

CONSULTATION PROCEDURES FOR FISHERY REGULATION IN
NATIONAL MARINE SANCTUARIES

Mr. Jim Balsiger, National Marine Fisheries Service, Acting Deputy Assistant Administrator, and Captain Craig McClean, National Ocean Service, Acting Deputy Assistant Administrator, sent a memo and draft flowchart to all eight Regional Fishery Management Councils (RFMCs) requesting input on a proposal to improve coordination concerning the promulgation of fishing regulations in National Marine Sanctuary (Agenda Item I.2.a, Attachment 1). The flowchart tracks National Marine Sanctuary Act and Magnuson-Stevens Fishery Conservation and Management Act regulatory actions and was intended to stimulate dialogue for improving the process of establishing fishing regulations within National Marine Sanctuaries. Formal written comments on the proposal, such as the letter submitted by the Southwest Regional Office of the National Marine Fisheries Service (Agenda Item I.2.a, Attachment 2) have been solicited by NOAA by April 30, 2006.

The proposed consultation procedures and draft flowchart were distributed in early-January and were presented in a series of conference calls with various stakeholder and interested parties. A conference call for members and staff of the eight RFMCs was held on January 30, 2006. Several Pacific Fishery Management Council (Council) members and staff attended the call and provided comments. Agenda Item I.1.a, Attachment 1 represents Council staff comments from January as well as a summary of pertinent comments from the conference call.

At the March Council meeting, Mr. Phil Anderson, Washington State representative on the Council, reported that he was contacted by the Washington Department of Fish and Wildlife representative on the Olympic Coast National Marine Sanctuary's, Sanctuary Advisory Committee and was asked to participate in a subgroup to compile comments on the proposal. Mr. Anderson stated that solicited comments were requested by late-March 2006 and that he could forward the resulting documentation to the Council office for inclusion in the supplemental materials for public review and Council consideration at the April Council meeting.

The Council is scheduled to receive advice from Council advisory bodies and the public and consider tasking Council staff with submitting formal written comments by the April 30, 2006 deadline.

Council Action:

- 1. Adopt final Council response to the NOAA proposal for improved coordination mechanism regarding fishing regulations in National Marine Sanctuaries.**

Reference Materials:

1. Agenda Item I.2.a, Attachment 1: January 6, 2006 memorandum and draft flowchart from Mr. Jim Balsiger and Captain Craig McLean regarding fishing regulations for National Marine Sanctuaries.
2. Agenda Item I.2.a, Attachment 2: January 19, 2006 memorandum and from Mr. Rodney McInnis to Mr. Jim Balsiger and Captain Craig McLean regarding comments on the draft flowchart on fishing regulations for National Marine Sanctuaries.
3. Agenda Item I.2.a, Attachment 3, Summary of Comments from a January 30, 2005 Conference Call and Council Staff.
4. Agenda Item I.2.a, Supplemental Attachment 3: Perspectives from Washington and the Olympic Coast National Marine Sanctuary regarding the proposed flowchart and consultation process.

Agenda Order:

- a. Agenda Item Overview
- b. Reports and Comments of Advisory Bodies
- c. Public Comment
- d. **Council Action:** Adopt Council Recommendations to NOAA

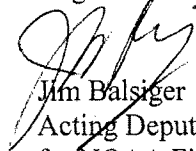
Mike Burner

PFMC
03/15/06

April 2006

**UNITED STATES DEPARTMENT OF COMMERCE**
National Oceanic and Atmospheric Administration

January 6, 2006

MEMORANDUM FOR: Regional Fishery Management Councils**FROM:**
Jim BalsigerActing Deputy Assistant Administrator
for NOAA Fisheries Service
Captain Craig McLeanActing Deputy Assistant Administrator
for Ocean Services and Coastal Zone Management**SUBJECT:** Draft Flowchart Regarding Fishing Regulations for National
Marine Sanctuaries

Recent NOAA actions have highlighted the opportunity for improved coordination and collaboration concerning the promulgation of fishing regulations in our Nation's marine sanctuaries. NOAA staff has developed a flowchart to clarify the role of Regional Fishery Management Councils (RFMCs), Sanctuary Advisory Councils, Treaty Tribes, NOAA Fisheries Service (Fisheries) and the National Marine Sanctuary Program (NMSP) in this process.

The National Marine Sanctuaries Act (NMSA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA) are both important pieces of marine resource legislation administered by NOAA. Although they reflect different purposes and mandates, these acts can be implemented in a compatible and complementary manner, and NOAA is committed to doing so. The development of sanctuary goals and objectives is a public process in which Fishery Management Councils are invited to participate. The regulatory options for meeting a specific sanctuary's goals and objectives, once developed, are evaluated by NOAA on a case by case basis to determine whether regulations proposed by a Council under the MSA would meet both the legal requirements of the MSA and the sanctuary's goals and objectives relative to fishing, or whether using NMSA authorities would be more appropriate. Each act requires fishery actions to be developed through a public process.

