

PROCESS FOR COUNCIL APPROVAL OF REGULATIONS IMPLEMENTING COUNCIL RECOMMENDATIONS (“DEEMING PROCESS”)

Section 303(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) speaks to a Council submitting, to the Secretary, proposed regulations which the Council deems necessary or appropriate for the purposes of implementing or modifying a fishery management plan (FMP) or FMP amendment. A recent court case decided that regulations promulgated by National Marine Fisheries Service (NMFS) to implement proposed North Pacific Fishery Management Council (NPFMC) management recommendations contained additional requirements for which there was no evidence the Council had “deemed” the additional requirements necessary or appropriate. As a result, all Councils have been asked to establish a formal process whereby it is clear that the Council has “deemed” all proposed regulations as necessary or appropriate.

Ideally, proposed regulations should be available at the time of the Council’s final action and thereby be available for the entire Council to review and approve along with the pertinent management recommendations. However, even if the proposed management recommendations before the Council include draft regulations, the Council’s final action often involves changing some portions of the recommendations so that regulations must be further modified. In the Pacific Council forum, the usual convention has been that regulatory language is completed later by NMFS and not brought back to the Council, although there have been exceptions.

Council staff proposes three options for establishing a formal deeming process through an addition to Council Operating Procedure (COP) 1, General Council Meeting Operations. Option 1 would require a scheduled Council meeting agenda item and approval by the full Council. Option 2 would authorize the Council Chairman or Executive Director to review and deem, on behalf of the Council, that the proposed regulations were consistent with the Council action. Option 3 allows the Council to decide at the time of each final action whether to use the process of Option 1 or Option 2, or even some other process that might later emerge as appropriate.

The benefit of Option 1 is that it ensures final proposed regulations will receive a full Council review with opportunity for advisory body comments and has the greatest probability that regulatory language is an exact fit to the Council action. The downsides are that it may (1) significantly delay implementation of the action due to the timing of a later Council meeting and the NMFS process of drafting regulations, or (2) further reduce already limited Council agenda floor time for other important issues. Option 2 avoids the downsides of Option 1 and could result in more timely implementation of some actions. A review delegated to the Chairman or Executive Director might be more expedient and is likely sufficient in most cases. However, it may not have the benefit of a potentially broader review achieved by the full Council and reducing time to implementation would depend on NMFS early submission of the draft regulations to Council staff to allow adequate time to review the regulations on behalf of the Council. Option 3 allows the Council to choose the preferred process based on an assessment of the Council’s workload, priorities, and issues at hand at the time of final action.

Attachment 1 displays the options in more detail by displaying Option 3 as it would be embedded within COP 1.

Council Action:

Consider options in Attachment 1 and adopt a formal “deeming” process to ensure all implementing regulations for FMPs or amendments are consistent with Council intent.

Reference Materials:

1. Agenda Item C.2.a, Attachment 1: Example Amendment to Council Operating Procedure 1 General Council Meeting Operations

Agenda Order:

- a. Agenda Item Overview John Coon
- b. Agency and Tribal Comments
- c. Reports and Comments of Advisory Bodies
- d. Public Comment
- e. **Council Action:** Adopt a Formal Process for Approving Proposed Regulations Prior to Implementation by NMFS

PFMC
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