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Northwest Straits Commission

April 19, 2006

Jim Balsiger
Acting Deputy Assistant Administrator
for NOAA Fisheries Service

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

Dear Deputy Assistant Administrators Jim Balsiger and
Captain Craig McLean,

The Advisory Council (AC) of the Olympic Coast National Marine Sanctuary (OCNMS) appreciates the opportunity to comment on the “Draft Flowchart Regarding Fishing Regulations in National Marine Sanctuaries”. We recognize the value of clarifying how these two important pieces of legislation can be used to protect some of our nation’s most treasured marine resources.

Artwork: David Sones

Clarification of the relationship and processes between National Marine Sanctuary Act (NMSA) and Magnuson Stevens Act (MSA) has been needed. Fishery-related issues have arisen for other sanctuaries on the west coast (with both the Pacific Fishery Management Council and the Western Pacific Fishery Management Council) and providing clear delineation of processes and standards is desirable.

In developing these comments, we recognize that when OCNMS was designated in 1994, the National Oceanic and Atmospheric Administration (NOAA) determined that existing fishery management authorities were adequate to address fishery resource issues. As a result, the OCNMS designation document does not authorize the regulation of fishing.

These comments do not weigh in on the policy issue of whether OCNMS designation document should be changed. They are meant to relate to how the NMSA and the MSA should be applied within a National Marine Sanctuary (NMS). While these comments relate specifically to development and adoption of fishing regulations, we fully support developing appropriate processes for other regulatory actions of sanctuaries.

We have several overall comments on the draft flowchart. More detail on these and specific comments will follow. The following overall comments are not prioritized:

- Development of this draft flowchart is a positive first step in improving the management processes already in place and the coordination and communication needed to implement such management. However, this draft is not adequate as proposed and needs additional work.
- Prior to the development of new regulations, substantive interactions are needed between NMSs and regional fishery management councils (RFMCs). Additional points of interaction should occur throughout the process and be specified in the flowchart.
- The flowchart does not reflect the ongoing work that the NMSs and RFMCs routinely engage in. This work involves extensive interactions with state and tribal managers and should be indicated on the flowchart.
- The flowchart needs to clarify standards for decisions and make the processes for decisions transparent.
- There are a several points in both flow charts where decisions might be made by non-federal organizations that would constitute an acceptable alternative to federal action. The flowchart should be modified to include these decision points.
- Recognition is needed of state-tribal cooperative management operating in compliance with U.S. v WA.
- It would be valuable to note the involvement of international organizations and additional places where the ACs of the sanctuaries or other organizations may be involved in the process.

In Washington State, fishery management involves a complex system operated in compliance with federal court decisions, treaties, executive orders and statutes. Management of these resources involves state, treaty tribes as well as federal agencies and organizations such as the International Pacific Halibut Commission. Tribal interest and management authority extends beyond reservation boundaries to include the Usual and Accustomed fishing areas (U & A's), as defined for each tribe in *United States v. State of Washington*, 384 F. Supp. 312 (W. Dist Wash. 1974). The management and regulatory authorities of the Coastal Treaty Tribes is noteworthy in that OCNMS is located within the U & A's of the four Coastal treaty tribes. This is unique among the National Marine Sanctuary system and a crucial factor in management of the OCNMS.

The operation of the cooperative management system means that the process followed locally will include interactions and processes not reflected in the draft national flow chart. While this is particularly important at the outset of potential regulation

development, the involvement of tribal and state co-managers in any fishery regulations will be continuous throughout any process. While these statements relate to current management in OCNMS, it should also be noted that this could apply where any NMS exists within the U & A's of treaty tribes or traditional fishing areas of indigenous cultures.

The potential involvement of OCNMS in this cooperative management system would add complexity to the existing management system. OCNMS's coordination and cooperation with the existing management entities would be critical to addressing any fishery-related management goals.

In developing these comments, we recognize that the goals of MSA and of NMSA are not the same. The recommendations that discuss parity and parallels should not be interpreted as proposing changes in these differing goals. Rather they are aimed at clarifying the relationship between these two processes.

