

COUNCIL STAFF PERSPECTIVES ON REVISED MAGNUSON-STEVENSON ACT
NEPA PROCEDURES, PROPOSED RULE (50 CFR PART 700)

General Comments

Opportunity for the Council to provide comments

The proposed rule was published on May 14, providing scant time prior to the deadline for materials to be included in the June advance briefing book. Therefore, there was not an opportunity to include developed staff comments helpful to the Council members and Council advisory bodies. The comment period closes on August 12, 2008, before the next Council meeting.

Council Staff perspective: The Council staff recommends the Council request that NMFS extend the comment period for an additional 45 days, to September 26, 2008. This would allow further consideration of the proposed rule at the Council's September meeting. It would allow time for staff to develop schedules showing the potential changes to various Council processes (e.g., groundfish biennial harvest specifications; salmon, CPS, and HMS management measures; amendments) and a listing of workload impacts, which would be presented at the September Council meeting.

Applicability of Council on Environmental Quality (CEQ) regulations, 40 CFR 1500-1508

Section 304(i)(2) of the MSA states that these agency procedures "shall be the sole environmental impact procedure for fishery management plans, amendments, regulations, or other action taken or approved pursuant to this Act." The preamble to the proposed rule (Summary at 73 FR 27998) states that "[t]hese regulations are modeled on the ... procedural provisions of NEPA, 40 CFR parts 1500-1508..." It seems apparent that these regulations would replace the CEQ regulations except where specifically referenced in Part 700 (e.g., see 700.3, definitions state that all terms defined in the CEQ regulations, part 1508, still apply where relevant). Furthermore, many parts of the proposed regulations are closely patterned on the language in CEQ regulations.

Council Staff perspective: The proposed regulations do not explicitly state that the unreferenced parts of the CEQ regulations are not applicable and should not be referenced. This is important for practitioners to the degree that the different sets of regulations serve as a guide for document preparation. Confusion over applicable regulations could complicate effective compliance. Council staff recommends that the new NEPA regulations (or NMFS guidance) explicitly state that CEQ regulations are no longer applicable, except where referenced in the new NEPA regulations.

Familiarization with the new procedures

Council Staff perspective: NMFS has put considerable effort in training staff to better comply with NEPA under the current CEQ regulations. Regulatory streamlining has changed the relationship between the Council and the NMFS Regions in that that Regional Offices carry out many of the functions previously done at the Headquarters level. It will be important for NMFS to commit sufficient resources to develop detailed guidance documents and train staff on the new procedures. Although the specific comments below touch on some of the main areas where procedures may change, there may be other aspects of the procedures whose implications become apparent only after implementation.

Council staff recommends that NMFS ensure sufficient training and resources are made available to Council and NMFS staffs to allow efficient implementation of the new NEPA procedures.

Specific Comments

Major Changes

Subpart C Integrated Fishery and Environmental Management Statement

Section 700.203(a) under timing of IFEMS process states "...the FMC must use the draft IFEMS in its deliberations." 700.203(b), IFEMS for fishery management actions developed by an FMC, states "(1) NMFS shall publish a Notice of Availability (NOA) of a draft IFEMS in the Federal Register no later than public release of the FMC's meeting agenda notice. NMFS shall ensure that the draft IFEMS is made available to the public at least 45 days in advance of the FMC meeting (unless this time frame is reduced under § 700.604(b))." Section 700.604, Minimum time periods for agency action, provides criteria NMFS may use, in consultation with the FMC and EPA, to reduce the public comment to period no less than 14 days. Many criteria are enumerated, which must be met to justify shortening the time period, in addition to the need to consult with EPA. This suggests that shortening of the time period would only occur in unusual circumstances. This section also allows the public comment period to commence upon publication by NMFS of a Notice of Availability (NOA) for the draft IFEMS rather than the Notice published by EPA for EISs received the week before.

