



THE  
**PEW**  
CHARITABLE TRUSTS

PEW ENVIRONMENT GROUP

October 10, 2008

David Rostker  
Desk Officer  
Office of Management and Budget  
Room 10202  
New Executive Office Building  
725 17th Street, NW  
Washington, DC 20503.

Dear Mr. Rostker,

Thank you again for meeting with us about the National Marine Fisheries Service NEPA proposed rule on April 17 and for the meeting with Susan Dudley on September 4.

This is a packet of new materials to follow up on our meetings. I've included additional comment letters from state and federal agencies and other organizations and NGOs raising serious concerns about this proposed rule.

Thank you for considering our concerns and feel free to contact me if you have any questions.

Sincerely,

Lee Crockett  
Director, Federal Fisheries Policy  
Pew Environment Group  
1200 18<sup>th</sup> St. NW, Suite 500  
Washington, DC 20036  
(202) 552-2065  
[lcrockett@pewtrusts.org](mailto:lcrockett@pewtrusts.org)



Mr. Alan Risenhoover, Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

**RE: Proposed Rule to Revise and Update Agency Procedures for complying with the National Environmental Policy Act, 73 Fed. Reg. 27998 (May 14, 2008)**

Dear Mr. Risenhoover:

Please accept these comments from Ocean Conservancy and Oceana on the National Marine Fisheries Service's (NMFS or Fisheries Service) proposed rule to revise and update agency procedures for complying with the National Environmental Policy Act (NEPA), as required by the Magnuson Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. §1854(i)) (as amended by the Magnuson Stevens Fishery Conservation and Management Reauthorization Act of 2007 (MSRA) (Pub. L. 109-479, 120 Stat. 3575)).

Ocean Conservancy and Oceana are members of the Marine Fish Conservation Network. The Network has submitted a thorough analysis of the legal and policy deficiencies of the proposed rule. We reiterate our support for the Network's letter, but also write separately to stress that the proposed rule goes in the opposite direction of what is called for by the current science and the law. Because the proposed rule would result in harmful and potentially unlawful changes to the existing environmental review procedures, we strongly urge the Fisheries Service to withdraw the rule and begin the rulemaking process again, taking as its basis Congress' direction in the MSRA and NEPA and in the Council on Environmental Quality's (CEQ) implementing regulations.

#### NEPA is Critical for Sustainable Fisheries and Marine Ecosystem Health

Congress enacted NEPA in part in response to the realization that a great deal of the harm being done to our environment was a result of federal actions taken without any consideration of the lasting and often devastating effects the actions would have on the environment. The Act imposes on all federal agencies, including the Fisheries Service, the duty to consider the effects of proposed actions and alternatives to proposed actions before taking them, and to solicit and respond to the concerns of the public before making final decisions about public natural resources. Congress intended that expertise and input from a wide range of experts and stakeholders, including other federal agencies, state and local agencies, conservation interests, and other members of the public, would inform federal resource management decisions, with the goal of minimizing adverse effects on the environment. Congress specifically expanded the breadth of natural resource management decisions by imposing a requirement that all federal

agencies use a “systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences...” 42 U.S.C. § 4332. The regulations developed by CEQ under NEPA are the roadmap for agencies to implement the Act’s requirements. Any process to comply with NEPA must necessarily comply with the regulations as well.

We no longer labor under the misapprehension that our nation’s fisheries are infinitely exploitable, or that fishing has no effects beyond that on the targeted species. A clear scientific consensus has emerged that a move toward ecosystem-based management of our oceans is necessary to avoid continued degradation of many ocean resources. This truth is reflected even in the MSRA, which included explicit notice that some Regional Fishery Management Councils “have demonstrated significant progress in integrating ecosystem considerations in fisheries management using the existing authorities provided under this Act.” 16 U.S.C. 1801(a)(11). This progress has been accomplished through the existing integration, albeit imperfect, of the NEPA and MSA procedures. The analytical and public process requirements of NEPA and the CEQ regulations are the best available tools to incorporate ecosystem-based management considerations into fishery management decisions. Rather than embrace the opportunity to fully integrate NEPA into the fisheries management process afforded it by Congress in this rulemaking, the Fisheries Service has proposed a process that significantly decreases the value of NEPA to fisheries management. The proposed rule goes in exactly the opposite direction of what science and sound public resources management counsels by constraining analyses and reducing the public’s role.

#### NEPA is Critical for Informed Decisionmaking

NEPA’s purpose is to foster excellent decisionmaking through thoughtful consideration of information, alternatives, and the views of the public, all before decisions are made. This proposed rule will not serve that purpose and must be withdrawn and substantially revised.

For instance, the proposed rule would establish blanket limits on environmental analysis under NEPA that would exempt from review many potentially significant actions. These limits would be unlawful in their specific application for agency actions that could have significant effects on the environment, such as framework rules and experimental fishing permits. Ocean Conservancy and Oceana have participated in many such rulemakings that had extensive environmental impacts. As with the general limitations on environmental review, these specific limitations via the new Framework Implementation Process (FIP), Framework Compliance Evaluation (FCE), and expansion of Categorical Exclusions, are likely to result in litigation and wasted resources.

The creation of new processes and documentation does not help streamline the environmental analysis process, and it has the potential to allow management decisions that could significantly affect the environment to go forward without proper NEPA analysis. While we appreciate the desire to streamline the NEPA process, this rule cannot be used to try to circumvent the NEPA process for actions that could affect the environment.

#### NEPA Is Critical for Public Participation

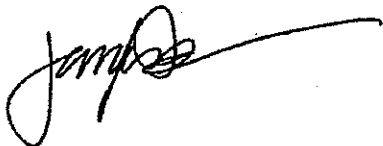
In addition, the public’s ability to participate in and affect decisions that could affect our environment is guaranteed by – and is at the core of – NEPA. In the fishery management context, the public’s participation in the process provides NMFS and the fishery management

councils invaluable information from diverse sources on which to base their decisions. Ocean Conservancy and Oceana advocate before fishery management councils in many regions of the country. It is critical to our advocacy that the environmental review process is transparent and well integrated with the fishery management process. Unfortunately, several parts of the proposed rule would limit the effectiveness of public participation in the fishery management process. From the shortening of the public comment timeframe to allowing fishery management councils exclusive authority to review and respond to comments on draft documents, this proposed rule improperly limits the ability of the public to participate in management of its resources.

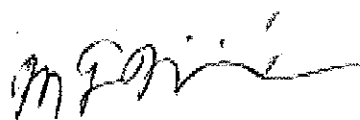
Moreover, the proposed rule would allow fishery management councils the ability to move forward 'hybrid' management actions that combine pieces of analyzed alternatives into a new alternative, which could create impacts not contemplated by the environmental review. While it is possible that a new hybrid could be chosen that would not require supplementation, it is also very likely that a new hybrid would have fundamentally different impacts from any suite of alternatives previously analyzed. To the extent a hybrid management action creates such impacts, these impacts must be assessed and disclosed to the public, and the public's views must be considered before a final decision is made. Properly scoped NEPA analyses that consider a reasonable range of alternatives afford the decisionmaker the latitude to select modified alternatives because the effects of that alternative have been fully disclosed to the public, and the public has had the chance to comment, all before the final decision has been made. There is no reason for this proposed rule to modify these already existing procedures. Overall, the proposed rule's provisions that would limit public participation through modification of comment periods and limited analyses of alternatives are completely unacceptable.

The many provisions of the proposed rule that do not comply with agency procedures permitted by the CEQ regulations, 40 C.F.R. § 1507.3, are, in our view, beyond the authority granted to the Fisheries Service by Congress. This not only diminishes the value of core elements of NEPA to fisheries management, but also introduces ambiguity into the process. This will likely prolong future fishery management processes, and invite more litigation. Based on the issues discussed above and the legal and policy deficiencies discussed in the Network's comments, we recommend the agency withdraw this proposal, and draft a new, simpler proposal that streamlines the process, while preserving the core provisions of NEPA and the CEQ regulations.

Sincerely,



Janis Searles Jones  
Vice President for Legal Affairs  
Ocean Conservancy



Michael F. Hirshfield, Ph.D.  
Senior Vice President, North America, and  
Chief Scientist  
Oceana



*The Commonwealth of Massachusetts*

HOUSE OF REPRESENTATIVES  
STATE HOUSE, BOSTON 02133-1054

F. 1/3/08  
John D. Keenan

**JOHN D. KEENAN**  
**REPRESENTATIVE**  
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Judiciary  
Tourism, Arts and Cultural Development  
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ROOM 136, STATE HOUSE

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Rep. JohnDKeenan@hou.state.ma.us

July 2, 2008

Director Risenhoover  
Office of Sustainable Fisheries  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910

Dear Director Risenhoover:

In 2007, the Magnuson-Stevens Fishery Conservation and Management Act (MSA) was re-authorized and directed the National Marine Fisheries Service (NMFS) to update its environmental review procedures for compliance with National Environmental Policy Act (NEPA). The proposed rule with the revised environmental review procedures was released on May 14, 2008.

As the Representative of a coastal community, I am well aware of the importance of protecting our coastal waters. I am pleased that the waters of Salem Sound are the first stretch of North Shore waterfront that the EPA has designated a "No Discharge" area. This is an important milestone in EPA's plan to designate the entire New England coastline. In addition, I am also pleased that on May 28<sup>th</sup> Governor Patrick signed the Ocean's Act of 2008, the nation's first comprehensive ocean planning law which will help protect our vital natural resources.

While we are making important steps in the responsible stewardship of our waters, I am very concerned that the proposed rule falls short of the intent of Congress that these revised procedures comply with NEPA. Compliance with NEPA is critical to providing both ecosystem-based management and sufficient public comment opportunity on fishery management proposals.

As proposed, the new rules would have the following impacts:

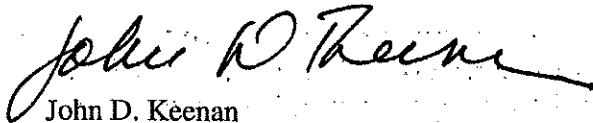
• Complicates NEPA compliance

Under the proposed rule, procedures will become more difficult to complete with the introduction of new documents with different requirements.

- Increased control given to fishing industry
  - Environmental review responsibility moved from NMFS to fishery management councils, which often have substantial financial interests in the local fisheries.
  
- More opportunities for avoiding environment reviews
  - Fishery managers could utilize categorical exclusions, framework procedures, and other mechanisms to avoid both environmental review and public input.
  
- Reduces the opportunity for the public to comment on proposals in both timeframe and subject matter
  - The public comment period could be decreased from the current 45 day allotment to as little as 14 days. Moreover, any concerns not voiced within this initial comment period could not be raised during subsequent comment periods.

If adopted, this proposal would undermine the application of NEPA to the detriment of both fishery management and ocean ecosystems. I urge you to withdraw this proposal and redraft it to maintain the intent of Congress and President Bush.

Sincerely,



John D. Keenan  
State Representative  
7<sup>th</sup> Essex - Salem



THERESE MURRAY  
PRESIDENT

OFFICE OF THE PRESIDENT  
MASSACHUSETTS SENATE  
STATE HOUSE, BOSTON 02133-1007

ROOM 332  
TEL. (617) 722-1500

July 17, 2008

Alan Risenhoover, Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910

Dear Director Risenhoover:

I write to you today in regards to the National Marine Fisheries Service (NMFS) updated environmental review procedures.