The attached draft flowchart graphically traces NMSA and MSA regulatory actions from initial concept to promulgation. It is a work-in-progress and we are seeking your input on the process outlined. The flowchart's associated text provides greater detail and is intended to more fully explain the contents of the boxes. The diagram highlights the points of coordination among the RFMCs, Fisheries, Sanctuary Advisory Councils,



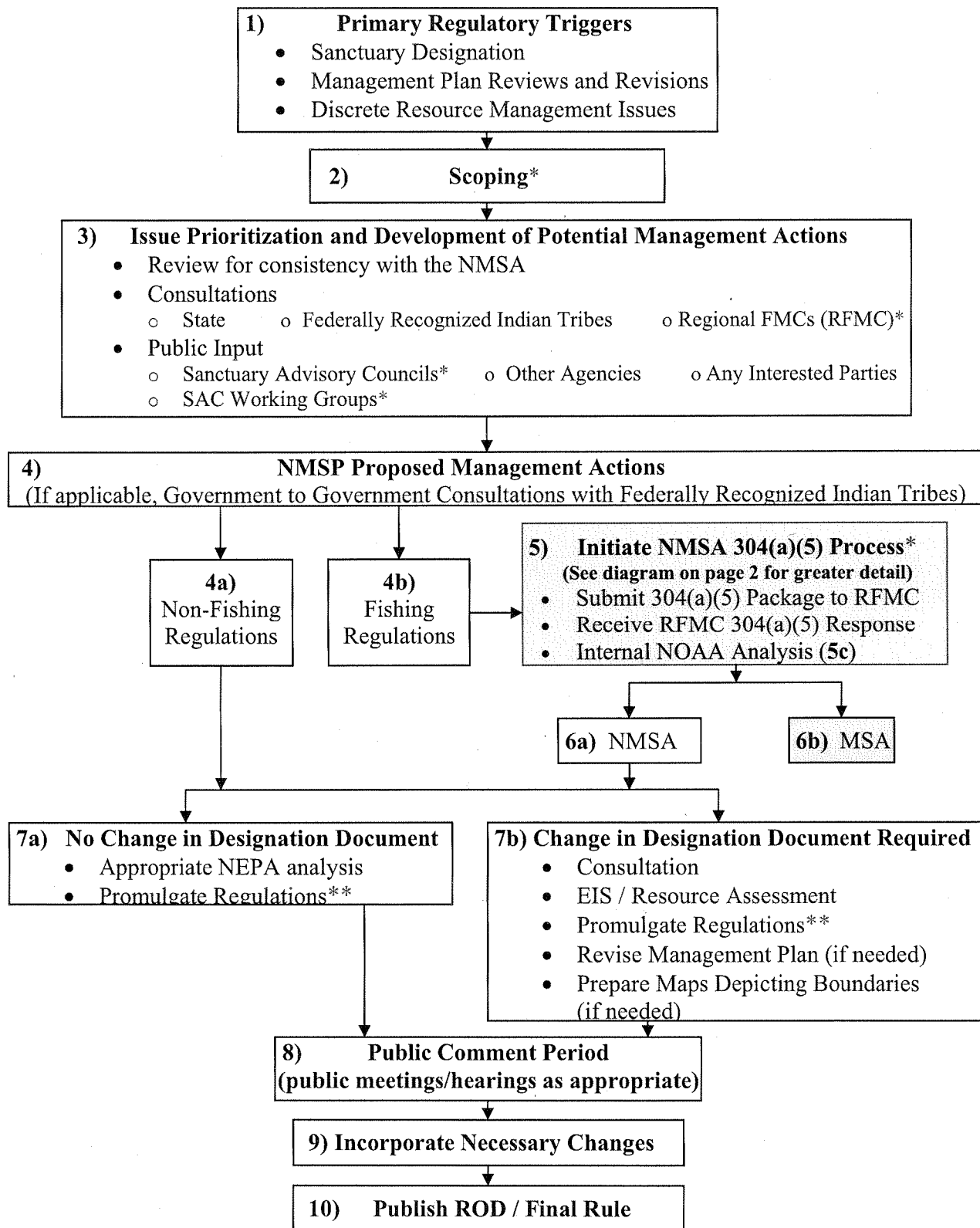
Treaty Tribes, and NMSP at the different stages in the process of developing fishing regulations.

On January 30, we will present this flowchart via conference call to all interested Council members. Once we have presented the flow chart, we are interested in hearing your suggestions of how we can improve this process. In addition, we invite you to send written comments by April 30, 2006. We thank you in advance for your participation.

Attachments

NMSA / MSA Regulatory Flowchart

National Marine Sanctuaries Act Regulatory Process



*These highlighted items represent specific steps in the process by which NOAA will actively engage the appropriate RFMC. Please see accompanying text for more detail.

**During final development of draft fishing regulations, staff of the NMSA, NOAA Fisheries Service and RFMCs coordinate as appropriate to ensure that any resulting regulation fulfills sanctuary goals and objectives.

DRAFT 6 January 2005 DRAFT

5) NMSA §304(a)(5) Regulatory Process
 (Expansion of Box 5 on page 1)

5a) Prepare 304(a)(5) Package for RFMC**

- i. Sanctuary Goals and Objectives of Envisioned Regulations
- ii. Supporting Documentation and Analysis
- iii. Operational Criteria
- iv. Suggested Action

5b) RFMC Deliberations

- RFMC Provided 120 days to respond per NMSP regulation
- RFMC, NOAA Fisheries Service, and NMSP Staff Coordination*

5c) RFMC Response

5c.i) RFMC prepares draft NMSA regulations

5c.ii) RFMC determines that NMSA regulations are not necessary (e.g., b/c MSA can be used to fulfill sanctuary goals and objectives)

5c.iii) RFMC declines to make determination with respect to the need for regulations

5d) NOAA Analysis
 (see page 3 for greater detail)

5e) Secretarial Determination

The Secretary determines whether or not the RFMC's action fulfills the purposes and policies of the NMSA and the goals and objectives of the proposed action

5e.i) RFMC Action Accepted

Draft regulations prepared by RFMC will be accepted and issued as proposed regulations by the Secretary.