It is also important to note that the draft IFEMS would not include the Council's final preferred alternative because this is not determined, or finalized, until the Council final action meeting. (In some cases, such as Trawl Rationalization, the Council takes preliminary action to develop a preliminary preferred alternative before taking final action at a subsequent meeting. In these cases an at least partial preferred alternative could be included in the draft IFEMS.) Section 700.203(b)(5) states "In its final vote to recommend an action, an FMC may select combinations of parts of various alternatives analyzed in the draft IFEMS or a new alternative within the scope of those analyzed in the draft IFEMS. NMFS may accept this recommendation without further analysis or supplementation by the FMC." If the Council develops a preferred alternative that is "not within the range of alternatives analyzed in the draft IFEMS"—that is, substantially different in its elements and anticipated impacts—then the Council must circulate a supplemental

draft IFEMS containing an analysis of the preferred alternative for a second 45-day public comment period before preparing the final IFEMS.

Under section 700.203(b)(6)(i) the Final IFEMS is included with the transmittal package. Section 600.704(c) states that NMFS shall not make the final approval decision less than 90 days after publication of the NOA for the draft IFEMS or 30 days after the NOA for the final IFEMS. (These minimum time periods parallel the CEQ timelines at 40 CFR 1506.10). These time periods may be shortened in extraordinary circumstances. This brings the final IFEMS earlier in the process than is the case for a final EIS. Currently, the final EIS is usually published so that the ROD can be signed concurrently with the Secretarial determination or publication of the Final Rule. Under this section the Final IFEMS would be published at the start of the 95-day MSA clock.

Council Staff perspective: In many cases the IFEMS process will require a change from how EISs are usually prepared under the current Council process. Typically, a complete draft EIS is not released for the 45-day public comment process required by CEQ regulations (40 CFR 1506.10(c)) until after the Council has taken final action. Under the proposed regulations the draft IFEMS would need to be completed and released much earlier than this since the public comment period initiated by NMFS publishing the NOA begins 45 days in advance of the meeting where the Council takes final action (by finalizing their selection of or a preferred alternative).

In some cases this will conform closely to current practice (the diagram at the end of this document compares the current process with that for an IFEMS). For example, staff currently plan to release a substantially completed draft of the Trawl Rationalization EIS around September 22, 2008, in anticipation of Council final action at the November 2-7, 2008, meeting. However, this document is not the “final” draft EIS triggering the public comment period in CEQ regulations. For that reason there is some flexibility in how complete the document needs to be. The “statutory” (i.e., submitted to EPA to trigger the public comment periods) draft EIS will be released some time in the first half of 2009. Under the new process, the draft IFEMS would need to be released on September 17 and would have to be a complete document containing all analyses.¹ The Trawl Rationalization project has an extended timeline because of the complexities of the decision to be made. More typically a partially complete, “preliminary” draft EIS is included in the briefing book for the meeting at which the Council takes final action.

In general, the proposed regulations better integrate public comment time periods into the Council process. This comes at a cost, however, in that a completed document must be ready well before the Council meeting at which final action occurs. Currently, it is often a struggle for staff to meet the comparatively shorter deadline of the briefing book and incomplete documents (although sufficient for reasoned decision making) are usually produced at this stage. Greater forethought will be needed to ensure that the range of alternatives likely encompasses what the Council eventually chooses as its preferred alternative in order to avoid the additional time

¹ Note that section 700.217, circulation of the IFEMS, states “NMFS shall ensure that the entire draft and final IFEMS, except for certain appendices as provided in § 700.216 and an unchanged IFEMS as provided in § 700.304, are circulated in a format that is readily accessible to decisionmakers and the public.” This underscores the requirement that the draft IFEMS be a complete document.

required for circulation of a supplemental draft IFEMS. As an example, if this process were used for the groundfish harvest specifications (because an EA or Framework Compliance Memorandum could not be used), then in 2008 the draft IFEMS would have to be released (by publication of the NOA) on April 24. This would require the Council to fully flesh out a range of alternatives at the April meeting, giving staff less than 2 weeks afterwards to complete all the analyses and prepare a complete document. If information became available after this deadline that caused the Council to formulate a substantially different preferred alternative a supplemental draft IFEMS would have to be prepared. It should also be noted that the amount of time needed after Council action until implementation (e.g., Secretarial determination, final rule effective date) is unlikely to be substantially shortened, because of the statutory time periods in the MSA and, for regulations, in the APA. For example, even if these procedures shortened the environmental review timeline it still may not be possible to move final action on the groundfish harvest specifications to the September Council meeting because of time periods required under the APA.²

Council staff views the IFEMS process as an improvement in terms of better-integrating public comment and participation into the Council process. But the staff views the overall process in the proposed regulations as worse than the current process under CEQ regulations because 1) a 45-day advance publication of the draft IFEMS before Council final action would impair many current Council schedules (the groundfish biennial specifications development process, for example) and 2) it actually lengthens the overall time required for the overall process, because a lot of the IFEMS timeline is before, rather than concurrent with, the MSA and APA timelines.