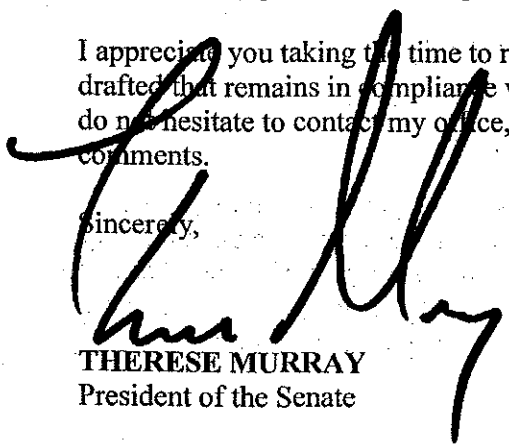
I represent coastal communities whose livelihoods rely heavily on the fishing industry and our ocean. I understand the importance of protecting our natural resources and ensuring their livelihood, and co-sponsored legislation that created an ocean management plan to ensure our ocean waters, and the interests of the fishing community, are protected. This legislation was signed into law in May of this year.

Concerns about the updated NMFS environmental review procedures have recently been brought to my attention due to a purported non-compliance with the National Environmental Policy Act (NEPA). As you know, compliance with NEPA is essential to ensuring that environmental impacts to proposed projects are thoroughly reviewed.

NEPA fears that these new environmental review procedures will be detrimental to both fishery management and ocean ecosystems. Among their main concerns, NEPA would like environmental review to remain the responsibility of NMFS, as well as maintain the current 45 day public comment period.

I appreciate you taking the time to review this request. It is my hope that a proposal be drafted that remains in compliance with the National Environmental Policy Act. Please do not hesitate to contact my office, at 617-722-1500, should you have any questions or comments.

Sincerely,



THERESE MURRAY  
President of the Senate

TM/jh

**JACKIE DINGFELDER**  
State Representative  
DISTRICT 45  
NE PORTLAND, PARKROSE,  
MAYWOOD PARK



**HOUSE OF REPRESENTATIVES**

July 22, 2008

Director Risenhoover  
Office of Sustainable Fisheries  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910

Dear Director Risenhoover:

In 2007, the Magnuson-Stevens Fishery Conservation and Management Act was re-authorized and directed the National Marine Fisheries Service (NMFS) to update its environmental review procedures for compliance with National Environmental Policy Act (NEPA). The proposed rule with the revised environmental review procedures was released on May 14, 2008.

I am very concerned that the proposed rule falls short of the intent of Congress that these revised procedures comply with NEPA. Compliance with NEPA is critical to providing both ecosystem-based management and sufficient public comment opportunity on fishery management proposals.

As proposed, the new rules would have the following impacts:

- Complicates NEPA compliance—Under the proposed rule, procedures will become more difficult to complete with the introduction of new documents with different requirements.
- Increased control given to fishing industry—Environmental review responsibility moved from NMFS to fishery management councils, which often have substantial financial interests in the local fisheries.
- More opportunities for avoiding environment reviews—Fishery managers could utilize categorical exclusions, framework procedures, and other mechanisms to avoid both environmental review and public input.
- Reduces the opportunity for the public to comment on proposals in both timeframe and subject matter—The public comment period could be decreased from the current 45 day allotment to as little as 14 days. Moreover, any concerns not voiced within this initial comment period could not be raised during subsequent comment periods.

If adopted, this proposal would undermine the application of NEPA to the detriment of both fishery management and ocean ecosystems. I urge you to withdraw this proposal and redraft it to maintain the intent of Congress and President Bush.

Sincerely,

A handwritten signature in cursive script that reads "Jackie Dingfelder".

Jackie Dingfelder  
Oregon State Representative

Capitol Office: 900 Court St NE H-377, Salem, OR 97301 — Phone: 503-986-1445 — Fax: 503-986-1130 — rep.jackiedingfelder@state.or.us  
District Office: P.O. Box 13432, Portland, OR 97213 — Phone: 503-493-2804 — www.leg.state.or.us/dingfelder





**DIANE ROSENBAUM**  
State Representative  
DISTRICT 42



**Speaker Pro Tempore**  
Chair:  
Elections, Ethics &  
Rules Committee

**HOUSE OF REPRESENTATIVES**  
900 Court St NE H-380  
Salem, OR 97301

July 22<sup>nd</sup>, 2008

Director Risenhoover  
Office of Sustainable Fisheries  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910.

Dear Director Risenhoover:

In 2007, the Magnuson-Stevens Fishery Conservation and Management Act (MSA) was re-authorized and directed the National Marine Fisheries Service (NMFS) to update its environmental review procedures for compliance with National Environmental Policy Act (NEPA). The proposed rule with the revised environmental review procedures was released on May 14, 2008.

I am very concerned that the proposed rule falls short of the intent of Congress that these revised procedures comply with NEPA. Compliance with NEPA is critical to providing both ecosystem-based management and sufficient public comment opportunity on fishery management proposals.

As proposed, the new rules would have the following impacts:

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- More opportunities for avoiding environment reviews
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If adopted, this proposal would undermine the application of NEPA to the detriment of both fishery management and ocean ecosystems. I urge you to withdraw this proposal and redraft it to maintain the intent of Congress and President Bush.

Sincerely,

*Diane Rosenbaum*

Oregon State Representative Diane Rosenbaum  
Speaker Pro Tempore

CC: The Honorable Congressman Wu  
The Honorable Congressman Walden  
The Honorable Congresswoman Hooley  
The Honorable Congressman DeFazio  
The Honorable Congressman Blumenauer  
The Honorable Senator Wyden  
The Honorable Senator Smith



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August 4, 2008

Director Risenhoover  
Office of Sustainable Fisheries  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910

Via e-mail to: [nepaprocedures@noaa.gov](mailto:nepaprocedures@noaa.gov)

Dear Director Risenhoover:

The Northwest Atlantic Marine Alliance (NAMA) submits these comments relative to the proposed rule recently issued by the National Marine Fisheries Service (NMFS) to implement the provisions of the Magnuson-Stevens Reauthorization Act (MSRA) addressing integration of the National Environmental Policy Act (NEPA) and fishery management processes [73 Fed. Reg. 27998 (May 14, 2008); 16 U.S.C. § 1854(i)(1)]. NAMA is committed to supporting local fishing communities in New England and the Northeast in their efforts to revive ailing marine ecosystems and recover healthy fisheries. We are supportive of community based fishermen, anchored in a history and geography of fishing fertile waters of the Northwest Atlantic, who seek sound scientific information to add to their own breadth of knowledge of the marine environment in order to develop plans and actions that will recover and sustain a fishery ecosystem that can support themselves and future generations of local fishermen. Careful and effective implementation of the MSRA and effective incorporation of NEPA are key to this goal.

#### **NMFS should withdraw the proposed rule**

Although the Magnuson-Stevens Fishery Conservation and Management Act was re-authorized and Congress directed NMFS to update its environmental review procedures for compliance with NEPA, the proposed rule does not accomplish that and serves only to weaken NEPA in the context of the MSA. The failures are so significant that the best course is to abandon this rule and start over.

Contrary to the claim that the new process would cause the Fishery Management Councils (FMCs) to be more attentive to environmental impact review and provide more opportunity for public input, the rule actually is an abrogation of NMFS' legal responsibility to implement NEPA reviews. It provides an avenue for the councils to circumvent such reviews and provides ample opportunity for reducing public participation by significantly reducing the required response time.

In the lengthy preamble, NMFS suggests that the councils are composed of balanced representatives from a wide variety of viewpoints and expertise, but in reality they are composed of politically appointed members, many of whom represent big industrial fishing interests. NAMA strongly opposes the removal of responsibility for environmental review from the hands of NMFS scientists and other trained experts into the hands of highly politicized non-federal advisory bodies limited in scientific expertise and laden with personal agendas. It is a dereliction of NOAA's obligation to conduct environmental reviews in accordance with NEPA, which requires that the assessment and solicitation of, receipt of, and response to public comments be conducted by a federal agency. If adopted, this proposal would undermine the implementation of NEPA to the detriment of fishery management, ocean ecosystems, and fishing communities. As suggested at the end of this letter, there is certainly a better way to comply with the mandate to update the environmental review process in the context of NEPA and the MSA.

### **The problems with the proposed rule**

Problems with allowing FMCs to share responsibility for NEPA. The rule incorporates an illegal delegation of NEPA responsibilities to the councils, which are non-federal advisory bodies, and thereby gives them a degree of control over the outcome of environmental review inconsistent with NEPA. In addition, NMFS should retain the authority to set time limits for fishery management actions; be solely responsible for seeking and receiving comments from the public on draft and final EISs; and, be responsible for responding to comments and writing the final EIS. While it is appropriate to confer with the relevant council and encourage their contribution to the information and their participation in the process, the full responsibility for the final product rests only in the hands of NMFS – and it should stay that way.

While NAMA is most concerned about the New England Fishery Management Council, and we believe there have been adequate numbers of examples to illustrate the Council will exert power over selection of alternative management options and decisions and may ignore environmental impact analyses, we are also aware that other Councils should not be given unusual and illegal responsibilities over the environmental review process and selection of alternatives. A better procedure for incorporating NEPA is essential. We believe that the proposed rule offers opportunities and creates ambiguities that will encourage the councils to have undue influence over the environmental review process and use it to their own ends, which are not always in the best interest of the marine ecosystem and local fishermen and their communities.

Problems with creating new environmental documents. There is nothing wrong with the usual NEPA environmental documents: EIS (environmental impact statement), EA (environmental assessment) and FONSI (finding of no significant impact) with clear public review procedures. There is no need or reason for creating additional types of documents or substituting new processes for those that are tried and true. Furthermore, new types of documents will have to have new guidelines and the entire review system will be confusing if not inadequate. In particular:

- IFEMS (integrated fishery and environmental management system) is not an acceptable alternative to EIS and EA documentation, because while similar to the standard NEPA documents, they vary in important ways including production and public review

procedures, timing, responsible bodies, scheduling of public review hearings if any, completeness of information, and consideration of cumulative impacts so critical in fishery management decisions.

- Framework Compliance Evaluations are an entirely unacceptable alternative to NEPA environmental review process. An internal decision by NMFS that a proposed action is already covered by previous documents leaves the public entirely out of the decision making process.
- Categorical Exclusion (CE) is not needed or in any way desirable. The situations described as warranting CEs can usually be handled sufficiently by the standard NEPA review process. The lack of severe restrictions on the use of CEs offers an opportunity for circumventing standard environmental assessment procedures in situations when they provide no obstacle to effective decision-making.
- Placing arbitrary length restrictions on complex environmental review documents is also unacceptable. While it is always helpful to reduce repetition and to be clear and concise in wording, there is no excuse for avoiding complicated information and relationships. Thoroughness is to be encouraged every step of the way.
- MFCs should not have the authority to recommend alternatives entirely outside the scope of the environmental review. If they add an alternative, it should be vetted with the same procedures as all other alternatives.

#### Problems with new time limitations and new procedures for public review

- Allowing the councils to issue environmental reviews for comment, to accept public comments and/or to schedule hearings on documents in the context of council meetings is absolutely unacceptable. There is no reason to believe that councils would give public comments careful review nor would they be equitable in their consideration of all comments received. The effect would be to shut some or much of the public out of the process. NMFS should handle the comment procedure from beginning to end.
- A fourteen-day period for public review of environmental documents, including complex EISs or IFEMS, would in practice shut out many fishermen and other citizens who would want to comment and would potentially have important input. While the rule sets out standard comment periods of 45 and 30 days for environmental documents (draft and final IFEMS), and it prescribes guidelines for circumstances under which a shortened comment period would be allowed, there are no guarantees that the shorter period of 14 days would not be used too often or could become the standard procedure. Furthermore the FMCs are given some discretion in this matter, which is unacceptable under NEPA.
- NMFS and the Secretary of Commerce are given the authority to shorten the time for making a final ruling on a fishery management action to as short a period as 15 days from some ill-defined point but clearly prior to the completion of a final environmental document or immediately upon release of the final IFEMS, without allowing public

comment on the alternative selected for the Secretary's decision. It is far too easy to cut off public input on a final management decision. These provisions are contrary to NEPA and unacceptable alterations to the public review process.

