

Ms. Nancy Sutley, Chair
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Ms. Sutley:

The Marine Conservation Alliance (“MCA”) submits these comments in response to the call for public comments on the Strategic Action Plans (“SAPs”) developed by the National Ocean Council (“NOC”). MCA is a broad-based coalition of harvesters, processors, coastal communities, Community Development Quota organizations, and support service businesses involved in the groundfish and shellfish fisheries of Alaska. MCA was formed to promote the sustainable use of North Pacific marine resources by present and future generations. MCA supports research and public education regarding the fishery resources of the North Pacific and seeks practical solutions to resource conservation issues.

MCA has long supported conservation actions to improve and enhance our nation’s marine resources and the environment. This includes ocean “zoning” as part of the fishery management process under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). We see potential benefits in enhanced coordination and dialog among agencies and constituents regarding our nation’s precious ocean resources. To that end, we are generally supportive of efforts which work at enhancing such coordination. However, MCA is unable to support the proposed NOC policy as currently written with its new, top heavy bureaucratic structures. The new policy would appear to:

- be costly to the economy with little additional conservation benefit;
- create a new, redundant, and expensive bureaucracy;

- frustrate transparency in decision making; and
- appears contrary to existing law, and will only serve to increase the potential for unnecessary litigation.

The NOC should be clear that SAPs and related policies are advisory only and that existing authorities and regulatory processes will retain primacy. This is particularly true for the Regional Fishery Management Council process under the MSA. The NOC should abandon its proposed role as final arbiter for ocean management. The NOC should instead seek to enhance existing regional efforts including those of the Regional Fishery Management Councils without this top-down approach.

Our specific comments follow.

I. THE PROCESS BY WHICH THE NOC IS DEVELOPING ITS POLICIES IS NEITHER OPEN NOR TRANSPARENT

Although the NOC has established a 30-day comment period on the SAPs, the reality is that the public comment process as structured is ineffectual because the SAPs provide virtually no substantive details on which to comment. For example, the Arctic SAP sets forth six proposed actions to implement separately established priority objectives. The six proposed actions are: (1) improve emergency response to oil spills and other accidents, (2) gather information on changes in Arctic sea ice, (3) establish a biological observatory to gather information on Arctic environmental conditions, (4) improve maritime communication systems, (5) improve Arctic mapping and charting, and (6) improve coordination on Arctic Ocean issues. Presenting these laudable general actions for public comment allows the NOC to say it has conducted an open public comment period and received near universal support. Who can be against improving coordination, communication, scientific data, and emergency response?

However, none of those general actions address the actual resource management issues that are critical –and on those issues public comment has not been sought.

The “Overview of the Priority Objectives” in the Arctic SAP identifies several priority objectives. For six of those priority objectives, the SAP presents the general action plans outlined in the preceding paragraph. However, the SAP sets forth two additional priority objectives for which no action plan item is set forth in the SAP. Those two priority objectives are (1) “environmental stewardship needs ... in light of climate and environmental change” and (2) “efforts to conserve, protect, and sustainably manage Arctic marine resources.” How these “priority objectives” are accomplished is nowhere discussed in the SAP. Thus, public comment on how the NOC proposes to accomplish these objectives is precluded, notwithstanding the fact that these are the critical resource management issues.

The NOC cannot respond to MCA and others by asserting that the six action items identified in the Arctic SAP are intended to also fulfill the two additional priority objectives identified in the preceding paragraph. The reason such a response fails is that each of the six action items in the Arctic SAP responds to a separately identified “priority objective.” Thus, each “priority objective” identified in the Arctic SAP corresponds to a specific action item – except for the two priority objectives identified in the preceding paragraph. As noted above, those are the two priority objectives that go beyond the general principles of improving data, communication, and coordination and which instead encompass actual resource management decisions. However, the SAP is devoid of any discussion on how the NOC plans to implement these two priority objectives and, thus, public comment is not allowed regarding these critical resource management issues.

