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September 29, 2014

Mr. Steve Leathery
NMFS NEPA Coordinator, Room 10828
1315 East-West Highway
Silver Spring MD 21755

Re: Comments on draft revised and updated National Environmental Policy Act procedures for fishery management actions under the Magnuson-Stevens Act (79 FR 36726) – NOAA-NMFS-2014-0024

Dear Mr. Leathery:

The Pew Charitable Trusts submits the following comments on the Draft Revised and Updated National Environmental Policy Act (NEPA) procedures (“Policy Directive”) for fishery management actions taken under the Magnuson-Stevens Act (MSA).¹ The Policy Directive replaces the flawed 2008 proposed rule that has now been formally withdrawn.² We applaud the agency’s withdrawal of that proposed rule, which, as we highlighted in our August 12, 2008 comment letter, included many provisions that were inconsistent with NEPA and the well-established White House Council on Environmental Quality’s (CEQ) regulations for implementing NEPA.

The National Oceanic and Atmospheric Administration’s Fisheries Service (NOAA Fisheries, after extensive consultation with the regional fishery management councils (Councils) and CEQ, proposes to use this draft policy distributed on June 30, 2014 as the basis for issuing revised and updated NEPA procedures for MSA actions in the form of a line-office supplement to National Oceanic and Atmospheric Administration Administrative Order (NAO) 216–6.³ Pew agrees with NOAA Fisheries that more effective coordination and integration of NEPA review of MSA actions can best be achieved through these improvements to internal policies and guidance documents, and that formal rulemaking does not need to be re-initiated. The Policy Directive outlines a framework of revised procedures, largely based on existing NEPA regulations, for achieving a consistent, timely, and predictable regulatory process for NEPA review of fishery management decisions, as Congress intended,⁴ and therefore satisfies the MSA requirement for NOAA Fisheries to revise and update its environmental review procedures for compliance with NEPA.⁵

¹ 79 FR 36726. The current draft Revised and Updated MSA NEPA Procedures is slightly modified from the draft Interim Policy Directive of 2013. Both are available at: http://www.nmfs.noaa.gov/sfa/laws_policies/msa/nepa.html.

² NMFS formally withdrew the proposed rule on July 14, 2014: 70 FR 40703, <http://www.gpo.gov/fdsys/pkg/FR-2014-07-14/pdf/2014-16426.pdf>. See Proposed Rule, Environmental review process for fishery management actions, 73 FR 27998 (May 14, 2008), <http://www.gpo.gov/fdsys/pkg/FR-2008-05-14/pdf/E8-10271.pdf>.

³ 79 Fed. Reg. at p. 36726. The NOAA Administrative Order 216-6 is available at: http://www.nepa.noaa.gov/NAO216_6.pdf, also at: <http://www.nepa.noaa.gov/procedures.html>.

⁴ Senate Report 109-229 on S. 2012, April 4, 2006, at 6.

⁵ MSA § 304(i), 16 U.S.C. § 1854(i).

Overall, the draft Policy Directive is a significant improvement over the 2008 proposed rule. It affirms the separate but compatible legal requirements of NEPA and the MSA, clarifies that ultimate legal responsibility for NEPA lies with NOAA Fisheries, and commits the agency to follow the established CEQ regulations when determining the adequacy of NEPA procedures and environmental review documents. Pew supports many elements of the Policy Directive. However, it can be improved in a number of important ways. Specifically, we urge that NOAA Fisheries:

- Strengthen the procedural safeguards intended to ensure compliance with all aspects of NEPA when Councils conduct activities associated with NEPA requirements.
- Strengthen and revise the procedures addressing conflicts of interest inherent in Council preparation of NEPA documents.
- Withdraw the optional forms of non-standard documentation that are intended as procedural shortcuts to NEPA compliance and focus instead on improved use of existing NEPA documents and procedures to achieve efficiencies in environmental review.
- Require that Councils and the agency actively engage and solicit input from the greater public at every stage of the NEPA process “to the fullest extent possible.”