In instances where the Secretary accepts the RFMC's determination that NMSA regulations are not necessary (e.g., b/c MSA can be used to fulfill sanctuary goals and objectives), no NMSA regulations are issued

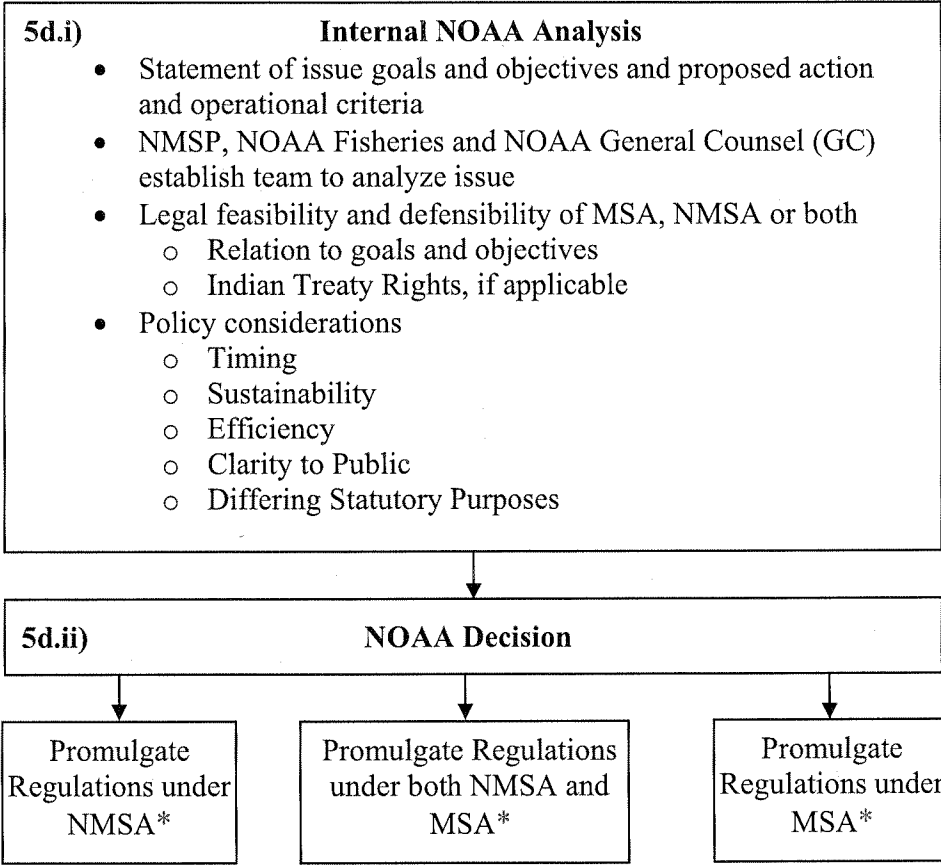
5e.ii) RFMC Action Rejected

The Secretary will prepare fishing regulations if the RFMC declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare draft regulations in a timely manner

* This highlighted item is a step in the process by which NOAA will actively engage the RFMC. Please see accompanying text for more detail.

** These materials are developed from the Scoping and Issue Prioritization steps in the process.

5d) NOAA Analysis
(Expansion of Box 5d on page 2)



* During promulgation of regulations resulting from the NMSA 304(a)(5) process, staff of the NMSP, NOAA Fisheries Service and RFMCs will coordinate as appropriate to ensure the resulting regulation fulfills its intended goals and objectives, regardless of the statute(s) under which it is promulgated. NOAA will ensure that any proposed regulations are consistent with Indian treaty fishing rights.

The flowchart graphically traces a National Marine Sanctuaries Act (NMSA) as well as Magnuson-Stevens Fishery Conservation and Management Act (MSA) action from initial concept through to implementation. The following text bullets correspond to the numbered boxes on the flowchart and are intended to more fully explain the contents of the boxes and identify the points of consultation for three players (NOAA National Marine Sanctuary Program (NMSP), Fisheries Service, Regional Fishery Management Councils (RFMCs)) at the different stages in the generic process of developing fishing regulations, and decision criteria used in moving from one step to the next in the decision making process.

National Marine Sanctuaries Act Regulatory Process

- 1) **Primary Regulatory Triggers.** This represents the initial concept or idea stage of what may eventually develop into a proposed federal action. Three typical categories of actions are most often taken by NMSP: a sanctuary designation, a sanctuary management plan review and revision, or a regulatory proposal that is developed in response to a discrete Sanctuary resource issue. An Environmental Impact Statement under the National Environmental Policy Act (NEPA) is required when a major federal action significantly affecting the human environment is taken under the NMSA, or when a change in a term of designation for the sanctuary is proposed.
- 2) **Scoping.** Once an action is initiated, a scoping process is undertaken which includes community outreach, public meetings, and literature review. Scoping provides a framework for identifying environmental issues and coordinating with interested parties. *NOAA Fisheries Service and the appropriate RFMC(s) established under the MSA are identified among the interested parties and will be expressly notified at this step because of their role under the NMSA and fisheries expertise.*
- 3) **Issue Prioritization and Development of Potential Management Actions.** A Sanctuary Advisory Council (SAC) is charged by NOAA under the NMSA to advise throughout the process. Representatives from NOAA Fisheries Service and the appropriate RFMCs are invited to be members of SACs or SAC Working Groups. The SAC prioritizes issues that may be addressed by the NMSP. The SAC may also form issue specific working groups to assist the SAC. *For instance, if there are fishing issues associated with designation or management of a Sanctuary, a fisheries working group could be formed. Such working group could consist of representatives from NOAA Fisheries Service (e.g., regional office and /or science center staff), the RFMCs, other agencies, Federally Recognized Indian Tribes, State marine resource management departments, the fishing industry, non-governmental environmental groups, and subject-matter experts and other interested parties.* SAC working groups may be charged to develop potential management actions and recommendations to the SAC. The SAC in turn provides NMSP with recommendations. [As a result of activities related to NMSP or SAC issue prioritization, a RFMC may pursue actions under the MSA. Refer to the Magnuson-Stevens Act Regulatory Process diagram for further description of the ensuing process.]
- 4) **NMSP Proposed Management Actions.** The recommendations provided by the SAC and interested Indian tribes are considered by the NMSP in its development of draft goals and objectives. The draft goals and objectives are ultimately reviewed within NOAA and become an agency statement of proposed goals and objectives for that sanctuary (“goals and objectives”). Because the draft goals and objectives become a statement of NOAA goals and objectives for that sanctuary, NOAA will conduct government to government consultation

