Regional Operating Agreement (ROA)

To Develop and Implement Fishery Management Actions

between

North Pacific Fishery Management Council (NPFMC) and NOAA Fisheries (NMFS), Alaska Regional Office

Background

In January 2013, the Department of Commerce, Office of Inspector General (OIG), issued its final report addressing opportunities for NMFS to continue streamlining the rulemaking process for fisheries management, and included a recommendation that NMFS finalize regional operating agreements (ROAs) between NMFS regional offices and Councils. The OIG cited the primary purpose of the ROA was to provide a clear understanding of roles, responsibilities, and obligations between the Councils and regional offices. The report recognized the different systems in place across various Council/Region pairings, and identified that documenting existing processes in each Region (including existing systems, roles, responsibilities, communication protocols, and expectations of each Council/Region partnership) is necessary to provide NOAA (and the Councils) a better opportunity to identify necessary tasks and ensure they are appropriately assigned and completed. The initial target date for completion of the ROA was identified as December 2013.

Generally, the respective roles of the Council (and staff) and NMFS are as follows:

The Council is responsible under the MSA for the preparation of FMPs, FMP amendments, and other related actions for species under its management authority. The Council (through its staff) develops, analyzes the likely impacts of, and recommends management measures to NMFS that are consistent with all applicable laws and regulations. The Council must document the management process and provide the justification and rationale for its recommendations. Council members must be informed of the potential impacts of the actions they are recommending. The Council process is the focus for public involvement during the development of fishery management actions. Additional specific Council (or Council staff) responsibilities include:

- The Council works with NMFS (which implements, administers, and enforces regulations and programs), state agencies, and other entities (Pacific States Marine Fisheries Commission, US Coast Guard, US State Department, and others) to develop effective management measures.
- To obtain scientific and technical advice, the Council establishes Council Committees and other groups, such as the SSC, issue specific Committees, Advisory Panels, and Plan Teams. These entities bring forward recommendations to the Council via a variety of mechanisms for consideration and eventual final Council approval and recommendation to NMFS.
- The Council clearly documents details on internal Council processes in its Standard Operating Practices and Procedures Document, which is available on the Council website.
- Council staff are responsible for compiling, or coordinating the compilation of, the various analyses and documentation necessary to support Council decision making.

Nearly all management actions considered by the Council are supported by analyses which are a close and necessary collaboration of Council and NMFS staff. The NMFS Alaska Region assists the Council in the development of fishery management actions, by:

- Providing staff representation on appropriate committees and working groups, to advise on technical, policy, administrative, and legal requirements and issues.
- Identifying a lead staff person in the Sustainable Fisheries Division to assist with coordinating other NMFS divisions as needed in support of fishery management actions, including the Habitat Conservation Division, Protected Resource Division, NEPA staff, Fisheries Data Services Division, Analysis and Program Support Division, OLE, and NOAA General Counsel.
- Identifying and responding to staff resource needs, requirements, and/or limitations associated with the development, review, approval, and/or implementation of an action, including assisting in the development and compilation of analyses to support management actions.
- Coordinating any necessary interactions between the Council and NMFS Headquarters and the various offices within NMFS Headquarters (e.g., Office of Sustainable Fisheries, Office of Science and Technology, and the NOAA NEPA Coordinator).
- Coordinating the review of Council actions and documentation within line offices, including NOAA General Counsel.
- Providing advice, guidance, and information on fishery management policy issues and requirements, as requested, including considerations of administrative costs and complexity, potential approvability issues, enforceability concerns, timing of the development and implementation of the action under development, particularly with regard to the Secretarial review phase, and regulatory simplification (i.e., how to keep measures and regulations as simple and clear as possible).
- Writing proposed and final rules to implement approved measures, with the accompanying regulatory language, consistent with the Council's action and intent.
- Ensuring that all applicable laws and executive orders are addressed (e.g., Paperwork Reduction Act, Information Quality Act).
- Conducting Essential Fish Habitat (EFH) consultations.
- Conducting Consultations under the Endangered Species Act (ESA), if required.
- Responding to public comments received during rulemaking.
- Implementing and administering approved programs and program changes; working closely with OLE and NOAA General Counsel to enforce regulations and defend approved Council actions in litigation.
- Monitoring, projecting, and documenting fishing activity and catches, and taking appropriate in-season and/or post-season actions relative to annual catch limits and seasonal catch quotas.
- Developing and implementing emergency actions, interim actions, and Secretarial FMPs/amendments to respond to new information or management/statutory requirements.

