendment to that FMP during the period that it is in effect, which is limited to 366 days.

3. *Fishery Management Actions Developed by the Secretary*. MSA sections 304(c)(6) and (7). (Authorities: MSA 304(c)(6), (7)).

4. *General Rulemaking Authority.* In addition to the above authorities, MSA section 305(d) authorizes the Secretary to promulgate regulations in accordance with the APA, that are necessary to implement approved FMPs or regulations or to carry out any other provision of the MSA (Authority: MSA 305(d)).

Each of these authorities is designed to address or adapt to different circumstances. As a result, they may differ in terms of how they are initiated, the effect and duration of the rules to implement them, the degree of public participation they enable or, in some cases, the factual determinations they require. Table Z summarizes the key differences in these rulemaking authorities and processes. Appendix 2, section C.2.b.v, and Appendix 3, section B.3, describe a planning technique, known as "frameworking," through which an FMP, amendment, or regulation can prescribe a procedure that is designed to develop and/or implement future management actions more rapidly when needed and appropriate.

2. Table Z. Rulemaking authorities and processes.

Rulemaking Process/ Authorities	Effect	Who Initiates	How Initiated	When Used	Duration	Examples	Required MSA Procedure for Rulemaking	APA Public Comment Period	APA Delayed Effectiveness	OALs
1. Standard/ Deemed Rule (MSA 303(c), 304(b))	Implement FMP or Amend or modifying regulations implementing FMP	Council	[council public process…]	When necessary or appropriate for implementing FMP or Amend, or modifying existing regulations	In effect until modified (or other duration specified in rule)	Measures needed for rebuilding plans, catch share programs, etc.	Sec: 5 days to initiate review of proposed rule; 15 days to determine consistency with FMP/ Amend/law; 15 – 60 days public comment; 30 days for final rule	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (cannot reduce below MSA 15-day minimum).	30-day delay, unless an exception or good cause waiver is applicable.	
2. Emergency Rule / Interim Measures (MSA 305(c))	If changes existing FMP or Amendment, considered temporary amendment to FMP or Amendment	Council or NMFS	Finding that emergency exists	Address Emergency	180 days with potential 186-day extension	Oil Spill Closure	186-day extension available only if public had opportunity to comment.	Yes, unless an exception or good cause waiver is applicable (no MSA minimum).	30-day delay unless an exception or good cause is applicable	Some OALs provide special provisions for addressing emergencies as well, e.g.,
Emergency Rule										
Interim Measure			Sec. or Council finding need to reduce overfishing	Address Overfishing		Quota Reduction	186-day extension available only if public had opportunity to comment.	Yes, unless an exception or good cause waiver is applicable (no MSA minimum).		

3. Rule Implementing a Secretarial plan or Amendment (MSA 304(c)(6), (7))	Implement an FMP or Amend	NMFS	When determined appropriate by the Secretary (see list of findings in section E.3.c of this Appendix 2).	To implement FMPs or amendments developed by the Secretary pursuant to 304(c)(1), 304(e)(5), 304(g))	In effect until modified (or other duration specified in rule)		60 day public comment period (may be shorter for minor rule revisions)	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (cannot reduce below what MSA requires).	30-day delay unless an exception or good cause waiver is applicable	NEPA and CZMA.
4. General Rulemaking authority (305(d))	Implement FMP/Amend or other MSA provisions/ responsibilities	NMFS	NMFS decides that action is needed	To implement FMP/Amend or carry out other MSA provisions/ responsibilities	In effect until modified (or other duration specified in rule)		N/A	Yes. Reasonable opportunity for comment. May waive part of comment period for good cause (no MSA minimum).	30-day delay unless an exception or good cause waiver is applicable	

3. Description of MSA Rulemaking Authorities and Requirements

a. Standard Rulemaking/Regulations deemed necessary by Councils.