We will discuss these recommendations in more detail below.

The importance of NEPA in federal fisheries management

NEPA mandates that environmental concerns be incorporated into the federal decision-making process and that federal agencies “promote efforts which will prevent or eliminate damage to the environment.”⁶ Pew is pleased to see that the Policy Directive affirms the vital role of NEPA in achieving greater stewardship of the marine environment and living resources, including U.S. fish populations managed under MSA. NEPA environmental reviews have made it possible to protect thousands of square miles of coral formations, begin the rebuilding of depleted fish populations, and reduce mortality of endangered marine wildlife, including sea turtles and marine mammals. Effective implementation of NEPA will continue to be important to ensure more resilient, sustainable ocean ecosystems for current and future generations.

In practice, NEPA and the implementing regulations from CEQ⁷ serve two key functions – ensuring robust environmental review that includes an analysis of reasonable alternatives to proposed actions, and engaging the public in order to promote more informed federal agency decisions. All federal agencies (NOAA Fisheries in the case of U.S. fisheries management and conservation) must prepare a thorough assessment that gives full consideration of environmental consequences of a major federal action prior to its undertaking.⁸ Early access to this analysis is crucial for more informed decision-making and the identification of ways to mitigate or avoid negative environmental impacts.⁹

NEPA also requires federal agencies to actively solicit and consider input of public officials and citizens. The public is engaged during the scoping of issues linked to a particular decision and the review of environmental impact. The agency must gather and analyze public comments *before* decisions are made and *before* actions are taken. NEPA promotes transparency, accountability and open government – key

⁶ NEPA, P.L. 91-190, 42 U.S.C. §§ 4321-4347, January 1, 1970, as amended.

⁷ Council on Environmental Quality (CEQ), Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR §§ 100-1508, available at: www.NEPA.gov and http://ceq.hss.doe.gov/nepa/regs/ceq/toc_ceq.htm.

⁸ 42 U.S.C. § 4332(2)(C).

⁹ 40 CFR §1501(a)-(c). See also: NOAA NEPA Handbook (May 2009), p. 11, available at: http://www.nepa.noaa.gov/NEPA_HANDBOOK.pdf.

goals of the Obama Administration.¹⁰ In the fishery management context, encouraging and facilitating wide public participation provides a societal perspective on fisheries management planning and decisions that would otherwise be viewed primarily from the perspective of vested fisheries interests associated with the Council process.

Elements of the Policy Directive We Support

Pew supports much of the Policy Directive. For the most part, it outlines a practical, flexible set of procedures to achieve consistent implementation of the requirements of NEPA and the MSA. It builds upon the extensive collaboration and integration of NEPA review in MSA decision-making processes to help accomplish the objectives and requirements of both laws.

Specifically, we support that the Policy Directive:

- Affirms the separate but compatible legal requirements of NEPA and the MSA while at the same time seeking to establish a single, consistent, timely, and predictable regulatory process for environmental review of fishery management decisions, as Congress intended.¹¹
- Clarifies that ultimate responsibility for implementing NEPA lies with NOAA Fisheries, which must ensure that NEPA procedures and environmental review documents are compliant with CEQ regulations and are implemented consistently in all regions, as well as ensure that “documents are adequate for Secretarial review and fully compliant with NEPA prior to approval or partial approval by the Secretary of Commerce.” The Policy Directive emphasizes that if NEPA documentation is not completed prior to Council transmittal of the proposed action for Secretarial review, the risks of delays and disapproval will increase.
- Underscores the importance of early planning and collaboration between NOAA Fisheries and Councils, and completing as much of the NEPA review process as practicable during the Council’s development of its management recommendations so that this review can inform the decision-making process instead of defending or justifying decisions already made. The Policy Directive asserts that MSA and NEPA requirements for schedule, format, and public participation are complementary and may be conducted jointly as long as all responsibilities are fulfilled but recognizes that, in some cases, it may be necessary to separate the two statutes’ procedures and documentation in order to ensure compliance with all requirements.
- Encourages NOAA Fisheries and the Councils to engage the public early in the environmental review, including scoping an issue, identifying alternatives, soliciting input, and developing environmental assessment documents.
- Acknowledges the importance of considering ecological information, and the requirement to use it in planning and development of resource-oriented actions, as required by NEPA itself in Section 102(2)(E).¹²

While the Policy Directive includes many aspects we support, we strongly recommend that several elements of the Policy Directive be strengthened to address serious shortcomings.