Generally Council staff recommends that Subpart C in the proposed regulations be changed to shorten the timeline, either on the front end (before Council final action), or the back end (after Council final action), or both.

Specifically, the new NEPA regulations could be changed in one or more of the following ways as a partial solution:

- **Reduce the public comment period to 14 days. This would more closely correspond to the current practice of including a preliminary draft EIS in the briefing book for the Council final action meeting.**
- **Eliminate the requirement for the public comment period to occur before Council final action. The new NEPA procedures actually reduce flexibility compared to current CEQ regulations, which allow initiating the 45-day public comment period on the draft EIS before Council final action and also allow it to occur afterwards.**
- **Loosen the criteria under which NMFS would grant a shortened public comment period to allow it to be better matched to circumstances.**

Section 700.104 Utilizing a memorandum of framework compliance pursuant to a framework implementation procedure

² Note also that both the 2007-08 and 2009-10 harvest specifications were combined with FMP amendments to modify rebuilding plans, invoking the 95-day MSA timeline.

This section would be applicable to harvest specification processes authorized under each of the Council's four FMPs. Annual specifications under the Salmon FMP and biennial specifications under the groundfish FMP are the most complex and procedurally demanding. The proposed regulations (700.104(a)) state "An FMP may establish a Framework Implementation Procedure which provides a mechanism to allow actions to be undertaken pursuant to a previously planned and constructed management regime without requiring additional environmental analysis, as provided in this section." The procedure allows determination of whether the anticipated effects of the action fall within a previous environmental analysis and criteria triggering additional analysis in an environmental assessment (EA) or IFEMS.³ This implies that an FMP must be amended to include the specifics for these determinations; because of the lack of these specifics any existing framework for harvest specifications described in an FMP would be insufficient for this purpose. If the action falls within the scope of a previous evaluation then a Memorandum of Framework Compliance may be prepared instead of an EA or IFEMS. This Memorandum is "a concise (ordinarily 2 pages) document that briefly summarizes the fishery management action taken pursuant to a Framework Implementation Procedure, identifies the prior analyses that addressed the impacts of the action, and incorporates any other relevant discussion or analysis for the record." (701.104(c))

Council Staff perspective: Overall, the Framework Implementation Procedure could provide considerable benefits if the Memorandum of Framework Compliance can be prepared in most circumstances. Alternatively (700.102(a)), an EA may be prepared for "...annual specifications taken pursuant to a fishery management plan and tiered to an IFEMS, EIS, or prior EA that are not covered by a CE or Memorandum of Framework Analysis [*sic*]." A Memorandum of Framework Compliance would be a much briefer exercise than the EAs or EISs currently prepared for harvest specifications, and the regulations support preparing an EA for actions not eligible for a Memorandum.

It seems likely that a broad, programmatic evaluation, covering the range of possible effects of harvest specifications, would be necessary to support the preparation of a Memorandum of Framework Compliance (or an EA) for harvest specifications. Environmental analyses prepared to date, which tend to be action specific rather than programmatic, may be insufficient for this purpose. However, if the FMPs must be amended to incorporate the Framework Implementation Procedure, the accompanying environmental analysis (IFEMS) could include the type of programmatic analysis necessary to support future Memorandums. However, such analyses may need to be periodically updated (5 years seems to be a common benchmark for programmatic evaluations; see, for example, NAO 216-6 Sec. 6.03a).

If the Framework Procedure is not implemented or the anticipated impacts of the action are outside the previously-analyzed range, an IFEMS would have to be prepared for a harvest specifications. It may be difficult to meet the new timeline for an IFEMS, as discussed above.⁴

³ An IFEMS (Integrated Fishery and Environmental Management Statement) would replace the Environmental Impact Statement described in CEQ regulations.

