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Before the House Subcommittee on Fisheries and Oceans

Hearing on Relationship Between The Magnuson-Stevens Fishery Conservation and Management Act
And
The National Environmental Policy Act

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Good morning Chairman Gilchrest and members of the Subcommittee. I am Dan Furlong, Executive Director of the Mid-Atlantic Fishery Management Council. I am also the former Deputy Regional Administrator of National Marine Fisheries Service's Southeast Regional Office, a position I held for over 10 years.

In your March 31 invitation letter, you asked for my views on the relationship between the Magnuson-Stevens Act (MSA) and the National Environmental Policy Act (NEPA), particularly any conflict between the two Acts. In my opinion there are no technical conflicts between the two Acts. However, I believe there is a genuine problem between the two Acts regarding duplication of embedded process requirements.

In the federal budget world there are two overarching perspectives - budget driven programs, and program driven budgets. The juxtaposition of these two words tells you which one is the driving force. The same can be said of the MSA and NEPA. Both statutes are process driven, but their outcomes are very, very different. MSA's process is designed to achieve conservation and management of our Nation's fishery resources, whereas NEPA's process is a self-fulfilling one of documenting the process itself. Better than NEPA, MSA in conjunction with the Administrative Procedures Act (APA), provides the public timely notice of its proposed actions so as to allow for review and comment, and provides a transparent, open public process through the Council system that allows for pubic involvement throughout the formulation and development of fishery management actions.

I believe that is why in the 108th Congress Senator Susan Collins of Maine introduced the "Fisheries Science and Management Improvement Act of 2003" (S 482). And, that is why, in the House, Congressman Donald Young of Alaska introduced a Bill "to amend the Magnuson-Stevens Conservation and Management Act" (HR 3645). Each piece of legislation included the following language: "that any fishery management plan, any amendment to such plan, or any regulation implementing such plan, that is prepared in accordance with applicable provisions of Section 303 and 304 of this Act are deemed to have been prepared in compliance with the requirement of Section 102 paragraph 2 (c) of the National Environmental Policy Act of 1969".

Some have interpreted this language to be a Magnuson-Stevens Act exemption from the National Environmental Policy Act, much like the exemption that Councils, their Committees, and Advisory Panels enjoy from the Federal Advisory Committee Act (FACA). To me, nothing could be further from reality. The language proposed by Senator Collins and Congressman Young recognizes that Section 303 and 304 of the Magnuson-Stevens Act are the functional equivalent of Section 102 (c) 2 of the National Environmental Policy Act. Under MSA, every Fishery Management Plan must address and contain 14 statutorily required plan provisions. And, every Fishery Management Plan should consider 12 additional discretionary plan provisions. Moreover, as provided by Section 301 in the Act, all Fishery Management Plans must be consistent with the Act's 10 National Standards. Their language does not create a FACA-like exemption, rather such language unifies and clarifies the relationship between the two Acts, and also meets National Standard 7's requirement under MSA that "conservation and management measures shall minimize costs and avoid unnecessary duplication".

For the record, I totally support such legislation.

In preparing for this hearing, I was amazed to find that the Environmental Protection Agency, an agency I believe to be highly associated and identified with NEPA, has benefited from legislation that substantially limits EPA's own impact statement preparation. The Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) specified that statements would be required only for wastewater facilities and new source permits. Yet, as the States assumed responsibilities for water pollution control programs, even these two actions that were subject to EIS requirements are no longer considered Federal decisions, and therefore NEPA is no longer applicable. These 1972 amendments also sanctioned the use of EPA's water quality standards for purposes of compliance with NEPA. Further, the Energy Supply and Environmental Coordination Act of 1974 (P.L. 93-319) provided that no impact statements would be required for any actions taken by the EPA under the Clean Air Act. Courts have also held that waste clean-up procedures constituted a

"functional equivalent" of NEPA compliance. What a deal! It appears that EPA is the poster child for the expression, "Do as I say, not as I do".