¹⁰ Presidential Memorandum on Transparency and Openness in Government (January 21, 2009), available at: <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>, <http://www.whitehouse.gov/the-press-office/statement-press-secretary-presidents-signing-two-executive-orders-and-three-memoranda>.

¹¹ Senate Report 109-229 on S. 2012, April 4, 2006, p. 6.

¹² 42 U.S.C. §§ 4332(2)(E).

1. NMFS must strengthen the procedural safeguards intended to ensure compliance with all aspects of NEPA conducted in the Council process

As previously mentioned, the draft Policy Directive promotes conducting as much of the NEPA process as practicable in the regular Council process. This allows the Councils and the public to be informed of potential environmental impacts and alternatives during the development of a management recommendation and prior to a Council's vote on a particular management decision. In key respects, this is consistent with the intent of the CEQ regulations to prepare environmental assessments early enough that they inform the decision-making process and are not used to justify decisions already made.¹³

However, many NEPA processes are already carried out by Councils, and the Policy Directive fails to adequately address the shortcomings of this practice. The NEPA process requires formal announcements to engage the interested public, an early and open public scoping of significant issues related to a proposed action, public comment on draft and final documents, analysis of comments and alternatives, and accessible documentation and records. The Council decision-making process is typically not as rigorous. So, when Councils oversee elements of the NEPA process and use the more informal Council process to undertake this work, key aspects of NEPA analysis and public participation may be shortchanged.

While the Policy Directive proposes that NMFS and the Councils should engage the public as early as practicable in the development, scoping, and identification of alternatives for both Environmental Assessments (EAs) and Environmental Impact Statements (EISs) (p. 9), greater rigor must be required to ensure the spirit and letter of NEPA are met in the Council process. Formal NEPA scoping is an important component of an open government and can lead to the discovery of alternatives or significant impacts that were overlooked by the lead agency and save time in coming to a final decision.¹⁴ But, without proper notice, members of the general public, local agencies, Tribes, and other entities interested in participating in NEPA-based analysis and process will have reduced opportunity to engage in meaningful ways. Too often, public comment on fishery management decisions is only available through notices distributed through Council websites and the limited public comment periods provided during Council meetings. These Council public comment periods may not coincide with the Council discussion period on a particular action, and on some occasions, they have occurred after Council debate has ended and decisions have been made. Such practices under Council procedural rules severely limit meaningful public participation in environmental review and are not consistent with the more robust requirements of NEPA. Procedural safeguards must be strengthened so that existing NEPA process requirements outlined by CEQ regulations are fully met and NMFS fulfills its own stated responsibility to oversee all stages of the NEPA process.

At a minimum, NMFS must ensure that the Councils follow the requirements for notice of scoping and comment periods in the CEQ regulations¹⁵ so that the public may have meaningful opportunities to engage and comment in an open process on: the purpose and need; the scope of significant issues related to a proposed action; a reasonable range of alternatives to consider in the analysis; and any mitigation measures that may reduce or avoid adverse impacts of the proposed action and alternatives. The NEPA scoping portion of a Council meeting should also be included in the Council meeting agenda and identified as such, so that all interested members of the public who wish to participate in the NEPA process may do so. If Council meetings and processes are to be relied on as the venue and approach for determining the scope of significant issues to be addressed by a fishery management action, formal notice

¹³ 40 CFR § 1502.5.

¹⁴ CEQ (1981), Forty Questions #13, 46 FR 18026 (March 23, 1981), as amended, 51 FR 15618 (April 25, 1986). Available at: <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>.