⁴ EISs have been prepared for each groundfish harvest specifications since 2003, suggesting the need for an IFEMS in the absence of the Framework Compliance Procedure.

Council staff thinks that the Framework Compliance Procedure could offer significant benefits, depending on ease of implementation. Council staff recommends that the new NEPA regulations state more explicitly whether or not an FMP amendment is needed to establish a Framework Compliance Procedure. In general, the staff does not favor requiring an FMP amendment in all cases. If an FMP already contains a framework for harvest specifications and previous environmental analyses cover the range of potential impacts, then NEPA compliance procedures should be specified in Council Operating Procedures rather than an FMP amendment. If an FMP amendment is required, the regulations should include a grace period under which current processes are allowed (i.e., EIS under CEQ regulations) to give time to amend the FMP with the Framework Compliance Procedure.

Minor Changes

700.108 Scoping

Section 708.108(a)(1), FMC-initiated actions, states “If scoping is conducted as part of an FMC meeting, a scoping notice must, at a minimum, be included as a component of the appropriate FMC’s next meeting agenda (MSA section 302(i)(2)(C)) and must be titled and formatted in a manner that provides the public with adequate notice of the NEPA-related scoping process.” Furthermore, 708.108(b)(1) states “NMFS, working with the appropriate FMC, shall ensure that affected Federal, State, and local agencies, any affected Indian tribe, the proponents of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds) are invited to participate. NMFS, working with the appropriate FMC, shall ensure that the scoping process meets the purposes of scoping as set forth in 40 CFR 1501.7.” This section then enumerates a range of activities to be included in the scoping process.

Council Staff perspective: Scoping goes beyond the requirement to allow for public comment; in essence it is the process whereby the agency specifies the action and determines the necessary environmental analysis. In general, the Council process, through committee and Council meetings, addresses the public involvement aspect of scoping. However, public comment opportunities at these meetings are usually not specifically identified as a scoping exercise. It would be beneficial if any interpretation of implemented regulations determined that the current public comment procedures used by the Pacific Council are sufficient and that a special scoping meeting or agenda item would not be required during a Council meeting.

Council staff considers the discussion of scoping in the regulations beneficial because it makes explicit that the Council process is the principal scoping mechanism for fishery management actions. However, the regulations should not be interpreted in a way that would reduce Council discretion on how meetings are run and public input solicited.

700.112 Assignment of tasks

According to this section an FMC and NMFS must establish which entity will carry the various actions required in the proposed regulations. “This clarification may be established through a Memorandum of Understanding for each environmental document individually or for classes of

environmental documents, but in no case should scoping activities be considered complete until such clarification is made.”

Council Staff perspective: **Council staff considers the requirement to clarify responsibilities beneficial. However, a written statement or MOU should not be required in all cases, if such clarification can be achieved informally. In general, the level of detail and formality of a clarification of responsibilities should be matched to the complexity of the project being undertaken.**

Section 700.205 Page limits and Section 700.206 Writing

An IFEMS “should be less than 150 pages ... but may be up to 300 pages for proposals of unusual scope or complexity.” (Note that CEQ regulations at 40 CFR 1502.7 identify a 150-page limit on EIS length and 40 CFR 1502.2 and 1500.4 speak to writing concise documents.) Section 700.205 also states that NMFS shall consult with CEQ on a programmatic basis if these page limits are regularly exceeded. Section 700.206 states in part “Each IFEMS should use all appropriate techniques to clearly and accurately communicate with the public and with decisionmakers, including plain language, tables, and graphics, with particular emphasis on making complex scientific or technical concepts understandable to the non-expert.”