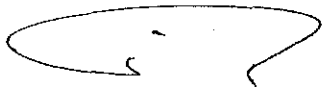
**Strengthen, don't weaken, the implementation of NEPA in the context of MSA**

NMFS should retain control of environmental review and strengthen its own procedures by guaranteeing independence to NOAA scientific review teams. EISs should utilize and document the best science available, consider impacts of alternative management actions on entire ecosystems, encourage public and fishing community participation in the EIS scoping process, make it difficult for the councils to ignore scientifically sound analyses, and require that decisions contrary to or outside the NMFS analyses be justified with equally rigorous and scientifically defensible reviews.

To coordinate the NEPA process with the requirements of MSA doesn't allow turning over complicated and objective scientific analyses to biased parties. It requires that the analyses be done by the federal agency and that they incorporate the best available science and fishery knowledge, complex ecosystem analysis, and a precautionary approach that takes into account inevitable uncertainties.

Finally, NMFS should have a process by which it makes sure all reasonable alternatives and their environmental impacts are considered in an EIS. Some of these alternatives may be suggested from the public, fishermen and their organizations, or others outside NMFS and the council. Councils should not have the authority to reject consideration of alternatives deemed reasonable by an objective NMFS process. Councils have often rejected alternatives aimed at complying with the affirmative conservation provisions of the MSA as impracticable and omitted them from the range of alternatives. NMFS should involve the relevant FMC but should not give them the authority to do the agency's job.

Yours truly,



Niaz Dorry  
Coordinating Director

CC: Congressional delegation  
New England Fisheries Management Council



**New England**

**PEER**

**Public Employees for Environmental Responsibility**

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August 7, 2008

Alan Risenhoover  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC3  
Silver Spring, MD 20910

RE: Comments on Proposed Environmental Review Process for Fishery Management Actions

Dear Director Risenhoover,

Thank you for the opportunity to provide comments on the proposed environmental review process for fishery management actions pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). As you are aware, in 2007, the MSA was re-authorized and National Marine Fisheries Service (NMFS) was directed to update its environmental review procedures for compliance with National Environmental Policy Act (NEPA) and to improve efficiency. The proposed rule with the revised environmental review procedures was released on May 14, 2008.

Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide; our New England chapter is located outside of Boston, Massachusetts. PEER has been involved in NMFS issues for a number of years, and we are extremely concerned about the proposed rule. Specifically, we believe that the rule does not comply with NEPA and the Council on Environmental Quality NEPA compliance regulations, and does not provide adequate opportunity for public comment on fishery management proposals. Our specific comments are set forth below.

**Proposed rule complicates NEPA compliance.** The proposed rule calls for the establishment of new forms of documentation. Specifically, the rule proposes the development of an "Integrated Fishery Environmental Management Statement" (IFEMS), instead of an Environmental Impact Statement (EIS), familiar to everyone who has dealt with NEPA. By

substituting a new type of environmental review document, there will likely be confusion over what legal standards apply to the document. From a legal standpoint, this shift to IFEMS will likely result in more litigation as the courts are asked to clarify these new requirements. Because of the new requirements for developing an IFEMS instead rather than EIS this proposal will actually make the environmental review process more difficult, and therefore less efficient.

**Increased control given to fishing industry.** The proposed rule gives too much control to fishery management councils (FMCs), advisory groups composed primarily of representatives of commercial and recreational fishing interests. As you are aware, NEPA documents must be prepared by the federal agency undertaking the action that invokes NEPA in the first place, or by a consultant the agency hires. While cooperating agencies do play certain roles under NEPA, the federal agency in charge is responsible for fulfilling NEPA requirements. This process ensures that the NEPA review is fair and impartial. In a drastic shift from these requirements, the proposed rule allows FMCs a joint role in initiating the scoping process, setting time limits, reviewing and responding to comments on draft IFEMSs, preparing draft and supplemental IFEMSs, being the public contact, and selecting a contractor for preparation of the IFEMS. This appears not only to be contrary to NEPA, but also has the potential to create conflicts of interest and the appearance of impropriety.

**More opportunities for avoiding environmental reviews.** Fishery managers could utilize categorical exclusions, framework procedures, experimental fishing permits and other mechanisms to avoid both environmental review and public input. Specifically, the proposed "framework" provisions could shield a variety of actions from any public environmental analysis whatsoever. In addition, the proposed rule would allow expanded use of categorical exclusions and experimental fishing permits, which allow fishery managers to avoid environmental review and public input entirely. This avoidance of environmental reviews is contrary to an ecosystem-based management of ocean resources.

**Reduces the opportunity for the public to comment on proposals.** Council on Environmental Quality (CEQ) regulations require a minimum 45-day comment period for a draft EIS. These timeframes can be reduced in certain unusual circumstances, but such reduction in public comment periods must be approved by either EPA or CEQ. The proposed rule would allow this timeframe to be reduced to as few as 14 days, if such changes are "in the public interest" or if there is "insufficient time to meet MSA timeframes." Moreover, these reductions in time frames are not subject to CEQ or EPA approval. The spirit and intent of NEPA is to ensure that federal agencies examine all alternatives for a particular project, and take the environmental impacts of federal projects into account. The public comment process is a huge part of this review. By giving FMCs the ability to set the time limits on comment periods, NMFS may be curtailing public input and therefore closing the door to critical information necessary to making a good decision. While speed and efficiency is certainly a noble goal, it should not come at the expense of sound decision-making.

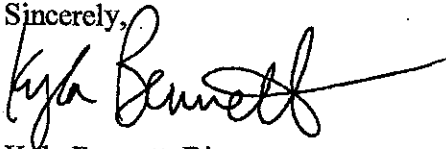
**Conclusion.** If adopted as proposed, this rule would undermine the application of NEPA to fishery management actions. PEER strongly urges you to withdraw this proposal. Any new proposal should ensure that: NMFS is the lead agency responsible for NEPA compliance; the existing forms of environmental review documents, such as the EA/FONSI and the EIS, are



maintained; the public is allowed ample opportunity to comment (in both scope and time); and that the new frameworking approach is eliminated.

Thank you for the opportunity to comment. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyla Bennett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Kyla Bennett, Director  
New England PEER



**Conservation  
Congress**

August 8, 2008

Alan Risenhoover, Director  
Office of Sustainable Fisheries, NMFS  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

RIR 0648-AV53

[NEPAprocedures@noaa.gov](mailto:NEPAprocedures@noaa.gov)

Dear Mr. Risenhoover:

I am writing in response to the proposed rule, Magnuson-Stevens Act Provisions; Environmental Review Process for Fishery Management Actions, published in the Federal Register on May 14, 2008. I have serious concerns about the procedural changes the National Marine Fisheries Service has proposed.

These procedural changes threaten to undermine and weaken this country's bedrock environmental law – the National Environmental Policy Act (NEPA). NEPA serves as an invaluable tool to guide policy decisions that affect our quality of life.

First, I am concerned that if NMFS implements these proposed changes, my ability to comment on policy decisions and activities that affect our environment will be severely limited. I am also disappointed that NMFS is proposing to circumvent environmental review, a proposal that would lead to minimal, or in some cases, no analysis of its actions. Lastly, I object to the proposal to eliminate the use of the well-established Environmental Impact Statements (EIS) and replace EIS's with the Integrated Fishery and Environmental Management Statement document.

As a biologist I work with federal agencies on TES issues including habitat designations. As you know, many fish species in western states are declining. Any attempt to weaken NEPA will indirectly impact TES species through loss of pertinent and often times critical analyses. This is yet another misguided attempt by the current administration to relax environmental laws and I strongly urge you to restrain from doing so.

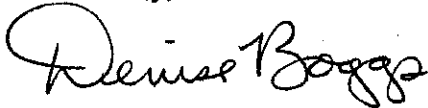
PO Box 5  
Lewistown, MT 59457  
406-538-4220

NEPA is a critical tool that keeps us informed of decisions by federal agencies and provides us with an opportunity to participate in these decisions. NEPA is also important in ensuring that we have a healthy environment to pass on to our future generations.

I urge NMFS to abandon these proposed procedural changes and to support and enforce the National Environmental Policy Act.

Thank you for considering my comments.

Sincerely,

A handwritten signature in cursive script that reads "Denise Boggs". The signature is written in black ink and is positioned above the typed name.

Denise Boggs, Executive Director

# ASSOCIATION OF ZOOS & AQUARIUMS

8403 Colesville Road, Suite 710  
Silver Spring, MD 20910-3314  
301-562-0777 tel 301-562-0888 fax  
www.aza.org

August 11, 2008

Alan Risenhoover,  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

Re: RIR 0648-AV53

Dear Mr. Risenhoover,

On behalf of the 216 accredited member institutions of the Association of Zoos and Aquariums (AZA) I respectfully submit the following comments on the National Marine Fisheries Service's (NMFS) proposed NEPA regulations that were published in the Federal Register on May 14<sup>th</sup>, 2008 (73 Fed. Reg. 27998).

AZA and its member institutions are proud to work with Congress, the Federal agencies, conservation organizations, the private sector and the general public to conserve our wildlife heritage. With 160 million visitors to 218 accredited zoos and aquariums, AZA's focus on connecting people and animals provides a critical link to helping wildlife in their native habitats. AZA members share the natural world with millions every year and share important conservation messages with citizens—of all ages—who come to see animals and nature that they probably would never have the opportunity to see in any other venue except on a zoo or aquarium visit. Our ability to legally obtain and display animals under federal regulatory regimes (including NMFS) is essential to carrying out the conservation and education missions of our members.

AZA and its members have serious concerns that the NMFS proposed changes would significantly weaken the integrity of the National Environmental Policy Act (NEPA), especially as it impacts potential users of the resource—such as zoos and aquariums. Accordingly, we recommend that you re-work this proposal accordingly.

NEPA, the strong foundation of US environmental law, ensures that federal agencies publicly disclose their actions that may significantly affect our environment and natural resources. NEPA also requires agencies to examine the impacts of those actions, consider alternatives to those actions, and obtain public comment before deciding on what action to take. Full NEPA compliance is essential to ensure that all federal agencies conduct a comprehensive review of

the significant environmental impacts of their decisions, and to guarantee that affected parties have an opportunity to fully participate in those decisions.

This NMFS proposal appears to significantly modify those essential NEPA core principles and provisions. As members of the environmental and NMFS-regulated community, AZA and its accredited institutions are concerned about the broad implications this rule could have on NEPA and the precedent it could establish. Specifically, we have the following concerns with the proposed rule:

- **Ability to Participate in Decisions is Limited:** NEPA ensures that affected parties will have an opportunity to participate and shape federal decisions that will have a significant effect on the environment, human health, and the ability to conduct their businesses. However, the NMFS proposed rule would curtail the ability for affected parties to comment. The proposed rule would authorize NMFS, on its own authority, to reduce the comment period (when certain, broadly defined conditions are met) from the minimum 45 days that the Council on Environmental Quality (CEQ) requires to as little as 14 days.

CEQ's NEPA regulations provide for two mechanisms through which agencies can shorten the public comment time periods and expedite environmental review if there are compelling reasons. These exceptions can be utilized when an emergency exists or there is a compelling national policy issue. Under the existing regulations, the lead agency must consult with either CEQ or the Environmental Protection Agency (EPA) before reducing the public comment time periods, providing a vital independent check and balance. The NMFS proposal appears to eliminate this critical consultation requirement by allowing NMFS to unilaterally decide that a shortening of the public comment period should be allowed, without any guidance/oversight from CEQ or EPA.