¹⁵ 40 CFR § 1501.7.

to the general public that a *NEPA scoping process* is underway needs to be clearly and widely communicated.

The problems associated with NEPA implementation in the Council process have their roots in the more or less complete delegation of agency responsibility for the NEPA process as described in NOAA Fisheries' existing internal guidance on these matters, the Operational Guidelines for the Fishery Management Plan Process.¹⁶ The NEPA guidance in NOAA Administration Order 216-6 does not address the role of the Council or its procedural nexus in the NEPA process, but the NOAA Fisheries Operational Guidelines ascribe a major role for the Councils in determining not only the scope of issues to be addressed and the range of alternatives to be considered in NEPA review, but also in determining whether an EA or an EIS is required and in preparing the draft NEPA document itself.¹⁷ Although the Operational Guidelines do not have the full force of regulations, they do provide insights into how NOAA Fisheries has traditionally viewed the relationship of the NEPA process to the Councils. Much of the confusion over roles and responsibilities for NEPA in fisheries decision-making stems from this delegation of the agency's NEPA responsibilities to the Councils, with little or no agency oversight or supervision. The Operational Guidelines are seriously out of date and do not reflect the policy or procedural revisions in the Policy Directive, having last been revised in 1997. To achieve consistency with the stated goals and fulfill the goals of this Policy Directive, NOAA Fisheries must also revise and update the Operational Guidelines accordingly. In doing so, NOAA Fisheries must assume full responsibility for any part of the NEPA process that is carried out through the Council process under the MSA, including public scoping, identification of significant issues to be addressed, alternatives to be considered, mitigation measures, as well as preparation of NEPA documents.

2. NOAA Fisheries must strengthen and revise the procedures addressing conflicts of interest inherent in Council preparation of NEPA documents

Councils play an important, but ultimately advisory, role in federal fisheries management under the MSA. Councils develop and submit fishery management plans, plan amendments, and regulations to NOAA Fisheries and the Secretary of Commerce, who has the legal responsibility to approve, partially approve, or disapprove Council-developed plans and to ensure legal requirements of the MSA are fulfilled.¹⁸

Councils include the principal State agency officials who oversee marine fishery management in the states of a particular region, regional directors of NOAA Fisheries, and several members who are nominated by State Governors and appointed by the Secretary of Commerce. To be appointed as a Council member, an individual must, by reason of their occupation or experience, have specific knowledge or expertise in the fisheries of the particular region. Often, these appointed members are commercial or recreational fishermen, or are employees or leaders in fishing organizations. So, by design, Council members often have financial or other special interests in the decisions they make. Due to their interests, Council members may have a difficult time taking an expansive view of the full scope of broader environmental issue or a set of reasonable alternatives to a proposed action.

Ensuring NEPA is implemented is the requirement of federal agencies. Under this statute, NOAA Fisheries is required to give full consideration of the environmental impacts and consequences of Council-proposed fishery actions in order to achieve national policy goals for environmental stewardship,

¹⁶ NMFS Operational Guidelines for the Fishery Management Plan Process, NMFS 01-101-03 (May 1, 1997). Available at: http://www.nmfs.noaa.gov/sfa/domes_fish/GUIDELINES.PDF.

¹⁷ Beth C. Bryant (2006), NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform, Harvard Environmental Law Review 30: 441-479. Also see: NMFS Operational Guidelines, pp. A-15 to A-22.

¹⁸ MSA §§ 302(h)(1) and 304(a)(3), 16 U.S.C. §§1852(h)(1), 1854(a)(3).

fulfill its role as trustee of public fishery resources for future generations, and comply with other relevant statutes.¹⁹

CEQ regulations require NOAA Fisheries, as the lead agency in federal fisheries management, to prepare EISs or delegate responsibility to a contractor of its choosing under the agency's supervision. NOAA Fisheries has responsibility to ensure that any contractor involved in preparation of an EIS does not have a conflict of interest in the outcome of the project, and contractors must sign a disclosure statement to that effect.²⁰