Authorities: MSA sections 304(b) and 303(c)

Standard rulemakings are used to implement fishery management plans or amendments and may be used to amend regulations implementing plans and amendments. A Council typically initiates such rules by submitting to NMFS proposed regulations that it deems[5] necessary or appropriate to implement an FMP or amendment or modifying existing regulations. After Council submission of proposed regulations, NMFS follows the below process:

Key Timing Requirements/Considerations:

- 5 days to initiate review of proposed rule
- 15 days to determine whether proposed rule is consistent with fishery management plan/amendment, MSA and other applicable law
- 15-60 (typically 45) day public comment period on proposed rule
    - This comment period generally runs concurrent with 60-day public comment period on associated fishery management plan or amendment
    - 15-day minimum comment period required regardless of whether an APA exception or good cause waiver is applicable
- 30-days to publish final rule after comment period ends on proposed rule
- Effectiveness of final rule delayed 30 days (unless an exception or good cause waiver is applicable)

Examples: Rules implementing rebuilding plans, catch share programs, etc.

b. Emergency Actions and Interim Measures to Reduce Overfishing

Authority: MSA section 305(c)

Section 305(c) of the MSA authorizes the use of temporary rules to address emergencies or interim measures needed to reduce overfishing, regardless of whether a fishery is managed under an FMP. Such rulemakings may be initiated by a regional fishery management council or the Secretary and are subject to all other applicable laws. APA good cause waivers may be applicable, but each waiver must be assessed on a case by case basis. In addition, several other applicable laws also provide for exemptions, waivers or special arrangements under certain circumstances. [ADD HOTLINKS to relevant NEPA and CZMA regulations, etc.]

[5] Section 303(c) of the MSA describes how "proposed regulations which the Council deems necessary or appropriate" to implement an FMP, amendment, or to modify existing regulations shall be submitted to the Secretary for review. The process by which Councils document that a proposed regulation has been deemed necessary or appropriate is often referred to as "deeming." The deeming process can vary depending on the Council/Region pair, and in some instances does not occur until regulatory text has been developed that is consistent with the intent of, but subsequent to, the Council's final action. Additional Information specific to the deeming process for each Council/Region pair is usually described in the SOPPS.

The Secretary *must* implement emergency or interim regulations if requested by unanimous vote of all present voting members of a regional fishery management council. The Secretary *may* implement emergency or interim regulations requested by a regional fishery management council if the vote is less than unanimous. The Regional Administrator or other NMFS representative participating in the council vote typically opposes such a motion, if necessary to avoid a unanimous vote, to preserve the Secretary's authority to approve or deny the request.

Key Timing Requirements/Considerations

- Opportunity for public comment on proposed rule (unless an exception or good cause waiver is applicable)
- Effectiveness of final rule delayed 30 days (unless an exception or good cause waiver is applicable)
- Final rules generally are limited to 180 days duration but may be extended one time for up to 186 days
    - If public comment has been taken; and, in the case of a council recommendation,
    - The Council is actively working on a permanent fix.
- If responding to a public health emergency or oil spill, an emergency rule may remain effective until the circumstances that created the emergency no longer exist, provided the public has an opportunity to comment and, in the case of a public health emergency, the Secretary of Health and Human Services concurs with the Secretary's action.

Emergency Rule

The MSA provides special authority for NMFS to issue regulations to address "an emergency" or "to reduce overfishing." (MSA sec. 305(c)). These measures must be temporary, but they may modify an FMP during their effective period without going through the MSA regular procedures for development of an FMP or amendment.

Note that while the MSA requirements pertaining to advance notice and comment do not apply to regulations issued under this authority, the APA does apply. As a result, notice and comment can be waived if good cause exists for regulations promulgated under this authority. In contrast regulations promulgated under 304(b)(1) (regulations deemed necessary by Councils) and 304(c) (regulations to implement Secretarial plans or amendments) must comply with the MSA requirements for minimum comment periods.

NMFS has published additional guidance on the use of this authority in Policy Directive 01-101-07, "Policy Guidelines for the Use of Emergency Rules."

See *Policy Guidelines for the Use of Emergency Rules* for additional information.