with any potentially affected federally recognized Indian tribe(s). These goals and objectives are the benchmark by which a RFMC action under NMSA §304(a)(5) is assessed.

Management recommendations normally come about through a SAC deliberative process as described in 3) above. The potential regulatory actions for a given sanctuary are divided into non-fishing and fishing actions (4a and 4b) by the NMSP prior to proceeding to the next step

5) NMSA §304(a)(5) Regulatory Process

5) Section 304(a)(5) of the NMSA requires that the appropriate RFMC(s) be given the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone of a sanctuary's boundaries. When such regulations appear desirable, NOAA develops and presents a 304(a)(5) package to the appropriate RFMC(s). All of the materials provided to the RFMC(s) as part of the §304(a)(5) package are intended to help the RFMC make a determination of what would best fulfill the sanctuary goals and objectives. The entire package is reviewed and approved by NOAA and provided to the RFMC.

- a. **Prepare 304(a)(5) Package for RFMCs.** NOAA develops a §304(a)(5) package (package) and provides it to the appropriate RFMC(s). These materials are developed from the Scoping and Issue Prioritization steps in the process. Copies are made publicly available and given concurrently to the appropriate NOAA Fisheries Service regional office(s). The package usually consists of, but is not limited to:
 - i. **Sanctuary specific goals and objectives.** (Refer to box 4 for the process a sanctuary goes through to develop goals and objectives.)
 - ii. **Supporting documentation and analyses** come from a variety of sources including: literature and reports authored by the NOAA Science Centers or interagency and university scientists, notes and reports of the working group and SAC, data and/or analyses obtained via contract from consultants, NMSP assembled socio-economic and biological information, along with NMSP prepared GIS maps and relevant supporting information.
 - iii. **Site-specific operational criteria** are developed and approved by NOAA (NMSP and NOAA Fisheries staff) to better define the goals and objectives.
 - iv. **Suggested action(s)** are the recommended actions developed throughout the process of Scoping (2) and Issue Prioritization and Development of Potential Management Actions (3).
- b. **RFMC Deliberations.** The RFMC is provided 120 days to respond to the 304(a)(5) package (15 CFR 922.22(b)). Extensions to this 120-day time limit may be requested and granted to accommodate RFMC agendas and workloads. *During the 120-day period staff of RFMC, NOAA Fisheries Service (e.g., regional office and /or science center staff) and NMSP may coordinate as necessary to clarify issues, address questions and provide preliminary feedback.*
- c. **RFMC Response.** The RFMC may take any of three actions at this point. The RFMCs will make their determination by following their standard operating procedures and certain MSA procedural requirements (e.g., majority votes, hold public meetings). The RFMC could:
 - i) Prepare draft NMSA regulations. If the RFMC determines that regulations should be promulgated under the NMSA, the RFMC may prepare draft NMSA regulations and submit them to the NMSP. If the RFMC determines that regulations should be promulgated under the NMSA and the RFMC

chooses not to provide draft regulations, then NOAA will draft the regulations. In either case, the RFMC may conduct such analyses as it considers helpful to making its determination. However, the RFMC is not required to comply with the MSA requirements for developing or amending an FMP (e.g., public notice and comment). NOAA will develop the required NEPA and other analyses for the NMSA action.

- ii) Determine that NMSA regulations are not necessary (e.g., the RFMC could recommend that sanctuary goals and objectives be fulfilled by the MSA or could recommend that no action be taken)
 - iii) Decline to make a determination with respect to the need for regulations
- d. **NOAA Internal Analysis.** NOAA determines, through the following internal process, whether or not the RFMC's proposed action would fulfill sanctuary goals and objectives.
- i. **Analysis.** The internal NOAA analysis consists of NOAA NMSP, Fisheries Service and GC staff examining the RFMC submission and determining whether the submission fulfills the sanctuary goals and objectives. As necessary, this team will analyze the feasibility and legal defensibility of the RFMC's proposed action. The team will also identify any relevant policy considerations (e.g., timeliness, sustainability, efficiency, clarity to the public, monitoring and research needs, and ease of enforcement) of the RFMC's proposed regulation(s).
 - ii. **NOAA Decision.** After the team considers all aspects of the analysis, it makes a recommendation regarding acceptance / rejection of the RFMC proposal. If unable to reach consensus, or if the recommendation is to reject a RFMC proposal, the team would elevate the issue to the Assistant Administrators (AAs) of the National Ocean Service and NOAA Fisheries Service for a decision, and to the Administrator of NOAA as appropriate.
- e. **Secretarial Determination**¹. Once the NOAA decision has been made regarding a RFMC submission, the §304(a)(5) process is concluded.
- i. **RFMC Action Accepted.** If NOAA determines that draft NMSA regulations prepared by the RFMC fulfill the sanctuary goals and objectives and the purposes and policies of the NMSA, the regulations will be issued as proposed regulations for public comment. If the RFMC determines that NMSA fishing regulations are not necessary because sanctuary goals and objectives can be fulfilled by the MSA, and the Secretary accepts that recommendation, no NMSA regulations are proposed and regulations are pursued through the MSA regulatory process (see accompanying diagram and text).
 - ii. **RFMC Action Rejected.** If NOAA determines that a RFMC submission fails to fulfill the goals and objectives of the sanctuary and the purposes and policies of the NMSA, then NOAA will prepare proposed fishing regulations for the sanctuary. NOAA will communicate the decision to the RFMC and coordinate as appropriate with the RFMC on the development of the fishing regulations.
- 6a) **NMSA Regulatory Process.** If the NOAA analysis of fishing actions (5d) determines the appropriate course of action is to pursue the proposed action fully or partially under the NMSA, then the regulations and supporting documentation (e.g., NEPA, APA, Reg. Flex)