Outside the fishery context, non-federal agencies frequently prepare NEPA documents as contractors or consultants. However, rules to safeguard against undue conflicts of interest are employed. In the fishery context, such precautions seem to be overlooked or discounted. NOAA Fisheries has routinely delegated responsibility for preparing NEPA documents to many of the regional Councils. Council-drafted documents are reviewed by NOAA Fisheries and NOAA's General Counsel to ensure that they comply with NEPA regulations and NAO 216-6, but agency oversight and supervision of Council document preparation is often lacking. The Policy Directive would continue the practice of delegating the preparation of NEPA documents to Councils while providing minimal oversight (p. 8).

Pew supports close collaboration between NOAA Fisheries and Councils in developing NEPA documents. However, to comply with CEQ regulations and ensure a full, fair, and impartial evaluation of the environmental impacts and consequences of a project, as intended by NEPA, NOAA Fisheries should be the primary author of such documents. We urge NOAA Fisheries to develop conflict of interest guidance and financial disclosure requirements for Council members and staff who are involved in developing NEPA documentation with NOAA Fisheries staff. Finally, NOAA Fisheries should be active in ensuring proper, diligent oversight of scoping and document preparation to prevent individuals with financial or other interests from unduly influencing the direction of NEPA review.

3. NMFS should withdraw the optional forms of non-standard documentation that are intended as procedural shortcuts to NEPA compliance and focus instead on improved use of existing NEPA documents and procedures to achieve efficiencies in environmental review

The Policy Directive introduces new forms of NEPA compliance documentation - the NEPA Advanced Planning Procedure (NAPP), the NEPA Compliance Evaluation (NCE), the Memorandum of NEPA Compliance (MNC), and the Supplemental Information Report (SIR). These documents largely replicate the "framework implementation procedure" (FIP) and non-standard forms of NEPA documentation such as the Memorandum of Framework Compliance that were first proposed in the flawed 2008 proposed rule.²¹ Pew continues to oppose the inclusion of such alternative NEPA documentation.

The agency proposes these new, non-standard NEPA documents to reduce duplication and promote efficiencies under NEPA (pp. 13-15). They are premised on early planning and coordination, building off prior NEPA analyses, combining of documents, etc. – all objectives authorized by the CEQ regulations under the concept of tiering.²² Tiering allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from a NEPA analysis of broader scope into one of lesser scope.²³ Unlike the established procedures for tiering off

¹⁹ NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C).

²⁰ 40 CFR § 1506.5(a)-(c).

²¹ Compare pp. 14-15 of 2014 Policy Directive to proposed regulations in 50 CFR 700.104 of the 2008 proposed rule, 73 Fed. Reg. at pp. 28012-13.

²² 40 CFR §§ 1502.20, 1508.28.

²³ CEQ (1981), Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026 (March 23, 1981), as amended.

CEQ-sanctioned NEPA documents and analyses, however, the Policy Directive's largely untried procedures and documentation have no rules for format and content, are not subject to public comment periods, and are not even required to be made publicly available.

The use of such alternative documents raises a number of concerns, particularly since they are envisioned as "shortcuts" that would allow NOAA Fisheries to reach a finding of no significant impact (FONSI) and tier off an existing NEPA analysis without further environmental review. Without clear standards or guidance for the use of such procedural shortcuts, we are concerned that they could be misused as a way to sidestep NEPA compliance. Of the proposed alternative documentation, only the SIR has been used thus far – most notably in 2014 as a substitute for an EA to approve recent catch specifications in the North Pacific groundfish fisheries. The SIR incorporated by reference to a prior (2007) TAC Specification EIS, which contains analysis that is, at best, increasingly stale.²⁴

Although NOAA Fisheries intends these untested procedures and forms of documentation to promote NEPA efficiencies, they are more likely to create confusion and controversy. The existing procedures for tiering and forms of NEPA documentation sanctioned by NEPA and the CEQ regulations are well-tested in management practice. They afford ample opportunities to reduce duplication, minimize paperwork, and achieve efficiencies under NEPA. The CEQ guidance on efficient reviews under NEPA provides additional suggestions on how agencies can achieve efficiencies under the existing regulatory requirements.²⁵ There is simply no need to create novel procedures and non-standard forms of documentation if NOAA Fisheries simply follows existing guidance and best practices for NEPA compliance. Therefore, we urge NOAA Fisheries to abandon the misguided effort to invent procedures and documents that are duplicative and unnecessary.