Speaking of EPA, I would like to address its guidance regarding the concept of "major Federal action". The term "major" applies to the significance of the impact of the proposed action on the environment. Impacts to be addressed include impacts on the physical, biological and human environment. As I believe most things in our capitalistic society can be reduced to dollar terms, I would like to try to put what the Councils and NMFS do in that context. Our Nation's Gross Domestic Production (GDP) is approximately $12 trillion. The value of U.S. commercial fishing landings is about $3.5 billion. The expenditures by marine anglers is estimated to be about $30.0 billion. Taken together, the contribution to our economy by those who are governed by MSA represents less than ½ of 1% of the GDP. Likewise, of the $2.4 trillion Federal budget ear-marked for discretionary programs, NMFS receives approximately $825 million. Even after reducing Federal discretionary funding to $818 billion by removing Defense and Homeland Security, NMFS' share is less than 1/10 of 1% of domestic discretionary spending. With fewer than 3,000 full time equivalent employees out of a workforce of 1.9 million Federal civilian employees, NMFS share of Federal employment is less than 2/10ths of 1%. Given the regulated sector's place in our economy, and the National Marine Fisheries Service's place in the Federal Government, what is it that they do that could rise to NEPA's concept of major Federal action? Think about it.

I would also like to offer some examples of the costly nature of NEPA in terms of its redundancy to that which is required by the Magnuson-Stevens Act. The North Pacific Fishery Management Council completed action last year on a 7,000 page programmatic EIS covering all of its groundfish fisheries. Because one of the findings contained in that EIS was that there was an "unknown" (and undeterminable) effect on overall habitat from allowing the fisheries to commence, the Council is now being told that it may have to do an EIS every year to support its groundfish specifications process; i.e., setting the total allowable catch (TAC). Even though the North Pacific Council just did the overall Essential Fish Habitat (EFH) action, and even though it has placed a 2 million metric ton cap on its groundfish fisheries which have an Allowable Biological Catch (ABC) of nearly 4 million metric tons, the Council - because of the time required to do the EIS - will now have to set quotas using the previous year's survey information, rather than using the most recent annual stock assessment survey data. This NEPA created circumstance requires analyses that are clear violations of the Magnuson-Stevens Act National Standard 2.

The Caribbean Council prepared a Sustainable Fisheries Act (SFA) comprehensive amendment in 1999 which the National Marine Fisheries Service thought could be reviewed and approved in a few months. In the meantime, a new emphasis on NEPA came into effect owing to the outcome of a lawsuit brought by American Oceans Campaign against NMFS and the Councils. As a consequence, the Caribbean Council had to rewrite the document; include alternatives that did not make any sense, but were required by NEPA; spend lots more money for additional meetings, rewriting of sections, etc.; and, finally end up with a document three times the size of the original one. Consequently - surprise - now 5 years later, the Council has reached the same conclusions as it did in 1999 regarding the management measures that will be submitted for Secretarial review. During this process, the Caribbean Council created a document of nearly 1000 pages that is very cumbersome and difficult to read. Fishermen and the general public are confused by the volume of information, and have accused the Council of trying to bury its real intentions under hundreds of pages of bureaucratic gobbledegook.

I have other examples from the Mid-Atlantic, South Atlantic, New England, Pacific, West Pacific, and Gulf of Mexico Councils that reinforce the damage NEPA has caused in the conservation and management of our Nation's marine fishery resources. At the recent "Managing Our Nations Fisheries II Conference", the following motion was passed by seven of the eight Councils:

"Following the addition of critical NEPA provisions to MSA, thereby making MSA fully compliant with NEPA's intent, the panel finds that legislation should be developed specifying MSA as the functional equivalent of NEPA."

Seven out of eight - that sends a clear message that something is indeed problematic regarding the integration and obsequious application of NEPA into MSA actions.

I thank you for having invited me to provide my views regarding MSA and NEPA. I sincerely appreciate the honor and opportunity to appear before the Subcommittee.