Examples:

Interim Measures to Reduce Overfishing
Interim measures may be implemented to reduce overfishing while a regional fishery management council develops an FMP, amendment or proposed regulations to address the overfishing. MSA section 304(e)(6) authorizes the use of interim measures to reduce but not end overfishing if they are otherwise in compliance with the MSA. NMFS' guidelines on the use of emergency authority state that, in considering a Council request for interim rulemaking, the Secretary would consider, among other things, the need for and urgency of the action and public interest considerations, such as benefits to the stock or complex and impacts on fishery participants.

**NOTE that the MSA term "interim measures" (sections 304(e)(6) and 305(c)) is different from the terms "interim rule" or interim final rule," which are used in the APA context to refer to a final rule published with good cause waiver of prior notice and comment. The latter types of rules, which are infrequently used, generally provide for public comment after the rules publish.

Examples:

c. Authority to Implement Fishery Management Actions Developed by the Secretary
Authorities: MSA sections 304(c)(6), (7)

The MSA authorizes the Secretary to develop and implement FMPs and amendments in the following circumstances:

- The Secretary *may* take action when a fishery requires conservation and management and the appropriate Council either fails to develop management measures within a reasonable time or recommends measures that are disapproved and not revised/re-submitted (MSA 304(c));
- The Secretary *shall* take action if, within 2-years of an overfished notification, the appropriate Council fails to submit a FMP, amendment or proposed regulations to end overfishing and rebuild affected stocks (MSA 304(e)(5)); and
- The Secretary is authorized to prepare FMPs, amendments and implementing regulations for Atlantic Highly Migratory Species (MSA section 304(g)).

Timing Requirements/Considerations
- In general, the process for developing a Secretarial FMP and accompanying regulations requires public hearings and consultations with appropriate Councils and other federal agencies.
- Secretarial FMPs and implementing regulations are required to have 60-day comment periods, except that comment periods may be shorter for proposed rules that are minor revisions to existing regulations.
- Additional procedures and requirements apply in the case of preemption (i.e. Secretarial action to regulate a fishery within the boundaries of a State) (MSA section 306(b)).

d. General Rulemaking Authority

Authority: MSA sections 305(d)

The Secretary may promulgate regulations in accordance with the APA, that are necessary to implement approved FMPs or regulations or to or to carry out any other provision of the MSA.

4. Petitions for Rulemaking

Any person may petition NMFS, pursuant to 5 U.S.C. 553(e), to issue, amend, or repeal a rule. The AA shall determine whether the petition contains enough information to enable NMFS to consider the substance of the petition. NMFS will notify the petitioner of the decision to proceed or not to proceed with the suggested rulemaking. Additional guidance on responding to petitions for rulemaking is available from NMFS Office of Sustainable Fisheries.

APPENDIX 3

Appendix 3. Record and Documentation

A. The Administrative Record

The Administrative Procedure Act (APA) sets forth specific requirements to enhance agency accountability to the public. The key components of the APA require agencies to utilize a notice and comment process, require a delay in the effectiveness of final rules, and require the final decision to be reasonable based on the facts in the record. Thus the Administrative Record (AR), the body of information on which agency decision-makers base their decisions, is of fundamental importance.

Councils propose fishery management actions which, if adopted and implemented by NMFS, become "agency actions." under the APA, the law that governs procedures for agency decision making. The Administrative Record (AR) is the record of that decision process, including the rationale supporting agency decisions. The AR must fully and accurately document the facts and processes used to make a final decision and how that decision complied with substantive and procedural requirements under applicable law. The AR must include all documents that NMFS considered in making the decision, including documents considered by the Council and other documents that have logical connection to the action.

A December 21, 2014, memo from NOAA General Counsel establishes guidelines for compiling an agency AR. In summary, the record MUST:

- Rationally explain the agency's decisions.
- Contain those documents necessary to show a complete history of the decision making process.
- Include relevant factual information and data that is in support of and in opposition to the decision made.
- Outline and explain how differing points of view were considered and provide explanations as to why the Council/agency chose a certain preferred course of action.
- Demonstrate the substantive and procedural requirements of the MSA, other applicable law, and executive orders were followed. For NMFS, as explained in Section 2(D), these may include the notice-and-comment provisions of the APA; the provisions of the MSA, NEPA, and other applicable laws; and executive procedural policies, such as those outlined in E.O. 12866 and E.O. 13132.