If NOAA Fisheries wishes to explore new avenues for achieving efficiencies and facilitating tiering under NEPA, we encourage the agency to consider wider use of Programmatic EISs. There are many possible advantages to conducting Programmatic NEPA analyses, which are deemed to be more strategic rather than tactical in focus.²⁶ Because they are generally prepared for a broad federal action such as the adoption of policy, plan or program,²⁷ Programmatic EISs support policy- and planning-level decisions and enable federal agencies to integrate environmental considerations at an early stage²⁸ and facilitate incorporation by reference.²⁹ Programmatic EISs can serve as a means to inventory relevant historical or other baseline information that provides a starting point for the analysis of cumulative and indirect impacts of a proposed management plan or program.³⁰ And, cross-cutting issues that affect multiple management plans or an entire management area, such as assessing climate change impacts on managed species and habitats, could be more thoroughly addressed through a Programmatic EIS.

In the event that non-standard forms of documentation are used, as has recently occurred in the case of the SIR in Alaska, NMFS should, at a minimum, apply the same standards and requirements that apply to traditional NEPA documentation. EAs and FONSI are considered to be public "environmental

²⁴ See Alaska Groundfish Harvest Specifications Supplementary Information Report (Jan/Apr 2014):

<http://alaskafisheries.noaa.gov/analyses/groundfish/041014bsaigoaspecssir.pdf>.

²⁵ 77 FR 14473 (March 12, 2012).

²⁶ Ronald E. Bass et al. (2001), *The NEPA Book: A step-by-step guide on how to comply with the National Environmental Policy Act*, Salano Press Books, Point Arena, CA, p. 63.

²⁷ 40 CFR § 1502.4(b).

²⁸ CEQ, *Effective Use of Programmatic NEPA Reviews*, Draft for public comment, August 22, 2014

http://ceq.hss.doe.gov/current_developments/IssuesDraftProgrammaticGuidance.html. Also see: Beth C. Bryant (2006), *NEPA Compliance in Fisheries Management: The Programmatic Supplemental Environmental Impact Statement on Alaskan Groundfish Fisheries and Implications for NEPA Reform*, HELR 30: 441-479.

²⁹ 40 CFR §§ 1502.20, 1502.21, 1508.28.

³⁰ CEQ, *Effective Use of Programmatic NEPA Reviews*, Draft for public comment, August 22, 2014

http://ceq.hss.doe.gov/current_developments/IssuesDraftProgrammaticGuidance.html.

documents” under the CEQ regulations³¹ and therefore they must be available to the public and agencies must give notice of their availability.³² In cases where an EIS would normally be required, where the proposed action is unprecedented, or when the action involves significant controversy, the CEQ guidance also indicates that FONSI must be made available for public review for 30 days prior to an agency’s determination on whether to prepare an EIS.³³ We suggest this higher standard of public review and comment should be applied to all the non-NEPA documentation proposed by the Policy Directive, given the potential for abuse of such procedural shortcuts.

To prevent indefinite tiering off a prior EIS, the Policy Directive should also include a sunset provision for the use of these new documents. As a rule of thumb, the CEQ recommends that EISs more than five years old should be carefully reexamined to determine if the criteria outlined in 40 CFR § 1502.9 (for preparing supplemental statements) apply.³⁴ We recommend the development of specific criteria indicating environmental, ecological, or fishery conditions which would trigger a new EA or EIS, and the use of a firm sunset period (e.g., five years) that would trigger a new EA or EIS regardless of whether the previous criteria had yet occurred.