Scope of ROA

While many aspects of this ROA are grounded at the respective staff levels of the Council and Region, it is essential that the Council itself be aware of, and provide its approval of, the basic tenants of this agreement. This agreement is between the Council and the Regional Office only, though it may necessarily contain reference to other NOAA line offices (for example, the Alaska Fishery Science Center or the Office of General Counsel) because of their importance and role in the process. This ROA is intended to document the specific roles and responsibilities of the Council (and by extension its staff) and NOAA Fisheries Alaska Region in the development, approval, and implementation of fishery

management actions promulgated under the Magnuson-Stevens Act (MSA). An additional objective of the ROA is to set forth procedures and review processes to ensure the preparation of adequate and complete analyses of proposed management actions, and to facilitate development of such analyses as early in the process as possible (i.e., frontloading). It is intended to function within the general parameters of the existing 'Operational Guidelines', and may be altered or updated upon completion of any new Operational Guidelines. The OIG recommended a review of Operational Guidelines and modifications as needed. That review is currently underway with a target completion date in 2015.

As parties to this (ROA), the Executive Director of the Council and the Regional Administrator for NOAA Fisheries, and their respective staffs, agree to engage in good faith effort and communication to accomplish the goals of this agreement, to minimize any adverse impacts to the mission of either the Council or NOAA Fisheries, and work to insure that neither the Council nor NOAA Fisheries are surprised by actions of the other. In addition to the formal aspects of this ROA, frequent communication among key Council and NOAA staff should be encouraged relative to accomplishment of these goals. This ROA will apply to all new proposed actions, and may be applied to ongoing actions depending upon their stage of development relative to the guidelines. Council and NOAA staff will meet annually to assess the success of this effort and review components of the ROA for any necessary revisions. This ROA is not intended to limit or prevent staff from agreeing upon alternative processes on a case-by-case basis in response to specific issues or needs. Specific components of this ROA reflect the four main rulemaking phases outlined in the Operational Guidelines, and include (1) planning, scoping, and coordination (including the Action Planning process); (2) document preparation (including adoption of a standardized analytical template); (3) Council action (initial and final action); and (4) Post-Council action (including development of implementing regulations and Secretarial review). A further description of these primary components follows:

Early planning, scoping, and coordination (Action Plans) - Early planning begins when a proposal for a management action is adopted for formal analysis by the Council, or when the Council initiates consideration of a management action through development of a discussion paper to initially scope an issue for further consideration. When initiating an action for formal analysis, the Council has determined that preparation of a relevant MSA/NEPA document will proceed, and will identify the problem to be addressed (inclusive of a purpose and need statement), and, insofar as possible, a reasonable range of preliminary alternatives.

Following initiation of a proposed action, either at that meeting or following that meeting, an Action Plan will be developed by Council and/or NOAA staff. In most cases Council staff will be the lead in terms of drafting and updating the Action Plan. The Action Plan will include the purpose and need statement; potential range of alternatives; identification of necessary analytical resources (and project analytical personnel where possible); necessary data needs for analysis; estimated timelines for analysis, action, and implementation (based on the 16 steps identified in the existing operational guidelines, as relevant/appropriate); identification of other applicable laws, legal issues, or other special considerations; and, determination of the appropriate NEPA document (EIS, EA, CE) to be prepared. In the case of discussion papers tasked by the Council, or a relatively simple regulatory amendment, an Action Plan may not be necessary, or may necessarily be brief and not contain all of the elements described above. In some cases, depending on the scope of the issue, an Action Plan itself will effectively be the appropriate discussion paper.

Staff resources to be deployed will be identified by the appropriate NMFS division director (typically the Assistant Regional Administrator for Sustainable Fisheries), and the Council Executive Director, or their designees, in consultation with (as necessary) other NMFS line offices (for example, Protected Resources or Habitat Conservation divisions), the Alaska Fisheries Science Center, and NMFS Enforcement, and other Federal or State management agencies as necessary. NOAA GC will identify individual(s) for

inclusion in the Action Plan. Action Plans will identify, to the extent practicable, specific individuals necessary for coordinated development of the discussion paper or analysis, including identification of specific individual(s) within the Office of General Counsel and Office of Enforcement for purposes of contact, input, or review (Action Team). Unless otherwise agreed, Council staff will take the lead in drafting Action Plans and will be the primary point of contact, recognizing that each Action Plan is a fluid document and may be adjusted as necessary in response to internal staff discussions, Council actions, or staffing needs. While the primary purpose of each Action Plan is to guide project development at the staff level, the Council and the NMFS Regional Office will have the opportunity to review all Action Plans, and provide direction where necessary. Work related to the proposed action may commence prior to such review, recognizing that the Action Plan, and associated tasks, may need to be adjusted following such review. A detailed description (DRAFT) of the comprehensive Action Planning Process is attached to this ROA as **Attachment 1**.