¹ The Secretary's authority under the MSA and NMSA has been delegated to NOAA.

are prepared by the NMSP, including any change to a sanctuary designation document (per NMSA paragraph 7).

- 6b) Magnuson-Stevens Act Regulatory Process.** If the NOAA analysis of fishing actions (5d) determines the appropriate course of action is to pursue the proposed action fully or partially under the MSA, then the regulations are pursued under the MSA process.
- 7) Sanctuary Designation Document.** A designation document is prepared as part of a sanctuary's designation process. The terms of designation are defined by the NMSA as: 1) the geographic area of a sanctuary; 2) the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational or esthetic value; and 3) the types of activities that will be subject to regulation to protect those characteristics. A sanctuary can only prohibit or restrict an activity listed in its designation document. A sanctuary designation document can, however, be amended if a discrete resource management issue arises or during the routine sanctuary management plan review processes outlined in the NMSA.
- a. No Change Required in Designation Document.** If proposed regulations do not necessitate a change to the sanctuary's designation document, then the NMSP proceeds to promulgate regulations accompanied by the appropriate level NEPA analysis.
 - b. Change Required in Designation Document.** Designation documents are changed following the applicable procedures for designation of a sanctuary (sections 303 and 304 of the NMSA). Some steps (e.g., consultation, draft EIS preparation) can be initiated as part of earlier actions under 3) Issue Prioritization and Development of Potential Management Actions. To issue a regulation prohibiting or restricting a fishing activity in a sanctuary for which a designation document does not have fishing as one of the activities subject to regulation, the sanctuary's designation document must be amended to include fishing as an activity subject to regulation.
- 8) Public Comment Period.** Publish the proposed rule, Notice of Availability of a draft environmental impact statement or environmental analysis, and amended sanctuary designation document (if one is being amended) in the *Federal Register* to start the public comment periods (minimum 45 days DEIS; proposed rules generally have a 60-day review period). Hold public meetings or hearings as appropriate and collect public comments.
- 9) Incorporate Necessary Changes.** Consider the public comments and revise regulations and analyses as appropriate.
- 10) Publish Final Rule.** Issue the Record of Decision (ROD) and the final rule. If a final EIS was prepared, the ROD and final rule are issued after the required 30-day wait period from publication of the Notice of Availability of a final EIS. If there is a change to the designation document, the change becomes effective after a period of 45 days of continuous session of Congress (NMSA §304(a)(6)). During this final 45-day review period the Governor (when state waters are included) has the opportunity to certify to NOAA that the change to the terms of designation is unacceptable, in which case the unacceptable change to the term of designation shall not take effect in that part of the sanctuary that is within the boundary of that State.

Magnuson Stevens Act Regulatory Process

I) MSA Ongoing Data Gathering /Review of Information

II) Identification of Need for Conservation and Management via:*

- Fishery Management Plan
- Fishery Management Plan Amendment
- Rulemaking/Regulatory Action

III) Planning and Scoping

- Frontloading, Action Plan
- Public Scoping Meetings (if required)
- Formation of Fishery Management Action Team (FMAT)*

IV) Preparation / RFMC Initial Action*

- Preliminary DEIS (if required)
- Selection of Preferred Alternative(s)
- Completion of Other Required Analyses

V) RFMC Deliberation and Public Review*

- Issue DEIS
- Public Hearings
- Committee / RFMC Meetings
- Consider Public Comments

VI) RFMC Final Action / Preparation of Final Documents*

- Make Final Revisions to Documents
- RFMC Vote to Recommend Management Action
- File Final EIS

VII) Secretarial Review and Final Determination

- Proposed Rule (if any) with Public Comment Period
- FMP / FMP Amendment with Public Comment Period
- Record of Decision
- Approve, Partially Approve, or Disapprove

Approved or Partially Approved

VIII) Final Action

- Final Rule (if any)
- Notice of FMP / FMP Amendment

Disapproved or Partially Disapproved Actions Returned to RFMC with Rationale

*These highlighted items are steps in the process by which RFMC and NOAA Fisheries Service will actively engage NOS. Please see accompanying text for more detail.

Magnuson Stevens Act Regulatory Process

MSA Process for the Magnuson-Stevens Fishery Conservation and Management Act. This flowchart traces a fishery management action under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) from initial concept through implementation. The following descriptions correspond to the numbered boxes on the flowchart and are intended to more fully explain the contents of the boxes and identify the points of consultation for three players (NOAA National Marine Sanctuary Program (NMSP), NOAA Fisheries Service, and RFMCs) at the different stages in the generic process of developing fishery-related regulations.