As a practical matter, reducing the public comment period to 14 days significantly limits affected parties' ability to participate in NMFS decision-making. This short time period does not grant these parties a realistic window of opportunity to review and prepare comments on proposals. In practice, allowing a federal agency to shorten the time period to 14 days when there is neither an emergency nor a compelling national policy concern, will likely shut the public or, more importantly, potential users of the resource out from participating in that agency's decisions, in contravention of the basic premise of NEPA.

We urge you to withdraw this provision and adhere to the current CEQ regulations that maintain a minimum 45 day public comment period unless exigent conditions exist. Removing this vital component of the NEPA process is a disservice to all parties involved since meaningful public and user involvement is essential to developing informed decisions.

- **Improper Delegation of Authority:** CEQ regulations plainly state that an EIS should be prepared by the lead agency, a cooperating agency when appropriate, or a contractor selected by the lead agency. In clear violation of those regulations, the proposed rule allows a non-federal advisory body to select a contractor to prepare environmental analysis documents. This establishes a dangerous precedent that could create a potential for abuse. Only the lead agency, or when appropriate, a cooperating agency, should be permitted to select a contractor to prepare an Environmental Impact Statement (EIS).

Further, the proposed rule contains various provisions that would allow a non-federal advisory body to perform essential NEPA tasks, such as deciding which alternatives should be chosen and what should be included in the scoping process. The rule must clearly articulate that NMFS, as the federal agency, has the ultimate decision-making authority.

AZA believes the proposed rule amends the basic structure of the NEPA process and damages the integrity of NEPA's mandate for environmental review and critical involvement from affected parties. We urge NMFS to withdraw this proposal and to redraft a new rule that will integrate the NEPA process into critical NMFS resource management decisions, while ensuring that NEPA is not weakened.

In closing, thank you for the opportunity to comment on this very important proposal. As NMFS continues to formulate future policies to address fisheries and marine mammal management issues, I strongly encourage the agency to call upon the informational resources and expertise of the AZA and its member institutions as a critical source of public comment. The professional zoo and aquarium community continues to view ourselves as important partners with NMFS in our ability to speak to millions of visitors annually about marine conservation needs and how fishery management is one of many tools that help protect the ocean's resources.

Sincerely,

Steve Olson  
Vice President, Government Affairs



Mr. Alan Risenhoover, Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, Maryland 20910

August 12, 2008

Re: Revisions to National Environmental Policy Act Procedures under the Magnuson-Stevens Act. Comments on RIR 0648-AV53. Proposed Rule 73 Federal Register 27998 (May 14, 2008)

Submitted via email and U.S. Mail: [NEPaprocedures@noaa.gov](mailto:NEPaprocedures@noaa.gov)

Dear Mr. Risenhoover:

Environment America is the national office representing hundreds of thousands of citizens in twenty-four statewide, grassroots environmental groups around the U.S. advocating for clean air, clean water, open spaces and healthy oceans. Of these twenty-four states, sixteen are coastal state partners of Environment America. They are: Washington, Oregon, California, Texas, Florida, Georgia, North Carolina, Virginia, Maryland, New Jersey, Connecticut, Rhode Island, Massachusetts, New Hampshire and Maine. All these state organizations join Environment America in condemning this latest move to weaken ecosystem protections by undermining environmental review rules as they apply to fishery management decisions. There are serious flaws in these proposals. They are actually a giant step backwards from current practice in terms of protections for our sensitive oceans. They should be sent back to the drawing boards.

**The Importance of a Strong National Environmental Policy Act Process**

The current National Environmental Policy Act (NEPA) process has resulted in some of the most important environmental improvements in fisheries management in the last two decades. Examples abound of important advances occurring because NEPA was used in decision making. Hundreds of thousands of square miles off the Aleutian Islands have been protected from destructive bottom trawling because of NEPA; groundfish

populations off the West Coast and New England are being rebuilt faster and smarter because of NEPA; and Western Pacific sea turtles and sea birds are being protected today from ending up drowned at the end of longline hooks because of the NEPA process. NEPA is not a theoretical exercise for these animals; for many it means life.

For three decades Environment America and its state affiliated organizations like Environment California, Environment Maryland, and Environment Texas have encouraged members and citizens around the country to express their opinions about a variety of environmental issues before Congress and on federal and state agency rule makings. We have organized the public to comment on such issues as protecting roadless areas in our forests to stopping poorly conceived national fishing standards such as the attempt to revise NS1 several years ago.

Underlying many of these campaigns is full public participation in a robust environmental review process for preparing Environmental Impact Statements on major federal actions. But the way that the National Marine Fisheries Service (NMFS) has recently proposed to comply with NEPA in fishery management decisions weakens this process and would roll back protections that have been in place for decades. Our ocean and its magnificent sea life such as whales, dolphins, sea turtles, fish and sea birds deserve no less than the full protection that NEPA provides.

#### **Specific Problems with Proposals**

Specifically, we are concerned about these aspects of the proposal:

1) *Throws out 30 years of accepted NEPA practice and resolved issues in favor of a new untested process and document.* NMFS is proposing to create a whole new Environmental Impact Statement-like process it calls the Integrated Fishery and Environmental Management Statement. This would throw out 30 years of accepted NEPA practice and court opinions for a new untested, and importantly, un-litigated process and document. This will not streamline environmental reviews; rather it is likely to lead to more litigation and delay as different groups attempt to define what is meant by the new rules. NMFS simply should comply with time-tested Environmental Impact Statement procedures and documentation standards.

2) *Limits public comments on alternatives proposed in later stages.* The proposed process limits public comments in later stages to only those issues raised in the initial comment period even though NMFS and the regional fishery management councils can examine and adopt last-minute alternatives that have never been reviewed or assessed in the NEPA process. We support creative solutions to fishery management problems, but these must be vetted and commented on by every interested party regardless of when they are proposed.

3) *Allows fishery managers to reduce the time periods for public comment well below the current required minimums.* At its discretion, NMFS can cut the length of any public



comment period from 45 days to as little as 14 days. This is a very short period of time for the public and fishermen to comment on complex issues.

4) *Enables fishery managers to circumvent environmental review.* Broad ranges of fishery management decisions can be excluded from any significant NEPA analysis by declaring them to be 'framework decisions' even if they will have significant environmental impacts.

5) *Can the new process produce decisions that favor ecosystem balance and resilience over single species management?* At a time when forage fish like herring, menhaden, sardines, pollock, and pacific whiting are managed as single species rather than as critical links in a food web that sustains other ocean populations, it is unclear to us that the new NEPA process will produce decisions on catch limits and methods that recognize other species besides the one being targeted in the fishery management plan. We believe that it is critical that fishery management decisions begin to be made as if the ecosystem exists. These proposals do not ensure that outcome.

### **Summary**

The Bush administration has wisely chosen to make ocean preservation and reform of fishery management one of its signature environmental priorities. We applaud that. Unfortunately, the problems of our oceans are well documented and widespread. Overfishing, persistent toxic pollution, over-enrichment and dead zones, habitat destruction underwater and on land, marine debris and global warming and acidification are just the major problems. Various fish, forage fish, marine mammals like whales, dolphins and sea lions, sea turtles, and sea birds are just some of the populations that are under stress as a result.

I am old enough to remember when the National Environmental Policy Act was enacted. It came at the very beginning of my environmental career. I was a senior in high school organizing recycling events and stream cleanups, wondering whether the grownups and those in power would save our planet from human excess. We viewed NEPA then as a huge step forward for: (1) getting federal agencies to recognize and assess the consequences of their decisions on ecosystems; and (2) getting federal agencies to listen to the public about those decisions and impacts.

Now, I am one of those grownups and I find it ironic that we are skirmishing over implementation of these basic principles when for more than 30 years this law has helped guide our way in making informed, rational tradeoffs between the natural environment and the human inhabitants of that environment. The law promises that those who don't have a voice be represented at the decision making table: the fish, the marine mammals, the sea turtles and sea birds. Your proposed revisions will not allow those voices mediated through citizens and fishermen to be heard at the table.

We must not go backwards to the old way of doing things that got us into trouble with so many fisheries. We know how that works out. Too many of our fish stocks are overfished or experiencing overfishing or subjected to bycatch rates that are too high. Too much of our marine habitat is compromised by destructive fishing practices. Our oceans need us to be bold and resolute in their protection.

Sincerely,

Michael Gravitz, Oceans Advocate  
Environment America  
218 D Street, SE  
Washington, DC 20003  
202-683-1250



## ENVIRONMENTAL DEFENSE FUND

finding the ways that work

August 12, 2008

Mr. Alan Risenhoover  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, Maryland 20910

**Re: MSA Environmental Review Procedures**

Dear Mr. Risenhoover:

On behalf of our over 500,000 members, Environmental Defense Fund ("EDF") hereby submits comments on the National Oceanic and Atmospheric Administration ("NOAA") and National Marine Fisheries Service's ("NMFS") proposed revisions to the guidelines for National Environmental Policy Act ("NEPA") for the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), published at 73 Fed. Reg. 27998 (May 14, 2008) ("Proposed Rule").

### **I. Overview**

EDF supports the need to align NEPA and fishery management protocols. This is a significant and challenging endeavor, however the Proposed Rule has key weaknesses that fail to adequately involve the public in the fishery management process. Establishing a robust and transparent process is critical for building and maintaining confidence in decisions that affect the welfare of fishing businesses, recreational opportunities, and the health of our oceans. We strongly recommend substantial improvements in two areas before this rule is finalized.

#### **A) Proven incentive-based approaches should be considered as an alternative in fishery management actions.**

A great strength of the NEPA process is the mandate to review a full array of alternatives that are compatible with the needs of the project and existing statutes. Recently, the application of NEPA to fisheries has resulted in developing more alternatives rather than better alternatives that are substantively feasible and achieve conservation and management goals, including ending overfishing and compliance with catch limits. In this Proposed Rule, NMFS has the opportunity to change course by promoting feasible alternatives that further conservation and management requirements of the MSA. Implementing incentive-based approaches, called limited access privilege programs ("LAPPs") or "catch shares," is arguably the most successful method of meeting the numerous, and sometimes conflicting, requirements of the MSA. Therefore we strongly recommend that NOAA exercise its authority to require that catch shares be considered as an alternative in fishery management plans developed by NOAA and the regional councils when conducting a NEPA analysis.

**B) Bolster the revised procedures to ensure adequate opportunity for public input and clarity in the application of the Council on Environmental Quality's NEPA regulations in the environmental review process.**

The cornerstone of NEPA is the predictability and adequacy of the public comment period and the ability of resource users, conservation groups, and concerned citizens to advocate for certain government decisions. The comment period is essential to ensuring an intelligent and thorough conversation about the proposed action. As such, it needs to provide the public with the time to digest and respond to a full array of alternatives, and their environmental, social and economic implications. Similarly, Environmental Impact Statements ("EISs") provide legally vetted and familiar means for the public to interface with governmental decision-making. The NEPA process and standards are well-established in the public dialogue and needs to be substantially bolstered in this Proposed Rule to live up to the public's expectations. We strongly recommend the following changes:

- NMFS should prepare and rename the Integrated Fishery Environmental Management Statement ("IFEMS") to Fishery Management Environmental Impact Statement ("FMEIS") and clearly state that the CEQ regulations and current case law governing EISs apply directly to an FMEIS.
- NMFS should prioritize the seven factors identified for shortening the comment period from 45 to 14 days, add additional criteria, and require a "compelling need" to modify the comment period.
- NMFS should explain the difference between the comment periods at the regional fishery management council level and the NMFS level.