Council Staff perspective: **Council staff considers the mandate for concise and clearly written documents beneficial. However, Council NEPA documents (including EAs) are almost never less than 150 pages, reflecting the difficulty of preparing concise, trenchant evaluations, especially for complex actions. Council staff recommends that NMFS assist the Council to more fully develop techniques, such as incorporation by reference and tiering off programmatic documents, to reduce the length of NEPA documents. Exceeding page limits, by itself, should not be a reason for NMFS (or the courts) to find a NEPA document inadequate.**

700.301 Public outreach

This section lists a wide variety of public outreach methods, including mailing notices to those who express an interest, and for actions of national concern to national organizations reasonably expected to be interested in the matter. Actions with effects of primarily local concern should be noticed through areawide clearinghouses; notice to Indian tribes; using the affected State’s public notice procedures; publication in local newspapers; other media and relevant newsletters; notice to community organizations; direct mailings to affected property owners and occupants; public posting of notices; and outreach via the internet. Section 700.301(c) discusses circumstances in which public hearings are warranted.

Council Staff perspective: **Council staff considers the mandate for comprehensive public outreach beneficial, but Council staff and resources are likely inadequate for a substantially expanded outreach effort as suggested by the regulations. If an action requires extensive outreach, dedicated funding will need to be provided or these efforts should be spearheaded by NMFS.**

700.303 Opportunity to comment and 700.305 Response to comments

Section 700.303(b)(1) states that the public may make comments "...to the FMC during the public comment period on the draft IFEMS by submitting written comments or during the appropriate FMC meeting by providing oral testimony." Section 700.305 requires written responses to comments to be incorporated into the final IFEMS in a fashion patterned after the requirements in current CEQ regulations for a final EIS (40 CFR 1503.4). This section emphasizes that the Council process is the principal vehicle for commenting on the action; section 700.305(d) allows comments on the final IFEMS but states "NMFS is not required to respond to comments raised for the first time with respect to a Final IFEMS if such comments were required to be raised with respect to a draft IFEMS pursuant to § 700.302(b)."

Council Staff perspective: Currently, because the 45-day NEPA comment period occurs after Council final action, often few comments are received. Integrating formal public comment into the Council process will make the public comments more influential. This is likely to generate a larger volume of comments requiring formal response. Furthermore, it is not clear how oral comments given at a Council meeting should be handled. If treated in the same manner as written comments, they will need to be transcribed or summarized in some fashion in order to formulate a formal response in the final IFEMS. As noted above, a special comment period during the Council meeting might be necessary to accept oral comments in a way that makes it easier to formally address them.

Council staff finds the response to comments requirements beneficial in terms of public participation, but the commenting process will increase the amount of work needed to complete the final IFEMS. Council staff strongly recommend that the response to comments requirement should not apply to oral public comments made at Council meetings.

700.401 Determining the significance of NMFS's actions and 700.402 Guidance on significance determinations

Section 700.401 lists factors for assessing significant impacts that are effectively identical to those in CEQ regulations at 40 CFR 1508.27. Section 700.401(d), potentially significant but previously analyzed effects, states "A FONSI may be appropriate for an action that may have significant or unknown effects, as long as the significance and effects have been analyzed previously." Section 700.402 lists factors for assessing significance previously included in NAO 216-6, section 6.02. Section 700.402(a) states that "NMFS may, as appropriate, develop guidance regarding criteria for determining the significance of effects on a national or regional level for purposes of informing the determination of whether a FONSI is appropriate or an IFEMS must be prepared."

Council Staff perspective: **Council staff believes that additional guidance on criteria for determining significant effects would be helpful. Such guidance should focus on methods for identifying case-specific thresholds rather than identifying specific thresholds applicable to all actions. Council staff recommends that the current internal scoping**

process conducted by NMFS staff, used to decide what kind of NEPA document to prepare, include development of thresholds and allow for early, full participation by Council staff.

700.501 Fishery management decisionmaking procedures

This section states “NMFS and the FMCs shall adopt and maintain procedures, consistent with current or future Statements of Organization, Practices, and Procedures, as described in 50 CFR 600.115, to ensure that fishery management decisions are made in accordance with the policies and purposes of NEPA and the MSA.”

Council Staff perspective: This requirement will increase workload if the Council has to adopt and maintain new Council Operating Procedures describing the full decision process. The Council SOPP document already has a clause indicating compliance with current applicable Federal law. **Council staff recommends that this requirement apply only to the modification of current Council Operating Procedures that would directly conflict with any procedural changes implemented through the regulations.**

700.701 Emergencies

Section 700.701(a) directs NMFS to develop alternative arrangements for NEPA compliance in consultation with CEQ for emergency actions with significant impacts (i.e., requiring an IFEMS). Section 700.701(b) allows promulgation of emergency regulations prior to the completion of an EA and FONSI for emergency actions that will not result in significant impacts.