I) Ongoing Data Gathering / Review of Information: The MSA requires that RFMCs conduct regular public meetings, and submit periodic reports, and submit recommended management action² for any fishery under their jurisdiction that requires conservation and management.

Typical routes of initiating FMP/rulemaking by a RFMC include:

- a) NOAA Fisheries Service submits information pertinent to Federal fisheries to the appropriate RFMCs.
- b) Constituents, fishing industry representatives, agency staff, RFMC members, and/or non-governmental organization representatives write or testify to the RFMC of their concern and may request a particular action.
- c) Some actions get on a RFMC agenda due to acts of Congress, which may require specific actions within statutory time frames. NOAA Fisheries Service has an intermediate role between the Executive Branch and the RFMC, and is ultimately responsible for deadlines and actions required by the Secretary of Commerce as a result of legislation.

The NMSP may provide information about potential relevant fishery management considerations that may affect sanctuary resources. Early identification of such issues will permit RFMCs to begin assessing potential management actions for fisheries.

II) Identification of Need for Conservation and Management. This is the point at which a RFMC determines that there may be a need to recommend action and may begin assessing the need for fishery management measures. *If a potential management action may affect sanctuary resources, RFMC staff would contact NMSP staff.*

At this stage ideas are developed for a response to an identified fisheries conservation or management need. The types of major Federal actions typically undertaken by RFMCs include: A new fishery management plan (FMP); an Amendment to an already approved FMP; and regulatory actions developed in response to a discrete marine conservation or management issue. FMPs and FMP Amendments must be consistent with the MSA national standards and other applicable laws, several of which require analysis of alternatives. Although it infrequently begins sooner, in most cases the National Environmental Policy Act (NEPA) process starts here.

² The term "fishery management actions" should be interpreted broadly to include a wide range of activities taken pursuant to the MSA, including proposed and final rulemakings, FMPs with no implementing regulations, and other substantive actions by the agency that promulgate or are expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, and advance notices of proposed rulemaking.

As part of internal NOAA Fisheries Service efforts to manage expectations and outcomes, FMP/rulemaking activities are divided into four phases in the draft Operational Guidelines³. Whether an action is a rule, an FMP or an FMP Amendment, and whether it will be supported by an Environmental Assessment (EA), Categorical Exclusion (CE), or Environmental Impact Statement (EIS), it is developed through the following four phases: (1) Planning and Scoping; (2) Preparation; (3) RFMC Final Action; and (4) Secretarial Review and Implementation. The time it takes a proposed Federal action to be developed varies depending on the complexity of the proposal, resources available to conduct the analyses and draft the documents, and a multitude of other contingencies. Staff resources to prepare FMP/rulemaking activities are pooled between RFMC and NOAA Fisheries Service to variable degrees across the six NOAA Fisheries Service regions and eight RFMCs. *Additional staff resources are achieved through cooperating agency agreements.*

III) Planning and Scoping. RFMCs have the primary responsibility for initiating the NEPA scoping process on actions initiated by RFMCs.

The draft Operational Guidelines recommend the development of an "Action Plan" which describes objectives, resources, alternatives and applicable laws, prior to commencement of drafting the initial NEPA document. These Guidelines rely heavily on the concept of frontloading, which means the early involvement of all interested parties to address and resolve issues. The draft Operational Guidelines also recommend formation of a fishery management action team (FMAT) as a project management activity intended to identify and task those necessary to work on a particular action from the beginning. The FMAT will generally include representatives of the RFMC and NOAA Fisheries Service, as well as other NOAA components and federal agencies, as necessary. *Personnel from the NMSP will be invited to participate on FMATs regarding potential fishery management considerations that may affect sanctuary resources.*

Through deliberations of the FMAT, NOAA General Counsel, and agency NEPA advisors, determinations are made as to the appropriate MSA type of action (FMP or regulatory) and level of NEPA analysis (CE, EA, or EIS), or whether supplements or amendments to existing NEPA analyses are appropriate for compliance.

IV) Preparation / RFMC Initial Action. This represents actions taken by preparers and the RFMC to complete preparation of the Draft NEPA analysis and all other required analyses deemed necessary by the FMAT for the proposed Federal action to achieve legal sufficiency.

Regulatory language, analyses and information collection requirements may be examined and preliminary estimates made of the costs and benefits of regulations depending on the nature of the proposed action and associated Federal permits, licenses, or other entitlements, and their respective accompanying analyses that will be required prior to implementation. RFMC standing committees or specially appointed committees may be asked by the RFMC to prepare components of actions for RFMC consideration. All meetings are advertised and open to the public, and public comments are taken each time an aspect of the proposed action appears on the agenda of the respective RFMC or one of its committees. *RFMC staff will invite NMSP staff to attend and participate at standing or specially appointed committee meetings regarding potential fishery management considerations that may affect sanctuary resources.*

³ Draft Operational Guidelines: For Development and Implementation of Fishery Management Actions. August 23, 2005. http://www.nmfs.noaa.gov/sfa/domes_fish/OperationalGuidelines/DraftOGs_082405.pdf

Preliminary Draft EIS: If schedules permit and the RFMC chooses, it may include a summary action, such as "Approve DEIS for Public Review" on the agenda. That would necessitate preparation and presentation of a preliminary DEIS to the RFMC (and public, because every action is open to the public).