Detailed discussions of these recommendations follow.

## **II. Detailed Recommendations**

**A) NMFS should state that incentive-based catch share programs must be considered in the reasonable range of alternatives when completing the NEPA analysis.**

As part of the NEPA process, NOAA should require that catch share programs be considered when developing or revising federal fishery management measures. Under the MSA, the Secretary of Commerce and regional fishery management councils must adhere to numerous requirements when crafting measures to manage fisheries. For example, the MSA's National Standards require that conservation and management measures end overfishing; consider efficiency in the utilization of fishery resources; provide for the sustained participation of fishing communities; reduce bycatch; and promote the safety of human life at sea.<sup>1</sup> In addition, all fishery management plans are required to specify annual catch limits and include measures to ensure accountability.<sup>2</sup>

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<sup>1</sup> See 16 U.S.C. §§ 1851(a)(1), (5), (8), (9), (10).

<sup>2</sup> See 16 U.S.C. § 1853(a)(15).

Catch shares – or limited access privilege programs (“LAPPs”) – implement all of these requirements of the MSA, as NOAA has recognized. By allocating the catch among fishery participants, LAPPs create incentives for participants to adhere to annual catch limits, thus ensuring compliance, and helping to end and prevent overfishing. In fact, catch share programs come in 5% below their catch limit on average every year.<sup>3</sup> Catch shares also end the “race for fish,” thereby encouraging fishermen to fish more carefully and selectively, which decreases bycatch and bycatch mortality. Catch shares also enhance safety because fishermen are no longer forced to fish in bad weather. Consumers may also benefit from a wider variety of fresh and frozen products, because fishermen can fish more efficiently throughout longer seasons.<sup>4</sup> The goal of catch shares is to increase the value of the fishery over time, thus helping to ensure the sustained participation of fishing communities. The Administration has made a commitment to increase the number of LAPPs precisely because of these benefits, noting that “[e]ncouraging market-based incentives to adjust harvest capacity in a fishery can help end the race for fish, improve product quality, enhance safety at sea, and make fishing operations more efficient, ultimately improving the livelihood of those who depend on them”.<sup>5</sup>

The Secretary of Commerce and NOAA have substantial authority to require that catch shares be considered when developing management measures. In 2006, Congress expressly amended the MSA to permit the regional councils to submit, and the Secretary to approve, LAPPs.<sup>6</sup> Courts have recognized that NOAA has broad discretion under the MSA to develop regulations that it believes are appropriate to manage our nation’s fishery resources consistent with the MSA.<sup>7</sup> In fact, NOAA has relied on this authority in other contexts to require the regional councils to take certain considerations into account when developing management measures. NOAA’s National Standard Guidelines, for example, require the regional councils to consider ten factors when determining whether a management measure will reduce bycatch.<sup>8</sup> The Guidelines also require the regional councils to adopt the precautionary principle when approaching management decisions.<sup>9</sup> The same authority would permit NOAA to require the regional councils to consider catch shares when developing management measures.

In short, catch shares provide a promising management tool that can simultaneously promote conservation, increase profits for fishermen and communities, improve information about stock condition, provide higher-quality fish to consumers, create full-time jobs and help save lives.

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<sup>3</sup> Environmental Defense. 2007. *Sustaining America’s Fisheries and Fishing Communities: An Evaluation of Incentive-Based Management*.

<sup>4</sup> See Lee G. Anderson and Mark C. Holliday, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, *The Design and Use of Limited Access Privilege Programs*, NOAA Technical Memorandum NMFS-F/SPO-86 (Nov. 2007) at 6-7.

<sup>5</sup> See U.S. Ocean Action Plan: The Bush Administration’s Response to the U.S. Commission on Ocean Policy (Dec. 17, 2004) at 18.

<sup>6</sup> See 16 U.S.C. § 1853a.

<sup>7</sup> See, e.g., *Connecticut v. Daley*, 53 F. Supp. 2d 47, 57 (D. Conn. 1999) (“The Secretary’s determination of what fishery conservation and management measures would be in the nation’s best interest is “a classic example of a factual dispute the resolution of which implicates substantial agency expertise.”) (citation omitted); *Loga v. Daley*, 2002 WL 188401 at \*10 (E.D. La. 2002) (noting the “Secretary’s broad rulemaking authority under the Magnuson Act”); *Southern Offshore Fisheries Ass’n v. Daley*, 995 F. Supp. 1411, 1425 (M.D. Fla. 1998) (“Of course, the Secretary retains broad discretion to promulgate regulations and warrants cautious deference in matters falling within his studied specialty and concerning which equivocal evidence and genuine scientific debate abound.”).

<sup>8</sup> See 50 C.F.R. § 600.350(d)(3)(i).

<sup>9</sup> See 50 C.F.R. § 600.350(d)(3)(ii).

Implementing LAPPs is arguably the most successful method of meeting the numerous, and sometimes conflicting, requirements of the MSA. NOAA should exercise its authority to require that catch shares be considered in fishery management plans developed by NOAA and the regional councils when conducting a NEPA analysis. LAPPs may not be appropriate in some fisheries, but given their potential for achieving conservation and management objectives, they should at least be considered. For some fisheries, catch shares will achieve what traditional management approaches never could.

Lastly, the inclusion of a catch share as an alternative raises the requirements of all other alternatives under consideration to develop and implement substantial accountability measures in order to comply with annual catch limits – the goal and focus of the National Standard 1 draft rule which is also undergoing a comment period. By integrating catch shares into the NEPA analysis, NMFS and NOAA are ensuring a rigorous vetting process for alternatives and an assurance that the alternative chosen truly ends overfishing by ensuring compliance with scientifically-determined catch limits while meeting the needs of the fishery, coastal communities and the public.

**B) NMFS should bolster the revised procedures to ensure adequate opportunity for public input and clarity in the application of the Council on Environmental Quality's NEPA regulations in the environmental review process.**

- *NMFS should prepare and rename the IFEMS to FMEIS and clearly state that the CEQ regulations and current case law governing EISs apply directly to an FMEIS.* The creation of the Integrated Fishery Environmental Management Statement (IFEMS) with changes to the traditional timing of public comments and identification of alternatives, and yet being labeled as an "EIS-like" document leaves many ambiguities and is ripe for litigation. We suggest that NMFS prepare a "Fishery Management Environmental Impact Statement (FMEIS)" and that it be clearly enumerated in the regulations that FMEISs will be governed by the CEQ regulations and case law governing as Environmental Impact Statements (EISs).
- *NMFS should prioritize the seven factors identified for shortening the comment period from 45 to 14 days, add additional criteria, and require a "compelling need" to modify the comment period.* While we understand the need for responsive and dynamic fisheries management, a reduction of the comment period to 14 days limits, and perhaps eliminates, the voice of many fishermen, conservation organizations, and other interested parties from the NEPA process. Such a shortening of the comment period could well mean that fishermen may be fishing for the entire comment period, and therefore have no say in their fishery. A 'compelling need' test, based on one or more of the seven criteria, should be required before a comment period may be shortened. There needs to be a prioritization and/or weighting of the seven criteria to determine when and to what extent a comment period may or should be shortened. Reducing the public's input on key management decisions related to a public trust resource should demand a clear justification and rigorous standards. There should also be approval by the EPA of this shortened comment period, as currently required by the CEQ regulations.
- *NMFS should explain the difference between the comment periods at the regional fishery management council level and the NMFS level.* The comment periods at the level of the

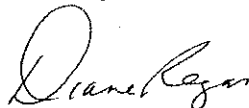
regional fishery management council and the Secretary of Commerce appear to be distinct in this Proposed Rule. At the regional council level, the public may make comments about the alternatives, their impacts and the decision to choose one of those alternatives. At the Secretarial level, the public can only comment on the ability of the Secretary to approve, disapprove and/or partially approve or disapprove a plan. This substantive versus procedural distinction may significantly reduce public input from the status quo. For instance, when a regional council approves a hybrid of alternatives that has not been analyzed collectively in that same way – quite a common occurrence – and transmits that plan to the Secretary, the public could only comment on the Secretary's ability to approve the plan, and not on the unique combination of management actions that would actually be implemented. This inability to comment on the substance of the plan and its impacts handicaps the decision-maker and the public.

### III. Conclusions

Environmental Defense Fund underscores the need in this Proposed Rule to both draw on the well-known NEPA process and incorporate its history directly, as well as ensure consideration of management approaches that can greatly improve compliance of multitude conservation and management requirements of the MSA. We strongly recommend that substantial improvements be made NMFS's Proposed Rule regarding the environmental review process that: (1) require catch shares be considered as an alternative in NEPA analyses; and (2) bolster the revised procedures to ensure adequate opportunity for public input and clarity in the application of the Council on Environmental Quality's NEPA regulations in the environmental review process.

Thank you for the opportunity to comment on this proposed rule. Please don't hesitate to contact Amanda Leland, national policy director, at [aleland@edf.org](mailto:aleland@edf.org) with any comments or questions. We look forward to continuing to work with you towards the long-term sustainability of our nation's fisheries.

Sincerely,



Diane Regas  
Managing Director, Oceans Program



National Headquarters  
1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331  
www.defenders.org

August 12, 2008

Alan Risenhoover  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

Submitted via email: [NEPAprocedures@noaa.gov](mailto:NEPAprocedures@noaa.gov)

**RE: MSA Environmental Review Procedures; Comments on Proposed Rule, 73 Fed. Reg. 27998 (May 14, 2008).**

Dear Mr. Risenhoover:

On behalf of the over 1 million members and supporters of Defenders of Wildlife ("Defenders"), I am writing to oppose the rule proposed by the National Marine Fisheries Service ("NMFS") to amend the environmental review procedures applicable to fishery management actions taken pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). 73 Fed. Reg. 27,998 (May 14, 2008). Defenders is dedicated to the conservation of all native wild plants and animals in their natural communities, including in the marine environment, and relies on the robust implementation and enforcement of important environmental laws like the National Environmental Policy Act ("NEPA") to achieve its organizational goals. We believe that the rulemaking required by the 2006 reauthorization of the MSA provided NMFS an important opportunity to improve implementation of NEPA in fishery management decisions. Disappointingly, the agency has not taken this opportunity for improvement, and instead has moved in the opposite direction, proposing to roll back NEPA protections for ocean ecosystems. This was not the intent of Congress in its recent reauthorization of the MSA, and certainly not its intent in the original enactment of NEPA. Accordingly, we urge NMFS to withdraw its proposed rule and develop a new proposal that streamlines the NEPA and MSA decision making process and at the same time maintains robust requirements for neutral decision making, public participation, agency oversight and accountability, and in-depth environmental review.

**NMFS's proposed rule errs in assuming that fundamental departures from established NEPA procedures are necessary or appropriate.**

The 2006 MSA reauthorization required NMFS to "revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.)." 16 U.S.C. § 1854(i)(1) (emphasis added). The Senate Report accompanying the legislation emphasized that such changes were to be procedural only, and not involve any substantive changes either to NEPA or its



regulations: "The intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, including those in existing regulation, but to establish one consistent, timely, and predictable regulatory process for fishery management decisions. . . ." 73 Fed. Reg. at 28,000 (quoting S. Rept. 109-229, at 8 (emphasis added)). In the House of Representatives, Rep. Rahall confirmed this point, stating:

Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but these new procedures will not supersede existing NEPA regulations and guidance issued by the Council on Environmental Quality.

Statement of Rep. Rahall, December 8, 2006 (emphasis added), 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks).