Council Staff perspective: Salmon harvest specifications required the promulgation of emergency regulations in 2006 and 2008. This language is an improvement on the current guidance on emergency actions in NAO 216-6, §5.06. **Council staff believes these provisions are beneficial because they clarify how NEPA compliance can be appropriately addressed when emergency regulations must be promulgated. Council staff recommends that the regulations describe how NEPA for emergency regulations can be incorporated into the Framework Compliance Procedure.**

700.702 Categorical exclusions

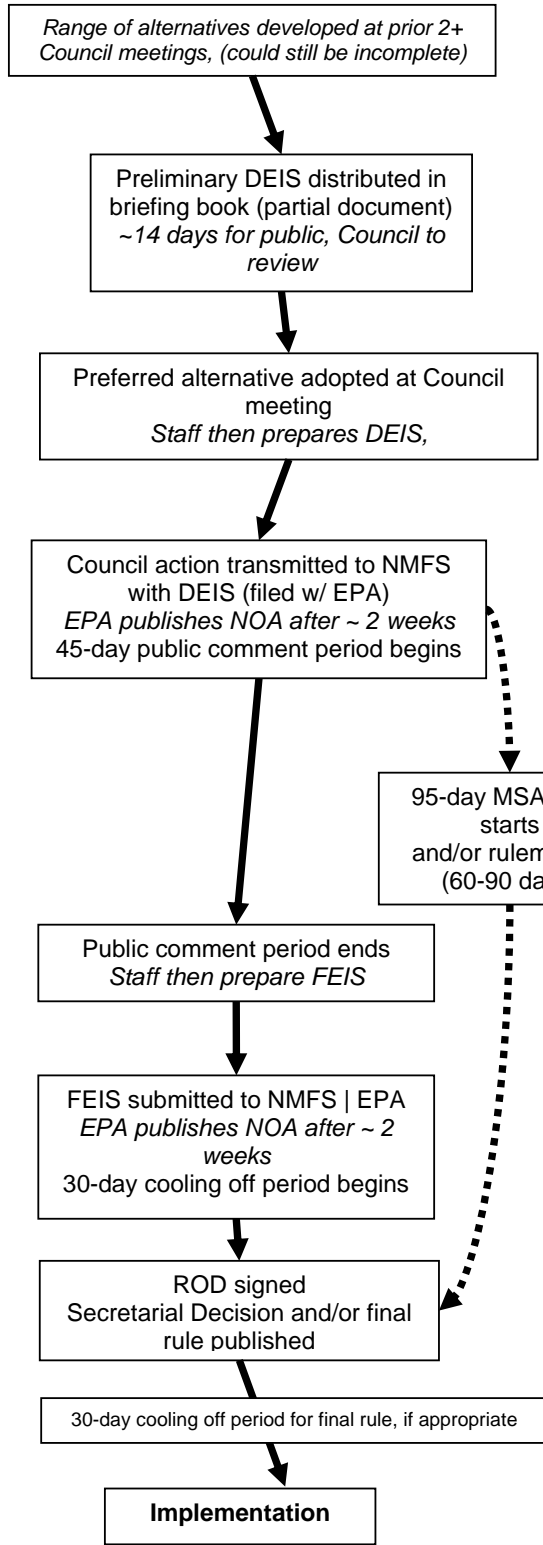
Section 700.702 identifies certain classes of actions eligible for a categorical exclusion (CE).⁵ These include ongoing or recurring fisheries actions; minor technical additions corrections, or changes to an FMP or IFEMS; and research activities permitted under an EFP or Letter of Authorization. In all cases the actions cannot have impacts not already assessed or do not have significant impacts. Section 700.702(a)(1) states that “...reallocations of yield within the scope of a previously published IFEMs, FMP or fishery regulation...” can qualify for a CE if, as already stated, the impacts have been previously analyzed and are not significant.

⁵ CEQ regulations at 40 CFR 1508.4 define a categorical exclusion as “a category of actions which do not individually or cumulatively have a significant effect on the human environment ... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.”