The comments that follow include General and Specific Recommended Changes to the flowchart in bold typeface. Additional detail and more general comments are also included. To illustrate some of our comments, we have edited the beginning sections of the NMSA and MSA flowcharts. Some of the changes we are recommending are included in these two revisions. However, the enclosed revised flowcharts are meant to be illustrative and are not complete. There are multiple places in the flowcharts where our comments should be considered and applied. We have illustrated their application in the initial stages of the process.

The comments that follow are not prioritized.

General Change needed: Add additional points of interaction between the National Marine Sanctuaries (NMSs) and the Regional Fishery Management Councils (RFMCs).

Specific change needed: Add a box at the top of both flowcharts that illustrates a 2-way communication between the two processes. This will be termed Box "0" for discussion hereafter. Early and ongoing interaction between a sanctuary and a RFMC needs to be illustrated in both sections of the flow chart. This will improve the process for both resource managers and affected resource users. The early interaction with the appropriate RFMC needs to precede the point where a decision is made to proceed to a regulatory action. The points for early communications between the National Marine Sanctuary Program and NOAA Fisheries and between the sanctuary advisory councils and the fishery management councils need to clearly precede decisions to move forward with a 304(a)(5) process.

Specific change needed: Add appropriate places in the flowcharts for discussion of data needs, exchange of data when possible and discussion of management alternatives throughout the flowcharts. The NMSA flowchart discusses supporting documentation that an NMS should include as a 304(a)(5) package to the FMC;

however, nowhere else in the flowchart is there a mechanism for sanctuary data to inform the council process, nor vice versa. Neither is there a mechanism for the RFMC to request specific information of the NMS. NMS and NOAA Fisheries staff should review the document and look for appropriate places in the flowcharts for a discussion of data needs, exchange of data when possible and management alternatives. The communication links between an NMS and the respective RFMC should look more like a ladder with two-way communication linkages and feedback loops between the two throughout the process.

General change needed: Provide parity between the two flowcharts. Where appropriate, given the actual legislative language, similar language should be used in the steps articulated.

Specific change needed: Change the titles of the first two boxes in the NMSA chart to mirror the first two of the MSA chart. The boxes in the NMSA chart would become: “1) NMS Ongoing Data Gathering /Review of Information” and “2) Identification of Need for Conservation and Management”.

General change needed: Clarify standards for decisions and make the processes for decisions transparent. The standards for these analyses may be one of the “disconnects” that occur between the NMSA and MSA processes. Communication and cooperation between these two processes are dependent upon clear and transparent process and products. While the goals of the two organizations (the sanctuaries and the RFMCs) are different (as dictated by their enabling legislation), the science and policy analyses that underlie the decisions need to be clear and apparent to all managers and parties. The RFMCs are tied to receiving a positive peer review of scientific work used as the basis for their decisions and are unable to take effective action without that. Certainly, the NMSA has an equal interest in both adequate science and policy analyses. However given the different goals of the NMSA, the type of scientific analysis and the expertise that should be involved to support decisions may be different. This may require formation of scientific panels, workgroups and products tailored to management questions involved in sanctuaries. If the expectation is that these will be used by a RFMC, joint development of these analyses will be important.

Specific change needed: Add a box to the NMSA flowchart for data gathering and the review of information. The NMSA chart seems to start with the decision that a regulatory action is warranted. The first box is entitled “Regulatory trigger” implying that it starts when a decision is made that a regulatory action should take place. Regarding fishing regulatory decisions, the chart needs to indicate the work that precedes a decision that a regulatory action should be taken. Sanctuaries pursuing conservation issues that relate to fishery management should seek broad participation of managers and users, as appropriate to the issue. As indicated in the general comment, development of scientific analyses that a sanctuary expects to submit to a RFMC should entail early consultation, a cooperative process and joint development to accomplish both sanctuary goals and MSA needs for peer-review.