Selection of Preferred Alternative: Because early identification of a preferred alternative facilitates compliance with the substantive requirements and procedural timelines of the MSA, ESA, and APA and other applicable law, the Draft Operational Guidelines encourage identification of the preferred alternative at the DEIS stage, though this is not always possible. *One such applicable law is section 304(d) of the NMSA which requires federal agencies to consult on any federal action that is likely to destroy, cause the loss of, or injure any sanctuary resource. (Stellwagen Bank NMS has a special standard, and consultation is required when a federal action "may affect" a sanctuary resource.)*

V) RFMC Deliberation and Public Review. Completed draft analyses are circulated for public review. *If a potential management action may affect sanctuary resources, RFMC staff would provide these draft analyses to NMSP.* RFMC meetings or hearings are held to facilitate understanding of the documents, collect public comment and have RFMC deliberations. After public review and comment, the analysis documents are revised as necessary and provided to the RFMC.

VI) RFMC Final Action / Preparation of Final Documents. The RFMC holds a vote on the proposed action at a public meeting. After the RFMC votes to submit an action to the Secretary, RFMC and NOAA Fisheries Service staff finalize the action document and any accompanying draft regulation and analyses for submission to the Secretary. *The NMSP would be given an opportunity to review any such documents for those MSA actions developed from the NMSA 304(a)(5) regulatory process to fulfill sanctuary goals and objectives.* It is anticipated that some work on the necessary supporting documentation will continue after the RFMC's vote. However, if NOAA or the Council determines that the supporting analyses have been substantively changed at this point, the model in the Draft Operational Guidelines would call for reconsideration by the RFMC. All parts of a final EIS (FEIS) analysis must be completed and assembled prior to NOAA Fisheries Service filing the FEIS with the EPA, who in turn publishes a Notice of Availability (NOA) of the FEIS in the *Federal Register*.

The MSA also requires that NOAA Fisheries Service initiate formal public review of the RFMC's proposed measures by publishing in the *Federal Register* the NOA of an FMP or FMP Amendment and/or the proposed rule to implement the RFMC's recommendation. The NOA of an FEIS is different from a NOA of an FMP or FMP Amendment and is published in a different part of the *Federal Register*.

VII) Secretarial Review and Final Determination. The MSA limits the time for Secretarial review and decision on new FMPs and FMP Amendments to ninety days. NOAA Fisheries Service must publish the NOA of the FMP or FMP Amendment immediately (within 5 days) of the transmittal date for a 60-day public comment period. The transmittal date is established by the NOAA Fisheries Service Regional Administrator when all of the necessary documentation is determined to be complete.

Within 30 days of the close of the comment period, the agency must approve, partially approve, or disapprove the RFMC's recommendation. A Record of Decision is issued at this time. The

determination to approve, partially approve, or disapprove is made by reference to the MSA's National Standards, other provisions of the MSA and other applicable law.

Approved: If a FMP or FMP Amendment is found to comply with the ten National Standards, contain all the required FMP components, and otherwise comply with all applicable laws and E.O.s, it is approved and the process is complete but for final publication of the regulations.

Disapproved or Partially Approved: If an FMP or FMP Amendment does not comply with the ten National Standards, contain all the required FMP components, and otherwise comply with all applicable law, it is disapproved. The NOAA Fisheries Service Regional Administrator must specify in writing to the RFMC the inconsistencies of the FMP or FMP Amendment with the MSA and/or other applicable laws, the nature of inconsistencies, and recommendations for actions to make the FMP or FMP Amendment conform to applicable laws. If the RFMC is not notified within 30 days of the end of the comment period on the FMP or FMP Amendment of the approval, disapproval, or partial approval, such FMP or FMP Amendment shall take effect as if approved. If an FMP or FMP Amendment is disapproved or partially approved, the RFMC may resubmit a revised FMP or FMP Amendment and revised proposed rule, where applicable.

VIII) Final Action. For approved actions or partially approved actions a notice of availability of the final FMP or FMP amendment is issued and final regulation (if any) is published.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

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JAN 19 2006

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MEMORANDUM FOR: Jim Balsiger
Acting Deputy Assistant Administrator
for NOAA Fisheries Service

Captain Craig McLean
Acting Deputy Assistant Administrator
for Ocean Services and Coastal Zone Management

FROM: Rodney R. McInnis *Rodney R McInnis*
Regional Administrator, Southwest Region

SUBJECT: Comments on Draft Flowchart Regarding Fishing Regulations
For National Marine Sanctuaries

My office had a chance to review the draft flowchart and provides the following comments.

Based on the current layout of the flow chart, it is implied that NOAA consults with external partners before consulting internally. We wonder if there may be some merit in clearly identifying points along the regulatory process where NOAA line offices consult between themselves much earlier. One area where internal consultation may be of value is after box 1 in the National Marine Sanctuaries Act process chart. That is, after "discrete resource management issues" are triggered, should there be some internal consultation? An example that comes to mind is the proposed effort to prevent a krill fishery from occurring on the west coast. This was a situation where one of the west coast sanctuaries went before the Pacific Fishery Management Council and requested that such a closure take place. This particular 'resource management issue' has worked out well but one can only speculate that the entire effort may have progressed more timely had NMFS and NOS collaborated early in the process on possible options before the Council was approached.

The scoping box (box 2) shows that this action includes community outreach, public meetings, and literature review. This may also be another opportunity for NOAA to undertake internal consultation by assimilating the information and internally determining the best approaches for proceeding. We find this may be a prudent aspect for completing this stage of the process before launching into the issue prioritization effort depicted in box 3 with the public.

With regard to box 3, we suggest that internal consultations with NMFS on the Endangered Species Act, the Marine Mammal Protection Act, and the essential fish habitat provisions of the Magnuson-Stevens Act be identified.



With regard to box 4, we suggest that this be relabeled as "NOAA Proposed Management Actions" rather "NMSP" because at this stage in the process, the proposed management actions should reflect the collaborative efforts between the various NOAA offices.