As part of the coordination and early planning initiative, Council, NMFS, NOAA GC, and ADF&G supervisors will meet after each Council meeting to update the list of on-going Council projects, identify priorities, set general, high-level deadlines, and generally develop consensus understandings of the tasking horizon over the near term.

Document preparation and development of Analysis – After finalizing the Action Plan, the bulk of analytical activity takes place during this phase. This is also where the bulk of Council activity will take place, perhaps over the course of multiple meetings and multiple drafts. Once a proposed management action is subject to formal analysis, the Action Plan will serve as the guiding document for coordination of the analysis. Under this ROA, the Council and the Regional Office agree to follow a standardized analytical format, which includes requirements of the MSA, NEPA, and other applicable laws, and which has been developed through numerous internal staff discussions and in accordance with the requirements of various applicable laws.

Once the draft analysis (or discussion paper) is completed by the Action Team for initial consideration by the Council, including any necessary ESA or EFH considerations, it will be distributed, as practicable, for internal review by the Action Team prior to release for Council and public consideration. While such internal review is not required, the overall concept of 'frontloading' is enhanced by this opportunity for internal review. It is also consistent with the intent of the (pending) NEPA Policy Directive from NMFS which strives for document quality, satisfaction of legal requirements, and informed decision-making as early as possible in the process.

Adoption of Draft Analysis, completion of final analyses, and Council action –Generally, documents (initial review of Plan or Regulatory amendment packages) will be provided to the Council and to the public at least 2 weeks prior to the Council meeting at which initial review is scheduled (at least one week for discussion papers). The draft analysis may be distributed to the Council, SSC, and AP at the same time it is distributed for internal review, or if time allows the document will be revised based on internal review prior to distribution to the Council. The Council, SSC, and AP would review both the amendment analysis at the same meeting, and take action as necessary. As outlined in the guidelines, any necessary document revisions could result in additional Council meetings (and an additional review of the draft analysis) prior to final action by the Council; however, the Council could determine that any necessary revisions to the document be made without an additional Council review, and the issue scheduled for final action by the Council at a subsequent meeting, noting that an additional round of public review and comment on the final analysis will occur prior to Council final action. Council adoption of a preferred alternative in the draft for public review and comment is not required, except in those cases where formal ESA/EFH consultations are necessary.

Generally, documents scheduled for final action by the Council will be made available to the Council and the public at least 3 weeks prior to the Council meeting at which final action is scheduled. The analyst will work with the Action Team to accommodate a reasonable time for internal review of initial and final analysis prior to its release to the Council and public, except in limited cases where it would be impractical, or not needed based on earlier review by the Action Team.

Post-Council action – Following the Council's final action, the analysis will be finalized as necessary to reflect the specific action of the Council (which may be one of the alternatives specified in the document, or something within the range of the alternatives specified). This process typically rests with the primary author (project lead), which may be either Council or NMFS staff, and will include the necessary coordination and reciprocal, internal review to achieve a mutually agreed upon final document for Secretarial transmittal. The remainder of the submittal package, including implementing regulations and any other necessary decision documents, will be completed by NOAA staff, with input from Council staff as necessary, and through consultation with the Council as necessary (noting the MSA requirements for submittal of Council plan or regulatory amendments). The intent of the operational guidelines, the pending NEPA Policy Directive, and regulatory streamlining (RSP) in general, is to frontload the documentation/analyses underlying regulatory actions. Revisions to documentation/analyses following Council action should be minimal. The rulemaking process prescribed by statutes remains unchanged, though the time required to review and implement the post-decision rulemaking should be expedited if the frontloading process is successful. The documentation and report of activities under this agreement, particularly timelines involved in frontloading and approval/implementation of actions, as well as the results of any litigation efforts, will be informative in evaluating the success of the revised guidelines, and this ROA.

This Agreement will remain in effect unless and until it is terminated or revised by mutual agreement. By signature below, and on behalf of the organization I represent, I support the tenets of this agreement, and agree to fulfill the roles and responsibilities outlined herein, and to support the efforts of the other parties in doing likewise.

Eric A. Olson, Chairman, NPFMC _____ 2/24/2014

Chris Oliver, Executive Director, NPFMC _____ 2/24/2014

for James Balsiger, NMFS Regional Administrator _____ 2/24/2014

Appendix 1:
DRAFT Comprehensive Action Planning Process

The comprehensive action planning process starts at the beginning of the project and ends with the implementation of the final rule **AND** involves all key staff throughout the process. Action planning is a **dynamic** and **iterative process**. This process is **flexible** and should be tailored to each specific project as appropriate.