Specific change needed: Add additional detail within the first box on the MSA Regulatory Process flowchart (and parallel this in the revised first box of the NMSA chart). As drafted neither flowchart reflects the broad participation of state, federal and tribal managers as well as affected users. The first box in the MSA flow chart entails cooperative work with the state management agencies, tribal managers and industry. These groups participate in both policy and scientific analyses during the ongoing work. The products include the stock assessments, the socio-economic studies, etc. These types of information are part of the foundation for the RFMC decisions and should be reflected in the flowchart.

Specific change needed: Add a dichotomy in the second and third bullets in the first box of the NMSA flowchart to clarify when changes to an existing designation document are required. The NMSA flowchart should clarify the steps that are taken when a new sanctuary is being designated from steps taken at existing sites. In addition, a distinction should be made between steps taken when a change to a designation document is required and when it is not. Changes to designation documents can be extremely controversial and could constitute or be perceived as a broken agreement or breach of trust. The full array of potential actions should be articulated at an early stage in the document.

General change needed: Add appropriate decision points to both flowcharts where decisions might lead to a non-federal and/or a non-regulatory approach. The current process does not recognize the possibility of a non-federal or non-regulatory action. Neither does it identify points where it may be decided to terminate the process. We recommend that both flowcharts be revised to include “off-ramps”, where it is appropriate to terminate the process, i.e., the need for conservation is satisfied in a non-regulatory manner, such as agreements with (or among) industry groups, or through non-federal action such as state or tribal regulations.

General change needed: The NMSA flowchart should be reviewed in regards to additional areas where advisory councils, states and tribes should be involved in the process following box 3 and these should be added as appropriate.

General change needed: Clarify the NMS manager’s capacity to report AC comments/actions. Current guidance on the administration of sanctuary advisory councils (National Marine Sanctuary Program Sanctuary Advisory Council Implementation Handbook, May 2003) states that when the council communicates with external parties, the sanctuary manager must approve the communication. While recognizing this, the working group recommends that when the advisory council is identified in the flowcharts, their comments and recommendations should be given full consideration in the decision making process and made part of the public record. Specifically, the sanctuary management handbook states, “If the sanctuary manager dissents from the council majority opinion, the sanctuary manager should document this difference of opinion in writing with a short narrative describing the rationale behind the decision. This written decision should be forwarded to the NMSP director for his review

and acknowledgement.” We fully support this provision and recommend this be emphasized in all sanctuaries. In addition full consideration is needed for consultations with other groups and organizations and comments received during the decision making process.

General change needed: The current time period identified in box5c is inadequate for the RFMC process. A RFMC would need a minimum of two meetings to be able to respond to a 304(a)(5) request from a sanctuary. Changes should be made to accommodate the RFMC process, including a notation of the need for extensions to the 120-day limit.

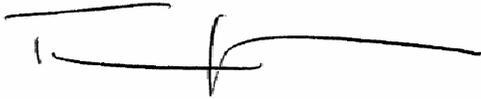
Specific change needed: Increase the period for a RFMC response to 180 days or more. The working group recommends that 120 day required response period, required for a RFMC response, be increased to 180 days or more (through extensions or other mechanisms) to accommodate the meeting schedules and processes of the RFMCs.

General change needed: The current flowchart does not recognize the need to consult with International entities. Many of the fishery resources off the Olympic Coast are managed by International Treaties and Conventions, i.e. salmon, hake, halibut and tuna. Any considerations of fishing regulations in this area should include the need for the appropriate consultations required by these international treaties and conventions.

We appreciate the major step forward that this draft document represents and are supportive of continued work to improve the processes that link NMSA and MSA management together. Considering the number of changes and the extent of the revisions this flowchart needs, we strongly urge circulation of another draft before finalization. Better coordination and cooperation in development of fishing regulations will improve our management and protection of the resources in our sanctuaries.