4. NOAA Fisheries and the Councils should strive for public engagement at every stage of the NEPA process “to the fullest extent possible,” without qualification

The Policy Directive “encourages” NOAA Fisheries and the Councils to engage the public as early “as practicable” in the development of EAs and EISs and, “when practicable,” to actively involve the public in scoping and identifying alternatives for both EAs and EISs (p. 9). In this and other examples throughout the document, NOAA Fisheries’ use of “practicable” suggests that its NEPA commitments are conditional or contingent on circumstances that are not a defined or delimited in any way, implying unlimited discretion. The NEPA regulations do not permit an agency unlimited discretion in complying with its procedural and public involvement responsibilities. Rather, “[t]he phrase ‘to the fullest extent possible’ in section 102 [of NEPA]³⁵ means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.”³⁶

In the spirit of “to the fullest extent possible,” NMFS should restate its commitment to engage the public *as early as possible* in the development of EAs and EISs. Similarly, NOAA Fisheries and the Councils should *make every effort* to involve the public in scoping and identification of alternatives for both EAs and EISs – the public purposes and policies of both NEPA and the MSA demand no less a commitment, without qualification. As part of that commitment to public engagement in the NEPA process, NOAA Fisheries and the Councils should also post all NEPA documents electronically in a prominent location on their respective websites where interested members of the public may access them. Failure to do so should be regarded as a failure to reach the interested or affected public and a violation of the regulations.

³¹ 40 CFR § 1506.6(b).

³² CEQ (1981), Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 FR 18026 (March 23, 1981), as amended. See response to Questions #38

³³ 40 CFR § 1501.4(e). Also see: CEQ (1981), Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 FR 18026 (March 23, 1981), as amended. See response to Question 37(b).

³⁴ CEQ (1981), Forty Questions #32, 46 FR 18026 (March 23, 1981), as amended, 51 FR 15618 (April 25, 1986). Available at: <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>.

³⁵ 42 U.S.C. § 4332.

³⁶ 50 CFR § 1500.6.

Conclusion

Overall, Pew supports the approach outlined in the Policy Directive and believes it satisfies the MSA requirement for NOAA Fisheries to revise and update its environmental review procedures for compliance with NEPA. Most importantly, the Policy Directive affirms the legal requirements of NEPA in fishery management decisions and clarifies that ultimate legal responsibility for NEPA lies with NOAA Fisheries. It also recognizes the separate, compatible, and complementary requirements of NOAA Fisheries and the Councils to work together to ensure fishery management decisions and broad environmental review of these decisions foster conservation of fish populations and protection of the ocean environment. However, in this comment letter, Pew identifies several shortcomings with the Policy Directive and urges NOAA Fisheries to address them to ensure NEPA analysis and procedures are robust and meet the objectives of the statute.

The critical importance of NEPA environmental review in federal fisheries management cannot be overstated. We thank NOAA Fisheries for its efforts to present a workable solution that, with a few adjustments, will uphold the statutory requirements of NEPA in fishery management decisions undertaken under the MSA. Federal agency requirements under NEPA and the CEQ regulations provide a needed, broader societal perspective on Council actions that the MSA simply does not afford, better ensuring that fisheries management decisions and associated analyses account for a fuller range of factors affecting our oceans and coasts. As acknowledged in the Policy Directive, adequate NEPA review must consider the wider implications of Council actions for NOAA Fisheries' other statutory, regulatory, and policy requirements, which include goals for ecosystem-based management, protected species conservation and stewardship of public trust resources for future generations.³⁷ In an era of accelerating climate change, ocean acidification, habitat loss, and species at risk of depletion or extinction, the wider-angle perspective that NEPA provides is more critical than ever to achieve sustainable fish populations in the present and the long term.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ted Morton".

Ted Morton
Director, U.S. Oceans, Federal Fisheries
The Pew Charitable Trusts

³⁷ Presidential Executive Order 13547, Stewardship of the Ocean, Our Coasts and Great Lakes (July 19, 2009), available at: <http://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf>.