Several key documents found in a complete AR include, but are not limited to:

- The final decision document (whether an FMP or an EIS/EA) signed by the official with authority to make the decision.
- Technical and scientific information, such as surveys, models, and stock assessments.
- All *Federal Register* notices related to the rulemaking process.
- Any comments a Council or the agency receives during the decision making process.

- Transcripts, minutes, summaries or Web recordings of meetings, where such documents are required to be developed by law. This includes any presentations or handouts provided during such events.
- Any analyses required by other applicable laws, which support development of the final action.

Consult NOAA General Counsel with specific questions about what to include in a particular AR.

B. Documentation: Examples, Models, and Techniques

1. Templates for Standardized Analysis

Some Council/Region pairs use standardized templates to develop FMPs, amendments, and other documents. Standardizing documentation, when possible and appropriate, can improve efficiency and readability, and facilitate both public and internal review by making it easier for readers to locate the information they are most interested in and see how the various requirements of the MSA, other applicable laws, and executive orders have been addressed. Where available, Councils are encouraged to post templates on their websites to enhance transparency.

- Caribbean Fishery Management Council (post and hotlink)
- Gulf of Mexico Fishery Management Council (post and hotlink)
- Mid-Atlantic Fishery Management Council (post and hotlink)
- New England Fishery Management Council (post and hotlink)
- North Pacific Fishery Management Council (post and hotlink)
- South Atlantic Fishery Management Council (post and hotlink)

2. Consolidated FMPs

Some Councils have prepared Consolidated FMPs:

- [Example 1]
- [Example 2]
- [Example 3]

3. Techniques for Enhancing Efficiency

To the extent that time, resources, and data allow, Council/Region pairs may consider using the following techniques to enhance efficiencies.

a. Frameworking is an adaptive management planning technique through which an FMP, amendment or regulation can prescribe a procedure that is designed to implement future regulatory actions more rapidly when needed and appropriate.

Regional fishery management councils may identify in FMPs a range of routine framework or regulatory actions they anticipate they may want to expeditiously implement through future rulemakings. Examples include quota adjustments, in-season closures, and trip limit or bag limit adjustments. If adequately described and analyzed in the fishery management plan and supporting documents, framework actions may be implemented through an abbreviated process and, as such, not require an FMP amendment. The intent of this process is to provide a mechanism to quickly effect needed changes that are anticipated but cannot always be absolutely predicted early in the decision process. When this process amends only the regulations rather than the FMP, it does not involve a separate 60-day public comment period on the FMP or amendment. Also, because framework actions are typically analyzed when they are first identified as such in FMPs, they generally require less analysis when implemented or adjusted through the framework or regulatory amendment process.

The framework process is not intended to circumvent the standard MSA FMP and rulemaking processes required to effect substantial changes, and does not obviate the need to comply with other applicable laws. Every action must be fully analyzed and is subject to APA notice-and-comment rulemaking requirements and requirements of other statutory authorities. The analysis and public comment period may be conducted at the time the action is identified in the fishery management plan or when the action is actually taken. The extent of analysis, notification and public comment required at the time the action is taken depends on whether, and to what extent, those requirements were satisfied when the framework measure was established.

b. NEPA Efficiency Tools

NOAA's Administrative Order implementing NEPA highlights several approaches to streamline NEPA compliance, including the use of programmatic NEPA documents, tiering, and incorporation by reference.

Programmatic NEPA Documents: The Council on Environmental Quality encourages agencies to use programmatic EISs to eliminate repetitive discussion of the same issues. Programmatic NEPA reviews assess the environmental impacts of proposed policies, plans or programs for which subsequent actions will be implemented either based on the programmatic environmental review document or based on subsequent NEPA reviews tiered to the programmatic review. A programmatic environmental review should analyze the broad scope of actions within a policy or programmatic context. Subsequent EISs or EAs for specific actions that fall within the scope of that programmatic NEPA document then need only summarize the issues discussed in the broader statement with respect to the specific action and incorporate discussion from that environmental review by reference.