Thus, NMFS received explicit instructions from Congress that its proposed rule should be confined to procedures to implement NEPA, and that the regulations and guidance of the Council on Environmental Quality ("CEQ") would continue to apply in full to fishery management decisions. The CEQ regulations themselves state that they are "applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA], except where compliance would be inconsistent with other statutory requirements," and that "[t]he provisions of [NEPA] and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law." 40 C.F.R. § 1500.3.

NMFS has not attempted through its proposed rule to demonstrate that compliance with NEPA and the existing CEQ regulations would be inconsistent with the requirements of the MSA. Instead, the agency makes only vague allusions to this effect to justify its diversion from the CEQ regulations and traditional NEPA compliance. See, e.g., 73 Fed. Reg. at 28,001 (stating that maintaining the use of environmental impact statements, environmental assessments, and categorical exclusions as provided for in the CEQ regulations "would negate the opportunity for improvements to the NEPA process for MSA actions as intended by the MSRA"). The fact is that there simply is no inconsistency between NEPA and the MSA. The Marine Fish Conservation Network submitted to the agency a proposal that would meet the requirements of the 2006 MSA reauthorization to streamline and coordinate the timeframes for NEPA and MSA compliance, yet maintain NEPA's full applicability. See June 8, 2007 letter from Lee R. Crockett, Executive Director of Marine Fish Conservation Network, to Dr. William Hogarth, Assistant Administrator for NMFS (attached). Defenders supports the Network proposal and believes NMFS must take a hard look at this approach and explain to the public why it would not be feasible.

NMFS's apparent conviction, without a reasoned basis, that fundamental departures from established NEPA procedures are necessary to facilitate fishery management under the MSA underlies its entire proposal, and constitutes a basic error in judgment requiring withdrawal of the proposed rule.

#### **Specific flaws in NMFS's proposed rule**

In addition, the proposed rule contains several specific defects that further require reexamination of the agency's proposal. Among the proposed rule's flaws, it:

- **Undermines neutral decision making by allowing individuals with financial interests to control the environmental review and public participation process.**

One of the biggest problems with the proposed rule is its delegation of power over the NEPA process to the fishery management councils. Although the preamble to the proposed rule states that NMFS will "bear[] ultimate responsibility for compliance with the MSA and NEPA," 73 Fed. Reg. at 28,005, the proposed rule delegates to the fishery management councils responsibilities for scoping, review and response to comments on the draft environmental document, and for contracting out preparation for the final environmental document. The fishery management councils are not federal agencies, however, and cannot properly carry out these central functions of the NEPA process, which are entrusted by law to federal agencies.

The fishery management councils are advisory bodies created by the MSA to assist NMFS with fishery management decisions, and are often dominated by members with financial interests in the fisheries they manage. Thus, the councils may be faced with strong conflicts of interest that prevent them from taking the "hard look" at the environmental consequences of their management actions that NEPA requires. To carry out the NEPA process, the councils also will undoubtedly be faced with evaluating issues that are beyond the scope of their narrow expertise in fisheries management. NEPA requires an examination of the effects of fishery management actions on the broader ocean ecosystem, an aspect that does not receive sufficient attention under the agency's proposed rule (see also comments on experimental fishing permits, below).

As the federal agency responsible for implementation of the MSA, NMFS must recognize its central responsibility in implementing NEPA, including the basic elements of scoping, identification of alternatives, preparation of draft and final NEPA documents (or supervision of the preparation of such documents by qualified contractors selected by the agency itself), and review and response to public comments. It may be helpful to seek ways to involve the fishery management councils in that process, but NMFS may ultimately do so only in a manner that recognizes the councils' advisory role and maintains the agency's responsibility for implementing the NEPA process.

- **Undermines public input by allowing fishery management councils to control the timing, location, and delivery of public comments, including reducing the amount of time to review and comment on complicated actions.**

As part of the substantial delegation of the NEPA process to the fishery management councils discussed above, NMFS's proposed rule creates a two-tiered system of public comment that, even while giving the public an "extra" opportunity to comment, significantly diminishes their ability to make those comments count. The first comment period under NMFS's proposed rule would be to the fishery management councils. During this comment period, the standard 45-day minimum provided for by the CEQ regulations could be reduced to as little as 14 days for a variety of reasons introduced for the first time through this proposed rule. The second comment period under the proposed rule would be to NMFS itself on the final environmental document, but would focus solely on issues related to legal compliance with the MSA and NEPA. Substantive issues not raised to the fishery management councils at the draft stage could not be considered by NMFS, regardless of whether the first comment period afforded adequate time for public review or the complexity of the issues to be discussed.

To remedy the deficiencies in this aspect of the proposed rule and ensure full public input in the decision making process, NMFS first must resume control of the NEPA process, from scoping through the final decision. Beginning with scoping, 40 C.F.R. § 1501.7 provides that scoping should be "early and open" and "invite the participation of ... interested persons." This aspect of early public involvement is an aspect of NEPA implementation in fishery management that has long needed reform and improvement. Fishery management council meetings and agenda notices are not sufficient to ensure full participation from the public, but rather are targeted only at narrow fisheries interests. NMFS must ensure that public hearings are held in locations that are accessible to the general public, and that they focus on where the effects of the action are likely to be felt on an ecosystem level, rather than only on where the action will be initiated and fisheries interests will be affected.

At the draft environmental document comment stage, Defenders agrees that such public engagement should occur before fishery management councils vote on their proposed actions, and we commend the agency for its attempt to make NEPA relevant to this critical phase in the fishery management decision process. However, even where the comment period is integrated with the fishery management council's decision making, the comment process ultimately should be controlled by NMFS. There is no justification for excluding the agency at this stage in the process and limiting their involvement to responses to comments regarding the legality of the council's actions. In addition, it is not clear how the agency can distinguish effectively between comments addressing the substance of the environmental document and those raising issues of legal adequacy. For example, the preamble to the proposed rule states that comments on the range of alternatives considered in the draft environmental document must be addressed to the fishery management councils at the draft stage. The adequacy of the range of alternatives considered is a critical element for NEPA compliance, however, which NMFS must be given the opportunity to evaluate. The same is true for many other "substantive" aspects of the draft environmental document. Bifurcating these important issues between the fishery management councils and NMFS will inevitably confuse the public, and result in NMFS disregarding comments conveying important information and perspectives on environmental issues, to the detriment of the NEPA process. NMFS should retain control of the comment process, and consider all comments that raise substantive issues without the artificial and unworkable division between substance and legality suggested in the proposed rule.

The length of the comment period allowed on draft environmental documents is also critical to the ability of the public to engage in the decision making process. Given the length and complexity of fishery management documents, 14 days simply is not enough time for the public to engage in the process in a meaningful way. In addition, the proposed rule's provisions for reduction of the comment period arguably conflict with CEQ regulations that vest this discretion in EPA for "compelling reasons of national policy." 40 C.F.R. § 1506.10(d). NMFS should drop from the proposed rule the provisions for shortening the comment period, and maintain the provisions of the CEQ regulations.

- **Undermines accountability and consistency by creating an entirely new environmental document with new requirements.**

The proposed rule creates a new environmental document, the Integrated Fishery Environmental Management Statement ("IFEMS"). Although the agency implies that the new document would fulfill the legal role of an EIS under NEPA, the precise nature of the new

document, and the extent to which it will in fact fully comply with the requirements for an EIS, is unclear. NMFS's preamble to the proposed rule states:

The proposed name change from [environmental impact statement] to [integrated fishery environmental management statement] is intended to make clear that the requirements applicable to an IFEMS are distinct from those applicable to an EIS, especially in terms of procedure and timing, but also regarding the identification of alternatives, how to deal with incomplete information, and the requirement to analyze cumulative impacts.

73 Fed. Reg. at 28,004 (emphasis added). The proposed rule itself states that the IFEMS "will meet the policies and goals of NEPA," 73 Fed. Reg. at 28,014 (emphasis added), but does not state that the IFEMS will fully meet the legal requirements for an EIS under the statute and CEQ regulations. Indeed, even the preamble and the text of the proposed rule seem to conflict on this issue, leaving the public unclear as to just how distinct NMFS intends for these documents to be.

To comply with NEPA, an environmental document must fully comply with the required elements for an EIS specified in NEPA and the CEQ regulations. Although CEQ guidance recognizes that agencies may find it helpful to integrate their EISs into larger agency planning documents, CEQ makes clear that the environmental analysis of the EIS must be distinct and separately identified within such an integrated planning document. See CEQ "Forty Most Asked Questions, 46 Fed. Reg. 18026 (March 16, 1981) (Question 21, Combining Environmental and Planning Documents: "The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of reasonable alternatives."). Although NMFS is thus free to suggest ways to better integrate NEPA and fisheries management decision making, including ways to integrate NEPA analysis into a fishery management plan, it must ensure that the environmental analysis contained in any such integrated document is as thorough and complete as that in a free-standing EIS, and should require that the portion of any combined document that serves as the EIS be clearly demarcated.

The agency's identification of a new hybrid environmental and fishery management document, the "IFEMS," does not comply with CEQ's direction for clear identification of the elements of the EIS in a combined planning document. The new terminology, combined with the agency's vague language in the preamble, will inevitably confuse the public and the fishery management councils themselves regarding whether the new document is intended to comply fully with NEPA's requirements or instead establish a shortcut around them. Indeed, under one interpretation of the proposed rule's and preamble's language, the agency could be trying to remove itself from the umbrella of 30 years of established NEPA caselaw and move itself closer to the "functional equivalence" approach of exempting MSA actions from NEPA advocated by fishing industry representatives during the 2006 MSA reauthorization. This approach was specifically rejected by Congress, of course, which explicitly directed that fishery management actions were to remain subject to full NEPA compliance. NMFS should accordingly clarify in a new proposed rule that all elements of a traditional environmental impact statement will continue to be required, and should ensure that those elements are distinctly identified in any combined environmental analysis and planning document.

- **Undermines comprehensive environmental review by improperly expanding categorical exemptions for actions with potentially significant environmental consequences.**

Finally, the proposed rule would "establish a new [categorical exclusion] category for experimental fishing activities permitted under an [experimental fishing permit], where the fish to be harvested have been accounted for in other analyses." 73 Fed. Reg. at 28,008. The focus of this proposed categorical exclusion on the impact on the targeted fish stock is far too narrow, however. Unlike the MSA, which is largely focused on target stocks, NEPA requires thorough investigation of impacts on the broader marine environment. The proposed categorical exclusion could thus permit significant environmental impacts, in violation of the CEQ regulations governing such exclusions. For example, the Pacific Fishery Management Council has been considering an experimental fishing permit that would allow longline fishing for swordfish in a leatherback sea turtle protected area. The purpose of this experimental fishing permit is to determine whether a new gear configuration can reduce the capture of a highly endangered species. Thus, the proper issue for concern is not "the fish to be harvested" and whether they have already been accounted for, but how endangered leatherback sea turtles will be impacted. Under NMFS's proposed rule, this environmentally significant activity could be subject to a categorical exclusion, eliminating any environmental review under NEPA. NEPA demands more than just this narrow focus.

### Conclusion

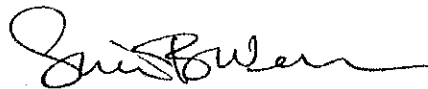
As noted above, the 2006 MSA reauthorization presented NMFS with an opportunity to significantly improve decision making through the use of NEPA in fishery management actions. Unfortunately, the agency's proposed NEPA rules do not fulfill this mandate. Instead, NMFS has proposed changes to longstanding NEPA procedure that will likely lead to more confusion and litigation. Although we commend the agency for its proposal to start the NEPA process and engage the public early so that fishery management decisions can be influenced by the analyses and public input required through NEPA, we do not believe that important elements of the agency's proposal are consistent with the requirements of NEPA and the 2006 MSA reauthorization. We urge the agency to withdraw the proposed rule and revisit the proposal of the Marine Fish Conservation Network that would maintain strong NEPA review while streamlining this process.