In public fora, NOC representatives have indicated that this will all come later and there will be a “process” by which resource management actions, including marine spatial plans, are developed. But, here again, the NOC has failed to explain to the public how this process is translated into actual resource management decisions. To use a specific example, what happens at the end of all of the process if a Regional Fishery Management Council (“Council”) established under the MSA declares an area open to fishing and the NOC plan closes the area to fishing? Which resource management plan prevails?

In public fora, NOC representatives have stated the NOC has a planning process and issues such the above are not ripe for decision or public discussion. That response fails to answer the question. The question assumes the process is complete and that two competing resource management policies are on the table. The question is whose policy prevails?

Section 1 of Executive Order 13547, 75 Fed. Reg. 43023 (July 19, 2010), “directs executive agencies” to implement NOC recommendations. However, the MSA establishes specific standards to be used by the Secretary of Commerce (“Secretary”) in approving or disapproving a fishery management plan (“FMP”), including the designation of areas open and closed to fishing. The MSA provides that if the Secretary disapproves a Council FMP, the Secretary “shall specify ... the applicable law with which” the proposed FMP is inconsistent. 16 U.S.C. §1854(a)(3). The legal question, unrelated to the process by which the NOC develops its policy, is whether a marine spatial plan developed by the NOC process is considered other applicable law, thereby forcing the Secretary to disapprove the Council FMP which opens areas to fishing that the NOC marine spatial plan marks for closure.

In non-public fora, NOC representatives have stated that in this fact pattern, the NOC marine spatial plan is other applicable law requiring disapproval of the Council’s FMP. If that is

the case, then the NOC Arctic SAP priority objective of developing plans to “manage Arctic marine resources” takes on a new legal meaning. In effect, the NOC process can become a substitute for the resource management process established by Congress in the MSA. The same issues arise in the context of statutes such as the Outer Continental Shelf Lands Act and other laws governing ocean resource management.

This legal issue of who has decision making authority is fundamental to the NOC’s purposes and functions and to the SAPs. It is an issue on which the NOC has neither sought nor allowed public comment. However, this question raises at least three critical issues which demand answers at the start of the NOC process, not at its end.

First, there are serious constitutional questions regarding whether an Executive Order has the same legal standing as a law duly approved by Congress and signed by the President. The power to pass and amend laws is vested by the Constitution with the Congress. If the purpose of the NOC plans, to be implemented via Executive Order 13547, is to constrain or override the statutory process and standards set forth in the MSA and in other statutes, it likely violates the separation of powers set forth in the U.S. Constitution. Treating NOC plans as recommendations is one thing. Treating them as other applicable law with which MSA FMPs must comply is entirely different. This legal issue must be addressed before the NOC process proceeds any further.

The second critical issue is the role of the public. Although the NOC purports to be an open and transparent process, stakeholder participation is not allowed. The NOC resource management plans are developed and approved by federal agencies in a top-down management system. No stakeholders sit at the decision table. Indeed, there are no rules or procedures requiring stakeholder input. Contrast that to the MSA process where Congress required that

stakeholders be part of the decision making process. Moreover, the MSA process, through the Council's and through the Secretary's review of FMPs, provides multiple opportunities for the public to provide input, not on general principles on which everyone can agree, but on actual management options that implement these principles. The old saying "the devil is in the details" becomes applicable. In the MSA process, the public addresses each detail and stakeholders sit at the decision table to vote on the details. This open and transparent process stands in stark contrast to the NOC process where stakeholders have no role, where public comments may not be sought, and where, if the past is prologue, public comments are sought only on general principles and not the key detailed issues. Indeed, it can be argued that the NOC process constitutes a direct amendment to the MSA replacing the MSA's extensive public stakeholder process with a new and less open process.