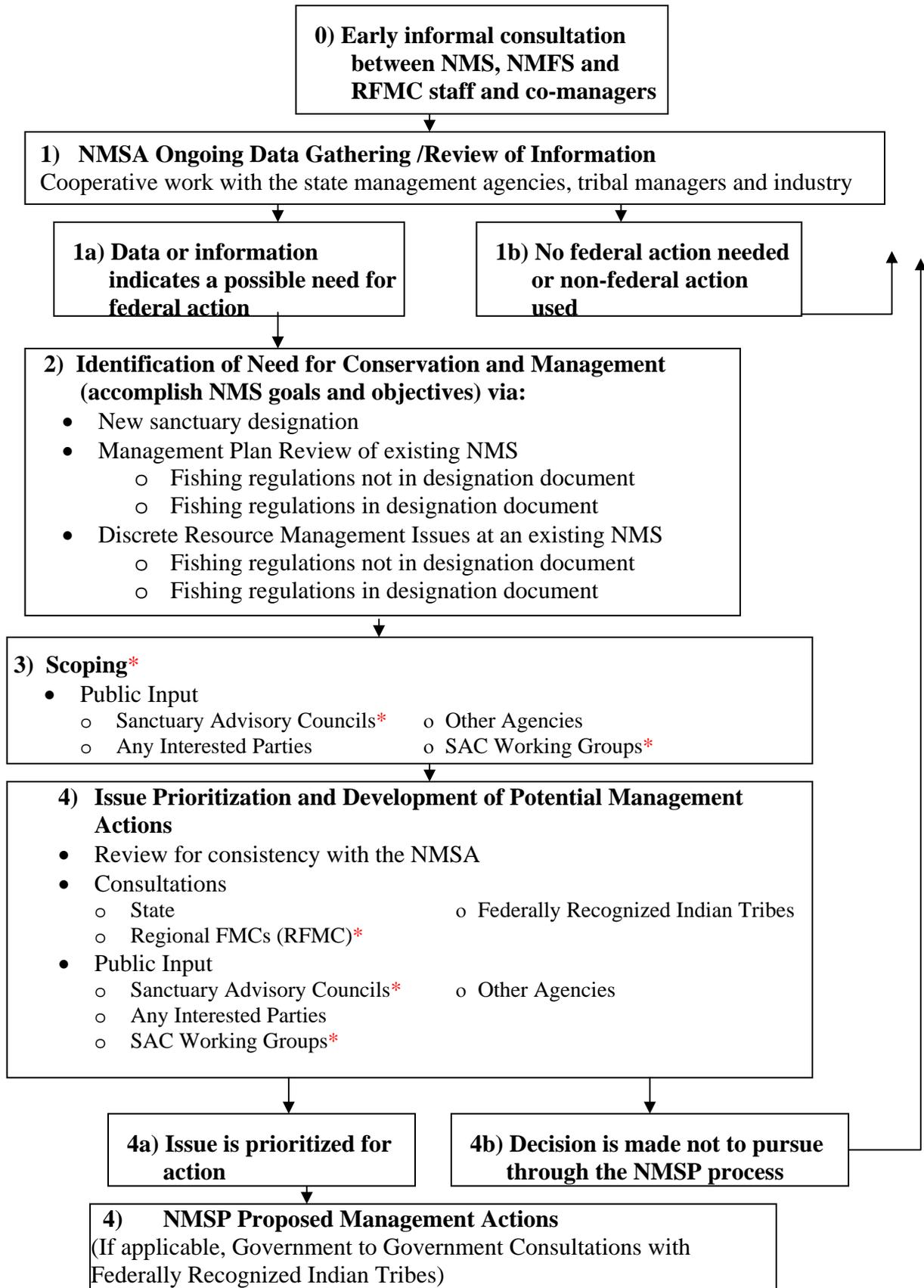
The advisory council is an advisory body. The opinions and findings of this publication do not necessarily reflect the position of the Olympic Coast National Marine Sanctuary and the National Oceanic and Atmospheric Administration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Terrie Klinger', with a long horizontal flourish extending to the right.

Terrie Klinger, Chair
Olympic Coast National Marine Sanctuary Advisory Council

National Marine Sanctuaries Act Regulatory Process-DRAFT REVISION



Magnuson Stevens Act Regulatory Process-DRAFT REVISION