Thank you for your attention to these comments and we look forward to working with you further on developing a NEPA process for fishery management actions that will best coordinate the requirements and timelines of NEPA and the MSA. Our oceans are facing too many challenges to scrimp on NEPA now. Please feel free to contact us at 202-682-9400 if you have any questions about these comments.

Sincerely,



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Sierra B. Weaver  
Staff Attorney

**American Lands Alliance - American Rivers - Animal Welfare Institute - Center for Biological Diversity - The Center for Food Safety - Defenders of Wildlife - Earthjustice - The International Center for Technology Assessment - Klamath Siskiyou Wildlands Center - The Lands Council - National Audubon Society - National Trust for Historic Preservation - Natural Resources Defense Council - The Wilderness Society**

Submitted via electronic mail and U.S. Mail: [NEPAprocedures@noaa.gov](mailto:NEPAprocedures@noaa.gov)

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August 12, 2008

Re: RIR 0648-AV53

Dear Mr. Risenhoover,

On behalf of the undersigned organizations, we submit these comments on the National Marine Fisheries Service NEPA regulations proposed May 14<sup>th</sup>, 2008 (73 Fed. Reg. 27998). The proposed changes would weaken the integrity of the National Environmental Policy Act (NEPA) as we have outlined below. Accordingly, we strongly recommend that you withdraw this irreparably flawed proposal in its entirety.

NEPA, the bedrock of U.S. environmental laws, ensures that federal agencies publicly disclose their actions that may significantly affect the human environment. NEPA also requires agencies to examine the impacts of those actions, consider alternatives to those actions, and obtain public comment before deciding on what action to take. Full and robust compliance with NEPA is imperative to ensure that all federal agencies conduct a comprehensive review of the significant environmental impacts of their decisions, and to guarantee that the public has an opportunity to participate in those decisions.

Unfortunately, the proposed NMFS rule significantly undermines NEPA and its core provisions. As members of the environmental community, we are concerned about the broad implications this rule could have on NEPA and the precedent it could establish. Specifically, we have the following concerns with the proposed rule:

- **Public's Ability to Participate in Decisions is Limited:** NEPA ensures that the public will have an opportunity to participate and shape federal decisions that will

have a significant effect on the environment, human health, and communities. *See, e.g., California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) (“NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action.”). Regrettably, the NMFS proposed rule would curtail the public’s ability to comment. The proposed rule would authorize a federal agency, NMFS, on its own authority, to reduce the comment period (when certain, broadly defined conditions are met) from the minimum 45 days CEQ requires to as little as 14 days. *See* 73 Fed. Reg. at 29022 (to be codified at 50 C.F.R. § 700.604(b)(2)).

CEQ NEPA regulations provide for two mechanisms through which agencies can shorten the public comment time periods and expedite environmental review if there are compelling reasons. These exceptions can be utilized when an emergency exists or there is a compelling national policy issue. *See* 40 CFR 1506.11; 40 CFR 1506.10(d). Under the existing regulations, the lead agency must consult with either CEQ or the Environmental Protection Agency (EPA) before reducing the public comment time periods, providing a vital independent check. The proposed NMFS rule eliminates this consultation requirement by permitting NMFS to unilaterally decide that a reduction in the public comment period should be allowed, without the beneficial guidance that CEQ or EPA can offer.

As a practical matter, reducing the public comment period to 14 days significantly limits the public’s ability to participate in NMFS decision-making. This short time period does not grant the public a realistic window of opportunity to review and prepare comments on proposals. In practice, allowing a federal agency to shorten the time period to 14 days when there is neither an emergency nor a compelling national policy concern, will likely shut the public out from participating in that agency’s decisions, in contravention of the fundamental promise of NEPA.

We urge you to withdraw the authority that is granted to NMFS to limit the public’s ability to comment, and adhere to the CEQ regulations that maintain a minimum 45 day public comment period unless exigent conditions exist. Limiting public review to 14 days will leave the public unable to provide meaningful contributions to the agency’s environmental decision-making. Removing this vital component of the NEPA process is a disservice to all parties involved; strong, meaningful public involvement is essential to developing informed decisions.

- **Improper Delegation of Authority:** CEQ regulations plainly state that an EIS should be prepared by the lead agency, a cooperating agency when appropriate, or a contractor selected by the lead agency. 40 C.F.R. §1506.5(c). In clear violation of those regulations, the proposed rule allows a non-federal advisory body – the Regional Fishery Management Councils – to select a contractor to prepare environmental analysis documents. This establishes a dangerous precedent that

creates a potential for abuse. Only the lead agency, or when appropriate a cooperating agency, should be permitted to select a contractor to prepare an Environmental Impact Statement (EIS).

Further, the proposed rule contains various provisions that would allow a non-federal advisory body to perform essential NEPA tasks, such as deciding which alternatives should be chosen and what should be included in the scoping process. *See* 73 Fed. Reg. at 28013 (to be codified at § 700.108). Nowhere, are non-federal advisory bodies delegated the authority to fulfill the federal agency's NEPA obligation to carry out these important tasks. The rule must clearly articulate that NMFS, as the federal agency, has the ultimate decision making authority.

- **Public's Ability to Comment on Alternatives is Limited:** The proposed rule contains several procedural provisions that when taken in totality, establish a scheme that would severely limit the public's ability to comment on the alternatives being considered by NMFS. Consideration of alternatives by a federal agency is "the heart" of NEPA environmental analysis, 40 C.F.R. § 1502.14, and thus the ability for the public to effectively and meaningfully comment on alternatives should not be minimized.

The proposed rule requires the public to comment on the substance of proposed alternatives when those alternatives are published in draft form. 73 Fed. Reg. at 28019 (to be codified at 50 C.F.R. § 700.303(b)(1)). Those comments are transmitted not to NMFS, the federal decision-making agency, but to the applicable Council. If the public does not comment at this early stage before the non-federal advisory body, concerned citizens can be shut out of the process when the EIS reaches NMFS. The proposed rule states that NMFS "is not obligated to respond to comments raised for the first time during Secretarial review" if those comments are "pertinent to the FMC's analysis" including, comments relating to "the alternatives considered." 73 Fed. Reg. at 28006. Furthermore, the proposed rule permits the Councils to adopt and send to NMFS alternatives that were not considered in the draft analysis – alternatives that the public did not have a chance to comment on to the Councils, and likely will not be able to comment on to NMFS.

As written, the rule ultimately requires that if the public wants to comment on an alternative, it must foresee what alternatives a non-federal advisory body will piece together at their meeting, based on the tea leaves provided in the draft analysis. If the public does not guess what alternative the Council will put forth to NMFS, the public would not have a chance to raise its concerns to the federal agency during its review of the draft EIS.

- **Creates a New Document:** For over thirty years, NEPA practitioners have used well established NEPA compliance documents in performing environmental reviews of agency decisions, including the EIS. The proposed rule seeks to create



a new, untested document called the Integrated Fishery Environmental Management Statement (IFEMS) that would explicitly replace EISs.

EISs have had a profound influence on how federal agencies consider the effects of their actions, and the public is familiar with this form of documentation. The creation of this new document will lead to confusion over applicable standards and approaches to how NMFS will consider its actions, especially in light of NMFS's explanation that "[t]he proposed name change from EIS to IFEMS is intended to make clear that the requirements applicable to an IFEMS are distinct from those applicable to an EIS . . . ." 73 Fed. Reg. 27998, 28004 (May 14, 2008). Ironically, this confusion will likely lead to an increase in litigation as stakeholders struggle to determine the scope of such "distinctions." We urge NMFS to abandon the confusing "IFEMS" and to return to the well-established and time-tested EIS and EA as NEPA compliance documents.

- **Circumvents Environmental Review:** The proposed rule creates several means to circumvent environmental review. For instance, the proposed rule contains procedures that would establish a new process for relying upon previously conducted environmental review without providing for appropriate analysis or public review. *See* 73 Fed. Reg. at 28012 (to be codified at 50 C.F.R. § 700.104). This new "frameworking" procedure would allow approval of a wide range of management actions without required NEPA analysis or public input.

CEQ regulations have clear mechanisms designed to incorporate prior environmental reviews, known as tiering and incorporation by reference that are designed to "eliminate repetitive discussions" by allowing agencies to rely on their prior environmental reviews. *See, e.g.*, 40 C.F.R. § 1502.20. We believe that federal agencies should continue to use these time tested mechanisms to take advantage of previous NEPA analysis, rather than circumventing all analysis through the use of the proposed "frameworking" procedure.

In addition, the proposed rule also improperly expands the use of categorical exclusions (CEs), thereby excluding certain actions that would have significant effects on the environment from environmental review. *See* 73 Fed. Reg. at 28022 (to be codified at 50 C.F.R. § 700.702). The rule also does not provide for the required qualifier that before applying a CE, the lead agency must verify that no extraordinary circumstances exist that may cause the proposed action to have a significant environmental effect, and thus need to prepare an EA or EIS. *See id.* We urge you to reconsider these provisions and ensure that all potentially significant environmental actions are properly analyzed before being implemented.

We believe the proposed rule amends the basic structure of the NEPA process and damages the integrity of NEPA's mandate for environmental review and public involvement. We urge NMFS to withdraw the proposal and to redraft a new rule that will

integrate NEPA into fishery management decision-making, while ensuring that NEPA is not weakened. We thank you for considering our comments.

Sincerely,

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CENTER for BIOLOGICAL DIVERSITY

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August 12, 2008

**Via Electronic Mail**

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**Re: 0648-AV53; Comments on Proposed Rule Re Environmental Review  
Process for Fishery Management Actions**

Dear Mr. Risenhoover,

On behalf of the Center for Biological Diversity and Turtle Island Restoration Network, we urge the National Marine Fisheries Service ("NMFS") to withdraw its proposed rule regarding environmental review procedures for fishery management actions. Congress tasked NMFS with simplifying the environmental review process under the Magnuson-Stevens Reauthorization Act ("MSRA") and, most importantly, ensuring its consistency with the National Environmental Policy Act ("NEPA") and Council on Environmental Quality ("CEQ") regulations. The proposed rule achieves neither end. Rather, it represents an unprecedented repudiation of NEPA requirements, including opportunities for meaningful public participation, careful review of alternatives, and the agency's fundamental responsibility to ensure that the nation's fisheries are managed in an environmentally sound manner.

Virtually every provision of the proposed rule is illegal. This letter details our major concerns with the proposed rule. We also join in the concerns expressed by the Marine Fish Conservation Network. Briefly, the proposed rule would severely undercut public participation in fisheries management by allowing fisheries managers to cut short the required public comment period, requiring public comments to be made to fisheries management councils ("FMCs"), and preventing the public from commenting on the preferred alternative after it is selected. The proposed rule impermissibly vests NMFS's authority to undertake NEPA analysis in FMCs, which are non-governmental, advisory bodies whose membership is largely made up of industry interests. The proposed rule would allow fisheries managers to further dodge NEPA responsibilities by exempting broad, ill-defined categories of significant fisheries actions from any sort of environmental review. Where environmental review is required, the proposed rule would allow fisheries managers to undertake that review with incomplete information, without

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searching for further available information, and base analysis on an incomplete range of alternatives. Finally, the proposed rule's sacrifice of all these crucial NEPA requirements achieves not one iota of the streamlining of environmental review that Congress sought in the MSRA. To the contrary, the proposed rule creates a confusing new scheme of environmental documentation with poorly defined requirements – a scheme that unnecessarily duplicates existing, well understood mechanisms under NEPA and the CEQ regulations and promises nothing but a new crop of litigation over the meaning of the new provisions and the validity of the rule itself.