The action planning process involves --

- identifying an Action Team -- **project lead** and **key staff** -- responsible for the project
- conducting a **kick-off meeting** to identify
    - **substantive issues** to analyze
    - any **legal** or **controversial issues** associated with the action
    - **milestones** and **deadlines**
- writing the **action plan** as a **living document**
- regular communication among the team to provide **ongoing feedback** into the action plan, analysis, and rulemaking

Tasking, Prioritizing, and High-level Deadlines

After each Council meeting, Council, NMFS, and ADF&G managers will meet to update the list of projects on-going in the Council process, **identify staffing**, set **high-level deadlines**, and **identify priority projects for action planning**. This group will provide meeting results to all staff as soon as possible after each meeting. Input from staff, review of project status and priorities, and communication will be on-going among all staff before, during, and after Council meetings.

For most projects, the **project lead** will be a Council staff person. For NMFS initiated projects, NMFS staff will be the project lead. Some projects may have **project co-leads**. The project lead is responsible for conducting the **kick-off meeting** and documenting the results in an **action plan** and keeping it up to date, in consultation with the Action Team.

Action Team - Key Staff

The Action Team should include at least one key staff pejrson from the Council, GCAK, and NMFS (and ADF&G, if appropriate). Identifying key staff for a project in the beginning allows everyone to learn about the action and issues and provide early input into the development of the action, alternatives, and analysis. Key staff can also be used to contact or consult with other members of their agency that may be necessary to keep informed. **The Action Team members are responsible for reading available information and coming to meetings prepared.**

Kick-off Meeting

At the **early stages of the project**, the Action Team will conduct a **kick-off meeting** (a.k.a. **internal scoping**). The goal of kick-off meeting is to (1) identify substantive issues using the **kick-off meeting topics** on **page 3** and (2) review high-level deadlines and project management. Issues include identifying which resources and entities could potentially be impacted, the potential nature of the impacts, areas of controversy, and areas of uncertainty. This meeting will be a first step in defining the scope of the project and provide direction for completing the analysis. **The information generated during the kick-off meeting will be reflected in the Action Plan and be the foundation for the analysis.**

Project Management

Once the substantive issues have been identified, the Action Team will initially identify the **roles and responsibilities** of each team member, and whether additional staff or expertise are necessary to complete the project. The Action Team will identify milestones and the deadlines necessary to complete each milestone so that the project is completed by the established **high-level deadlines**. **The project management details will be reported in the Action Plan.**

Action Plan

The Action Plan will be a live document (like a google doc) and the **project lead or co-leads** will be responsible for updating and revising it to keep it current. Ideally, the action planning process will start before developing a discussion paper. However, **the scope of the early action plan depends on the kick-off meeting and the nature of the project with the goal that communication, planning, and identifying issues starts at the beginning of the project.**

After the kick-off meeting, the project lead and team members will **write an action plan to reflect the issues, milestones, and deadlines resulting from the meeting**. The Action Plan will address the important issues from the kick-off meeting and be the foundation for the analysis.

Action Plan Contents

- Action Summary
- Purpose and Need
- Type of analysis document
- Substantive issues for analysis
- Implementation issues
- Staff involved
- Milestones and Deadlines

Ongoing Meetings

Through the course of project, the Action Team should meet periodically to review the issues, identify new issues, and measure the progress towards the milestones. The goal of these meetings is to improve communication and provide feedback into the Action Plan. **The Action Plan will be updated to reflect these meetings.** The nature and frequency of these meetings should be tailored for the specific action.

Kick-Off Meeting Topics

At the kick-off meeting, the Action Team will look at the following topics and questions, plus any additional issues appropriate for the action. These topics and questions may be used as a kick-off meeting agenda. To prepare for the meeting, the project lead may initially answer questions with obvious responses, focusing the team on questions that may need group input to answer. **The responses to each question should be documented in the Action Plan, as appropriate, and be the foundation for the analysis.** This process recognizes that these answers may change over the course of the project and the action plan should be revised accordingly so that it remains current.

What is the action?

- Describe the action.
- Is this an FMP amendment, and if so, which FMP(s)?
    - Which FMP sections could be amended?
- Does it require regulatory changes?
    - Which sections of the regulations could be amended?
    - Is there a potential for a PRA collection?

Why are we doing it?

- What is the purpose of the action?
- Why is it needed?