The third critical issue raised by the legal status of the NOC process and the resulting resource management plans is who decides what is the best scientific information on which management decisions are to be made. Many statutes require the use of the best scientific information. *See, e.g.*, 16 U.S.C. §1851(a)(2). However, Executive Order 13547 directs the NOC to use the precautionary principle set forth as Principle 15 in the 1992 Rio Declaration. That principle states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The statement that the NOC will employ the precautionary principle in the Rio Declaration when developing resource management plans raises issues of legal and interpretive significance.

One such issue involves the risk assessment trigger under the Rio Declaration that there is a "serious" threat of environmental damage. "Serious," like "beauty," may be in the

eye of the beholder and the use of this ill defined standard will lead to arbitrary and inconsistent decisions regarding when to apply any precautionary principle. Webster's New Collegiate Dictionary defines "serious" as "relating to a matter of importance" or "having important or dangerous possible consequences." Clearly, the word "serious" has some meaning more than detectable or known. There must be some consequential impact that rises to a level of significance or substantiality. The National Environmental Policy Act speaks of "major" actions "significantly affecting" the environment. The Resource Conservation and Recovery Act speaks of "imminent and substantial" endangerment. The Endangered Species Act is framed in terms of jeopardy to the very survival of the species. Which of these standards, or other standards, is the proper frame of reference for the legally untested concept of "serious"? Alternatively, are we to employ the well understood judicial injunction standard of irreparable harm? These issues merit further and focused debate.

Further, what are the factors weighed in any determination of what constitutes a "serious" matter? Is the impact on fish and wildlife or natural processes the only measure of "serious" or is that evaluation to be made in a larger context of the entire human environment. That larger context would include benefits to humans, including economic or similar benefits, that result in an overall balancing of interests to determine what is "serious"? A thing may appear "serious" only if a larger context is not provided. Given the absence of analysis regarding the need for marine spatial planning discussed below, one can only conclude that marine spatial planning advocates promoting this policy do not wish to consider the larger context.

In addressing this important risk management threshold, the Rio Declaration states "the lack of scientific certainty" shall not be a reason for postponing actions. This raises the issue of

the level of scientific certainty that is to be applied in making the “serious” determination. American jurisprudence is based on the principles of preponderance of evidence and beyond a reasonable doubt. The intent of the Executive Order and the NOC process appears to be to establish a new evidentiary standard that is less than the preponderance of evidence. Is that evidentiary standard to be some evidentiary basis even if it is a view held by a small minority? Is it to be a plausible belief or something else? If the great weight of evidence says there is no “serious” issue but a few minority opinions hold to the contrary, does this constitute scientific uncertainty justifying regulatory action?

In addition, to whom is assigned the burden of proof regarding whether there is a “serious” effect? Does the opponent of an action bear that burden or is it up to the proponent to prove by some unknown evidentiary standard that there is no “serious” impact? Placement of the burden of proof is not an insignificant legal matter. Further, it is inextricably intertwined with the issue of what level of proof is required.

Assuming these issues are somehow resolved, any Executive Order or other document seeking to implement the Rio Declaration must recognize and fully implement the standard in that Declaration that only “cost-effective” measures may be adopted “to prevent environmental degradation.”

In sum, embedded in the NOC SAPs process are numerous legally important issues that need to be addressed. Sadly, the NOC has invited public comment on none of them.

II. WHY DO WE NEED A NEW MARINE SPATIAL PLANNING PROCESS?

In addition to the fundamental legal questions discussed above, MCA and the public have yet to receive an answer to the question of why a new marine spatial planning process is necessary.

There is no analysis in NOC documents to support the assumption that some new ocean governance system is required. In the North Pacific, such an assumption regarding fisheries management ignores the long record of North Pacific fisheries in sustainable production. In that regard, a review of the North Pacific fisheries is in order.

North Pacific fisheries are managed pursuant to the MSA. Under that statute, the North Pacific Fisheries Management Council (“NPFMC”) develops FMPs that are implemented if approved by the Secretary, acting through the National Marine Fisheries Service (“NMFS”). The MSA has detailed provisions prohibiting overfishing and providing for the identification and protection of essential fish habitat.