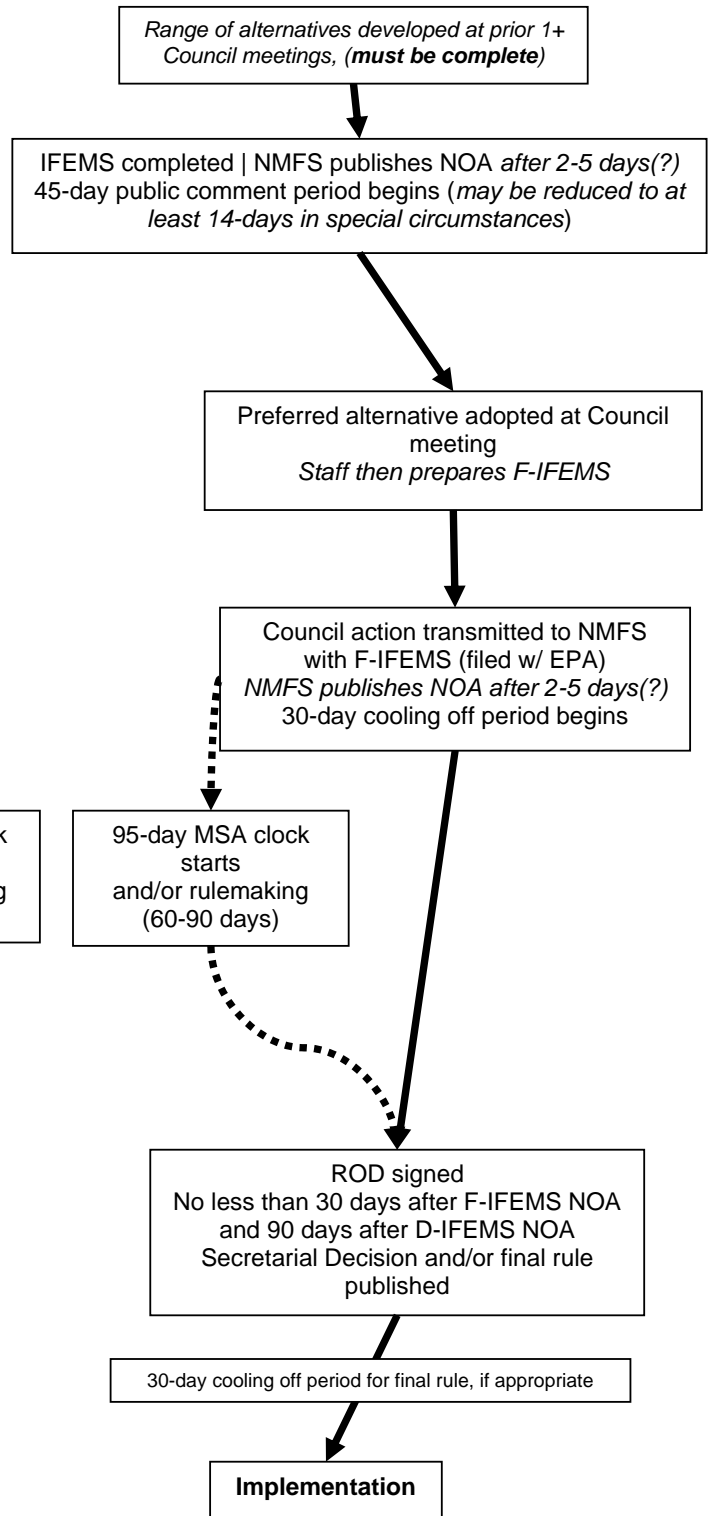
Council Staff perspective: This language may allow more frequent application of CEs in comparison to current guidance in NAO 216-6, §5.05. **Council staff believes that the language in the new NEPA regulations on CEs is beneficial to the degree it clarifies their use and allows them to be used more frequently.** Council staff recommends working with NMFS to explore whether the alternatives in the NEPA document for groundfish FMP Amendment 22, Inter-sector Allocation, could be structured in such a way so as to allow future changes in formal allocations to qualify for a CE.

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Current Process



Proposed Process



Comparison of current and proposed processes for NEPA, decisionmaking, and implementation.