Legal Issues

- Is there any legal guidance for this action or type of action?
- Are there any unique legal issues that should be addressed in the analysis?
- Are there any unique legal authorities for this type of action?

NEPA Analysis

- Does the action have the potential to impact the human environment?
    - If **not**, does the action qualify for a categorical exclusion? Identify categorical exclusion from NAO 216-6. No need to consider additional NEPA issues.
- If **yes**, then identify the species potentially impacted by the action/alternative--
    - Does the action have the potential to impact any target species, non- target species, endangered or threatened species, marine mammals, or seabirds?
    - Identify the type of analysis necessary to understand the impacts on the identified species and to conclude whether or not those impacts are significant.
- Does the action have the potential to damage the ocean, coastal habitats, or essential fish habitat?
    - Identify the habitat areas/types impacted.
    - Identify the type of analysis necessary to understand the impacts on habitat and to conclude whether or not those impacts are significant.
- Does the action have the potential to impact biodiversity and/or ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc.)?

    - Identify the type of analysis necessary to understand the impacts on the ecosystem.
- Are there any significant social or economic impacts interrelated with natural or physical environmental effects?
- Does the action have the potential to impact safety?
    - Identify the type of analysis necessary to understand the impacts on safety.
- Can the proposed action reasonably be expected to result in cumulative adverse effects?
    - Identify the type of analysis necessary to understand the cumulative effects.
- Is the proposed action likely to establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration?
- Can the proposed action reasonably be expected to result in the introduction or spread of a non-indigenous species?
- Does the action have the potential to impact unique areas or cause loss or destruction of significant scientific, cultural, or historical resources?

Economic Analysis

- Who are the directly regulated entities?
- Which sectors or stakeholders are likely to be directly affected? Indirectly affected?
- Are any of the affected entities "small entities" (earn less than the $19 million threshold)?
- What type of analysis is necessary to understand how the identified entities would be impacted?
- Does the action have costs/benefits that can be quantitatively assessed or only qualitatively assessed?
- Which are the best data sources to use for the economic analysis?
- Are the impacts primarily distributive (and to what sectors) or does the action affect national net benefits?
- Is the regulatory action significant in terms of EO 12866 ($100 million or more threshold)?

Data Availability and Uncertainty

- What data are necessary to conduct the analysis?
- With the best available information, can we predict the potential impacts of the alternatives?
- Identify data gaps and sources of uncertainty.
- Are the effects likely to be highly uncertain or involve unique or unknown risks?
- What criteria will be used to determine significance of effect? (for EAs)
- What related actions have recently been completed that may provide information to inform the analysis for this action?

Controversy

- What are the controversial issues associated with the action?
- What is the nature of the controversy?
- Are the effects, or our understanding of the effects, likely to be highly controversial? Could different experts look at the same information and come to a different conclusion (like whether the effect is significant or not)?

Creating the Agency Decision File (Record)

- Briefly review procedures necessary to build the agency decision file on this issue. Analysts must be able to provide the Alaska Region a pdf of every document referenced in the analysis (limited information needed for books referenced) and copies of information from websites referenced in the analysis. *See separate agenda discussion of Administrative Records procedures and developing policy on when pdfs of reference documents and websites must be provided to NMFS.*
- Drafts presented to the Council or released to the public are automatically retained by NMFS. However, if this is a controversial or complicated issue, you may want to discuss if key internal review drafts from the Council analytical phase should be retained for NMFS's record.
- For very controversial issues, consider separately developing an agency decision file plan.

Implementation Planning

- What are the implementation issues? Use this initial identification of implementation issues to start the implementation planning process, as appropriate.
- For example, does the proposed action affect or interact with:
    - ✓ Inseason management
    - ✓ Catch accounting
    - ✓ Observer Program, observer coverage
    - ✓ Permitting
    - ✓ Recordkeeping and Reporting (information collection, PRA, eLandings, elogs)
    - ✓ Equipment or operational requirements on vessels or in plants
    - ✓ Information technology (programming, applications development, website needs)
    - ✓ Legal issues, General Counsel
    - ✓ Enforcement considerations (OLE, GC-EL)
    - ✓ Other NMFS divisions (PR, HCD)
    - ✓ NEPA coordination (NMFS AKR NEPA Coordinator)
    - ✓ Budget, cost recovery, or fee collection (NMFS AKR OMD)
    - ✓ Other agencies and authorities (ADF&G-State waters, IPHC-halibut fisheries)
    - ✓ NMFS AKR Public Affairs
    - ✓ Administrative – (complicated document formatting, compilation, transmission)

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