The NPFMC is comprised of federal and state government officials and knowledgeable individuals appointed by the governors of Alaska, Washington, and Oregon. Before making management recommendations, the NPFMC receives recommendations from its Scientific and Statistical Committee (“SSC”), comprised of scientists and fishery management experts, and from the public through an extensive public comment and hearing process that can extend 12 months or more. The NPFMC has never allowed a harvest level in excess of the recommendation of its scientific advisors.

North Pacific fisheries are managed with the first priority given to conservation and to maintaining a sustainable resource. There are no overfished stocks of groundfish in Alaska. Fisheries are managed with hard limits on harvest and are closed when the harvest limit is reached. Federal observers and electronic vessel monitoring systems, coupled with Coast Guard and NMFS enforcement, ensure compliance with any closure.

Ecosystem considerations are taken into account in the development and implementation of fishery management plans. For example, fishing on forage fish species is

prohibited and measures are in place to protect endangered and threatened species, marine mammals, and seabirds. Our fishery managers have closed over 600,000 square nautical miles (794,576 square miles) in order to protect marine habitat. This is an area over five times the size of the entire National Park System. Significantly, these extensive closures do not include additional seasonal and gear limitations designed to protect the marine ecosystem and its resources.

The overall result of the scientifically based, conservation oriented approach to North Pacific fisheries management and ecosystem protection is that these sustainable fisheries are a major economic force in the region and the country. The question the NOC fails to answer, or even consider, is why we need to overlay a new marine spatial planning program on top of the existing MSA management program. The NOC has provided no analysis of why the existing MSA statutory and regulatory mechanism is legally inadequate. Absent any such analysis the only answer is that marine spatial planning proponents simply want to erect a new system that will be more restrictive, without any showing of why that is necessary.

Related questions arise with respect to other laws that also already provide for ocean use planning. For example, the Outer Continental Shelf Lands Act has an extensive planning and public input process that begins with the identification of areas appropriate for energy development. These geographic leasing plans are followed by carefully scrutinized exploration plans that are in turn followed by detailed development plans. All are subject to a transparent and open public comment and review process. Areas are effectively zoned for energy development. The NOC has failed to identify the legal inadequacy of this program that justifies a new marine spatial planning program, leaving the only conclusion that proponents of marine spatial planning do not like the results and want a new and more restrictive policy that will have

the effect of reducing this nation's energy production and furthering our immediate economic dependence on imported energy.

Similarly, the Coastal Zone Management Act contains a process by which the federal government approves a state's coastal zone management plan pursuant to explicit statutory standards. Federal activities occurring in a state's coastal zone must be certified by the state as consistent with its coastal zone management plan. Again, proponents of marine spatial planning fail to explain how this existing statutory program is legally inadequate, leaving the only conclusion that marine spatial planning proponents do not like the results and seek a new mechanism to restrict activities in coastal zone areas.

III. CONCLUSION

The request for comments on the SAPs is premature for three principal reasons. First, before proceeding to SAPs, the NOC must address the fundamental question of why there is a need for this process, particularly its marine spatial planning component. Second, the NOC must address the fundamental question of what is the legal basis for, and impact of, these NOC plans. Until those threshold questions are resolved, the NOC process cannot, and should not, continue. Finally, before proceeding further, the NOC must provide the public with sufficient details on which to comment. As noted above, the principles on which the public is asked to comment in the SAPs are so general and so lacking in detail as to preclude meaningful public comment and analysis. Indeed, as noted with respect to the Arctic SAP, the SAPs sometimes simply state a generalized objective such as conserving marine resources with which no one can disagree but fail to provide any explanation of how the NOC will accomplish that objective. Until those details are provided, public comment cannot be meaningful.

MCA urges your agency to terminate the NOC process as now constituted and to address the fundamental issues discussed above. Only then can we proceed to discuss how the NOC relates to the important ocean conservation issues before us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Merrick Burden', written in a cursive style.

Merrick Burden
Executive Director