Lastly, box 5 needs to be revised to accurately reflect the more detailed regulatory process depicted on page 2 that includes elements "d" and "e."

DRAFT SUMMARY OF COMMENTS ON THE PROPOSED FLOWCHART ON FISHING
REGULATIONS IN NATIONAL MARINE SANCTUARIES
FROM A JANUARY 30, 2005 CONFERENCE CALL AND COUNCIL STAFF.

A conference call hosted by Mr. Jim Balsiger, National Marine Fisheries Service Acting Deputy Assistant Administrator, and Captain Craig McClean National Ocean Service Acting Deputy Assistant Administrator, was held on January 30, 2005 to answer questions and solicit initial comments from the Regional Fishery Management Councils (RFMCs) regarding proposed processes and draft flowcharts designed to improve coordination and collaboration on the development and implementation of fishing regulations within national marine sanctuaries (Agenda Item I.2.a, Attachment 1. Due to the number of participants and the structure of the call itself, actual attendance is unknown and some participants were unable to voice their comments. However, several members of the Pacific Fishery Management Council (Pacific Council) and Pacific Council staff were in attendance. This document does not represent a record of the call or minutes of the proceedings. Rather, this document is a preliminary summary of Pacific Council staff comments and notes from the call to assist the Council and its advisory bodies develop comments.

The hosts of the call briefly reviewed the memorandum and draft flowcharts and clarified that the purpose of the call was to answer any questions or concerns from the group and to solicit any initial comments. It was noted that written comments are encouraged and were requested by April 30, 2006. The hosts noted that this call represented one of several calls being held, other groups participating in similar calls include National Marine Fisheries Service Regional Offices, National Marine Sanctuaries (NMS) and the National Marine Sanctuary Program (NMSP), treaty tribes, and states.

Purpose of the Document and Flowchart

- The group clarified that the memorandum and draft flowcharts represent a proposal for improving the current regulatory mechanisms for national marine sanctuaries, and was not intended to represent a review of current practices.

NMSA Regulatory Process

- **Development of NMS Goals and Objectives**
 - Representatives of several RFMCs observed that the key step in the NMSA process of developing NMS fishing regulations was the development of national marine sanctuary goals and objectives: after that point, the steps represent a means to that end. For example, if a goal is established for a no-take area, thereafter, the RFMC-related process is focused on the RFMC providing regulations to achieve the no-take status, not to debated whether no-take status is the appropriate objective.

- It was also noted that the process of establishing NMS goals and objectives involves little or no RFMC input. However, these goals and objectives become "the benchmark by which a RFMC action under the National Marine Sanctuaries Act (NMSA) is assessed" (page 5, first full sentence at top of page).
 - Participants suggested the RFMC be brought formally into the decision-making phases of this process and a scientific rationale for the goals and objectives be included as a precursor, along with the identified RFMC role in steps 1 through 3 on page 4.
 - It is unclear how Sanctuary Advisory Councils (SAC) are established, how Pacific Council representation will function (it was noted there are RFMC seats on some SACs, but no Pacific Council seat on any of the five West Coast SACs), and what role SAC recommendations play in NOAA determination of final sanctuary goals and objectives.
- **Decision Information Packages** - The information referred to as "supporting documentation and analyses" (page 5, step 5ii.) should be the preliminary Draft Environmental Impact Statement (DEIS) elements relevant to fishing regulations, and include all components that will be in the final DEIS.

RFMC and NMSP Coordination

- The Pacific Council supports coordination and is appreciative of NMS staff attendance at meetings of the Pacific Council and its advisory bodies. Recently, funding sources available to both the NMSP and RFMC have been reduced or eliminated making current or future coordination efforts difficult without additional resources. The Pacific Council noted that coordination with the NMSP is well documented in the section entitled "Magnuson-Stevens Act Regulatory Process" beginning on page 9. The proposal requires RFMC action to facilitate NMSP review up to as well as after Council final action. However, an analogous process is not described under the NMSA Regulatory Process. Although indicated in the NMSA flowchart, there is no description of NMSP coordination with RFMCs beyond the NMSA 304(a)(5) process. Further, within the 304(a)(5) process, a critical step involves internal NOAA analysis under which there is no consultation with RFMCs or the NMSP until the NOAA decision is made. The Pacific Council would have benefited from such coordination with NOAA General Council during the recent 304(a)(5) process regarding fishing regulations within the Channel Islands National Marine Sanctuary.

Review Periods

- The RFMCs are afforded a limited response period of 120 days under the NMSA 304(a)(5) process. The Pacific Council notes this review period does not allow thorough Pacific Council review nor adequate public participation as this period rarely encompassed two Pacific Council meetings. The NMSP and NOAA have frequently granted extensions of the response period for this purpose but, requiring the Pacific Council to repeatedly request such extensions does not represent cooperation and collaboration.

MSA Regulatory Process

- **NMSP Input Prior to RFMC Final Action** - Step VI of the MSA Regulatory Process pertaining to RFMC final action states, "The NMSP would be given an opportunity to review any such document for those MSA actions developed from the NMSA 304(a)(5) regulatory process to fulfill sanctuary goals and objectives." (presumably after the final Council vote). The Pacific Council notes that this review, and the resulting NMSP recommendations would better serve the process if provided under step V - RFMC Deliberation and Public Review (prior to the RFMC final vote).

MSA Regulatory Streamlining

- The Pacific Council is encouraged to see the incorporation of Regulatory Streamlining principles within the proposed MSA regulatory process. The Pacific Council is currently working on draft Operational Guidelines and regulatory test cases and encourages similar efficiencies be developed for the NMSA process.