Effective programmatic NEPA documents should present document reviewers with the agency's anticipated timing and sequence of decisions, highlight which decisions are supported by the programmatic NEPA document and which decisions are deferred for some later time, and describe the time-frame or triggers for a tiered NEPA review. A December 18, 2014, memo from the Council on Environmental Quality provides additional guidance on the effective use of programmatic NEPA reviews. Appendix B (p. 49) of that document contains examples of programmatic NEPA reviews.

NEPA Advanced Planning Procedure and Tiering

The Council on Environmental Quality's NEPA guidance promotes the use of tiering as described in 40 CFR 1502.20. A draft June 2014 NMFS document, "Revised and Updated NEPA Procedures for Magnuson-Stevens Act Fishery Management Actions" 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 EIS could establish a NEPA Advanced Planning Procedure, 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.

A December 18, 2014, memo from the Council on Environmental Quality provides additional guidance on the use of tiering. The CEQ describes tiering as the review of a broad-scale agency action in a programmatic EIS with subsequent narrower environmental reviews that incorporate by reference the general discussions in the broad environmental review and concentrate solely on the issues specific to the statement subsequently prepared. Tiering can help the agency focus on the issues that are ripe for decision and exclude from consideration issues already addressed or those that are premature for review. Appendix A (p. 47) of the CEQ document provides a table of key distinctions between programmatic NEPA documents and the subsequent tiered NEPA reviews.

Incorporation by Reference

The Council on Environmental Quality recommends incorporating other materials by reference to reduce the size of an environmental review document and avoid duplicative effort. When doing so, it is important to briefly describe the content of the material and provide a citation. The brief description should identify the referenced materials and the entity that prepared the materials, inform the reader of the purpose and value of the materials (e.g., explain how the information or analyses are relevant to the issues associated with the proposal under review), and synopsize the basis provided in those materials that support any conclusions being incorporated. No material may be incorporated by reference unless it is reasonably available to interested persons within the time frame allowed for comment on the environmental review document. Examples of information that may be incorporated by reference include "affected environment" chapters from previous EISs when the affected environment for the proposed action has not undergone noticeable changes, and discussions of cumulative impacts of a proposed action, if such impacts were discussed in a previous environmental review addressing a similar action.

A March 6, 2012, memo from the Council on Environmental Quality provides additional suggestions for preparing more efficient and timely NEPA documents.

APPENDIX 4

Appendix 4. Additional Resources and Appendices

- Comparative Matrix of Council Processes
- ESA Memoranda of Understanding
- NEPA Policy Directive
- Regional Fishery Management Council Statements of Organization Practices and Procedures
- Regional Fishery Management Council Websites
  - Caribbean Fishery Management Council
  - Gulf of Mexico Fishery Management Council
  - Mid-Atlantic Fishery Management Council
  - New England Fishery Management Council
  - North Pacific Fishery Management Council
  - Pacific Fishery Management Council
  - South Atlantic Fishery Management Council
  - Western Pacific Fishery Management Council
- Regional Operating Agreements (update PDS and hyperlink)
  - Caribbean Fishery Management Council
  - Gulf of Mexico Fishery Management Council
  - Mid-Atlantic Fishery Management Council
  - New England Fishery Management Council
  - North Pacific Fishery Management Council
  - Pacific Fishery Management Council
  - South Atlantic Fishery Management Council
  - Western Pacific Fishery Management Council
- Tracking Actions through the Process
  - http://www.gulfcouncil.org/fishery_management_plans/scoping-thru-implementation.php
  - http://www.alaskafisheries.noaa.gov/sustainablefisheries/status/amendments.pdf
  - http://www.pcouncil.org/groundfish/trawl-rationalization-amendment-20-and-intersector-allocation-amendment-21-trailing-actions/
- Transmittal Policy Directive
- NEPAnet
- Marine Mammal Take Reduction Program
  - MMPA List of Fisheries
  - Take Reduction Teams/Plans
  - MMPA injury/mortality reporting form
  - Marine mammal authorization program

Other

- Record retention: Link to national archives, Federal Records Act, new guidance being developed by Croft, other?