The proposed rule is so defective that no amount of tweaking will make it sound. We urge NMFS to withdraw the proposed rule and develop an entirely new one that complies with the letter and spirit of the MSRA, NEPA, and the CEQ regulations.

### **The Proposed Rule Illegally Denies Meaningful Public Participation**

One of the “twin aims” of NEPA is to ensure meaningful public participation in decisions that affect the natural and human environment. The Supreme Court characterized NEPA's objectives as follows:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citation omitted). These dual objectives require that environmental information be disseminated “early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5.

The proposed rule runs counter to NEPA's core public participation requirements. First, it would allow NMFS to unilaterally shorten public comment periods from the 45 days required under CEQ regulations (40 C.F.R. § 1506.10(c)) to 14 days. The CEQ regulations require a much longer public comment period for good reason. Draft fishery management measures and their accompanying draft environmental impact statements (“EIS”) are often hundreds of pages long and require careful review to construct useful comments. Shortening the public comment period predictably curtails the public's ability to consider and comment upon the impacts of proposed fishery measures. Moreover, this provision is entirely unnecessary. CEQ regulations already have procedures that allow NMFS to reduce the public comment period when action is truly urgent. *See* 40 C.F.R. §§ 1506.10, 1506.11.

Second, the proposed rule further constricts the public's ability to participate in decision-making by requiring the public to comment to the FMC on a range of alternatives in the DEIS that may or may not be reflected in the alternative selected by the FMC, then precluding the public from commenting to NMFS regarding the final preferred alternative selected by the FMC. *See* 73 Fed. Reg. at 28007. In other words, if the public does not correctly guess which "hybrid of alternatives analyzed in the [draft IFEMS]" or "another alternative not specifically analyzed in the draft IFEMS, but otherwise within the range of alternatives analyzed in the draft," the public may not then comment on those issues to NMFS. *Id.* NEPA was enacted to remove precisely this sort of guesswork and stonewalling from environmental decision-making, not to codify it.

Third, requiring members of the public to comment to the FMCs rather than to NMFS, the agency responsible for overseeing and enforcing fisheries management, restricts public participation while removing NMFS's accountability under NEPA to ensure that public comments are carefully considered and incorporated into decision-making. As advisory bodies, FMCs are not obligated, as NMFS is, to respond to public comments on the record. In addition, FMCs may attempt to limit the form of public participation to attendance at FMC meetings, potentially requiring members of the public to spend substantial amounts of time and money to travel to meeting where they are allowed to speak for three to five minutes and will not receive any response to their comments. NMFS is the agency responsible for NEPA compliance and, ultimately, the management of the nation's fisheries. As such, NMFS must be the entity to receive, consider, and respond to public comments.

#### **NMFS May Not Delegate Its Responsibilities under NEPA to the FMCs**

Rather than clarifying the NMFS's and the FMCs' roles in the NEPA process, the proposed rule codifies the current confusion and problems with implementation that exist today. As mentioned above and acknowledged in the proposed rule, NMFS is the agency ultimately responsible for NEPA compliance. The MSRA did not change this. The FMCs are to play only an advisory role in scoping, environmental analysis, and selection of alternatives. Yet the proposed rule would allow the FMCs, which predominantly represent industry interests, to take the lead role in the scope of issues to be considered and selection of alternatives. These processes have a very real effect on the substance of resulting fishery management measures by determining purpose and need, and whittling down the range of alternatives considered before the public or NMFS gets its say. The FMCs could reject as impracticable -- and have rejected in the past -- measures that are necessary to comply with the MSA. The public and NMFS are then presented with an incomplete set of alternatives and little or no opportunity to remedy the situation. Moreover, it is unclear how NMFS itself would remedy an improper scoping analysis or selection of alternatives without the necessary information showing why an issue or alternative was excluded. No other industry is allowed to govern itself in this manner,

particularly while excluding public input. Neither the MSA nor NEPA permits the FMCs to take on NMFS's responsibilities for environmental review.

### **NMFS May Not Exclude Significant Fisheries Management Actions from Review**

When Congress asked NMFS to "streamline" environmental procedures, it did not mean "eliminate" them. However, the proposed rule contains sweeping provisions that would allow fishery management measures with significant environmental impacts to proceed without NEPA review. The first of these is the provision allowing NMFS to determine "through a Framework Compliance Evaluation that the management measures in the action and their environmental effects fall within the scope of a prior analysis." 73 Fed. Reg. at 28013. The process provides for an internal review by NMFS and an extremely brief memo purporting to summarize NMFS's reasons for determining that no further environmental review document need be prepared. Moreover, this impermissible shortcut could be used for an unspecified "variety of fishery management measures and actions, including traditional framework actions, annual specifications, and other fishery management actions, as appropriate." 73 Fed. Reg. at 28005. The actions listed are no small matter. These actions authorize the removal of tons of fish, not to mention associated impacts to their habitat and non-target species. The proposed framework compliance process does not account for changing conditions or new scientific data. Furthermore, this provision is utterly unnecessary since existing NEPA procedures already provide for tiering subsequent environmental analyses to overarching EISs. The key difference is that existing procedures require public participation, incorporation of new information, and adequate explanation of the agency's decision-making. NMFS may not cut these keys elements out of an existing, functional process in the name of simplification.

The proposed rule would also create broad new Categorical Exclusions ("CEs") for activities that would require no preparation of an environmental review document whatsoever. These activities include at least three categories of activities: (1) "[o]ngoing or recurring fisheries actions of a routine administrative nature;" (2) "[m]inor technical additions, corrections, or changes to a Fishery Management Plan or IFEMS;" and (3) "[r]esearch activities permitted under an [Exempted Fishing Permit ("EFP")] or Letter of Authorization where the fish to be harvested have been accounted for in other analyses of the FMP, such as by factoring a research set-aside into the ABC, OY, or Fishing Mortality." 73 Fed. Reg. at 28022.

We find the EFP exclusion especially worrisome, especially given the increasing use of EFPs to allow fishing within closed and with otherwise prohibited gear types. EFPs have been proposed to allow shallow-set longline fishing in closed areas off the Atlantic and Pacific coasts – areas that were closed specifically because longlining in these regions resulted in unacceptable impacts to non-target species and vulnerable life stages of target species. For example, NMFS is currently entertaining an EFP application



that would allow shallow-set longline fishing in the Pacific Leatherback Conservation Area off the coasts of California and Oregon. Longline fishing within the exclusive economic zone off California has been prohibited for over thirty years due to its impacts on non-target species. The Pacific Leatherback Conservation Area has been seasonally closed to gillnet fishing after NMFS determined that it was a critical foraging area for Pacific leatherback sea turtles. Indeed, the area is also under consideration for designation as critical habitat for this species. 72 Fed. Reg. 73745 (December 28, 2007). Despite the significant resources at stake, the CE provision would permit fishing in this closed area and others with no environmental analyses of the associated impacts that led to their closure in the first place. This approach directly contravenes the MSA's requirement that NMFS account for impacts to non-target species, protected species, and habitat. There is no justification for putting these resources at risk, particularly when NEPA already exist to efficiently review and approve or disapprove EFPs.

### **The Proposed Changes Create Confusion and Duplicate Existing Procedures**

The greatest irony of NMFS's proposed rule is that it would achieve the exact opposite of what Congress intended when it tasked NMFS with streamlining environmental review procedures in compliance with NEPA. Instead of simply adopting the well known NEPA processes and documents that managers have implemented for several decades, the proposed rule creates a new, vaguely defined document to replace the EIS. Among other things, this new document, the Integrated Fishery Environmental Management Statement ("IFEMS"), would differ from an EIS in terms of procedure and timing (e.g., less time and opportunity for public comment), identification of alternatives (i.e. would allow a narrower range of alternatives), how to deal with incomplete information (i.e. would allow the agency to curtail its review on the grounds of "incomplete" information), and analyzing cumulative impacts. 73 Fed. Reg. 28004. While some of those differences are made apparent by other provisions of the proposed rule, as a whole the IFEMS process is poorly defined. NMFS's own inconsistent descriptions of the IFEMS reflects the confusion inherent therein, suggesting that the IFEMS must comply with NEPA on the one hand while listing all the ways it will diverge from NEPA requirements on the other. The IFEMS neither complies with NEPA requirements nor simplifies the environmental review process. This duplicative, confusing document should be rejected in favor of maintaining the well-known EIS that has been used successfully for years.

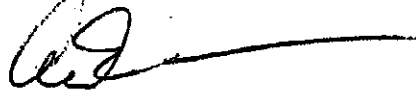
### **Conclusion**

Overall, the proposed rule's vague and befuddling new terms and processes, along with its curtailment of public participation and meaningful environmental review, promise to do serious harm to the nation's marine resources. As gaining efficiency, the proposed rule would accomplish nothing of the sort. Rather, if implemented, this rule would elicit a storm of lawsuits over the meaning of its provisions and, indeed, over the

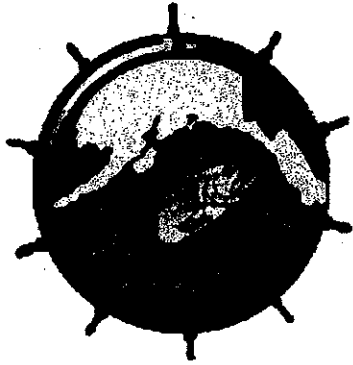
Alan Risenhoover, NMFS  
0648-AV53; Comments on proposed NEPA procedures  
Page 6 of 6

validity of the rule itself. Given its numerous, fundamental, and blatant legal flaws, it is all but certain that the rule would be stricken down and NMFS would be forced to develop a new one. We urge NMFS to correct the deficiencies now by withdrawing the proposed rule and drafting a new rule that complies with fundamental NEPA requirements. Thank you for your consideration.

Sincerely,



Andrea A. Treece



Gulf of Alaska Coastal Communities Coalition (GOAC3)  
PO Box 201236, Anchorage Alaska 99520  
Phone: (866) 561-7633 or (907) 561-7633 Fax: (907)561-7634  
Web: [www.goac3.org](http://www.goac3.org) Email: [goaccc@alaska.net](mailto:goaccc@alaska.net)

August 12, 2008

Alan Risenhoover  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
SSMC3  
Silver Spring, MD 20901

Re: RIN 0648-AV53  
NEPA proposed rule, Federal Register/Vol. 73, No. 94/Wednesday, May 14, 2008  
Compliance with National Standard #1 under MSRA

Dear Mr. Risenhoover:

The Gulf of Alaska Coastal Communities Coalition (GOAC3), is a small, non-profit organization representing some of the fishing interests of over 45 communities within the Gulf of Alaska<sup>1</sup>, all remote, accessible by air or water only, fisheries-dependent in the truest sense of the word.

GOAC3's mission is to assist in community efforts to retain or regain access to local marine resources in order to provide for the socio-economic stability of Gulf of Alaska fishing communities. Most of these efforts have been in regaining access ability and opportunity because the loss, often due to regulatory action, has been dramatic and rapid.

While the GOAC3 very much appreciates the necessity of more fully integrating the requirements of the National Environmental Protection Act (NEPA) with the Magnuson-Stevens Fisheries Conservation and Management Reauthorization Act of 2006 (MSRA) *primarily for the protection of the resource*, this Proposed Rule has the potential for significant unintended impacts on fishing communities and tribal organizations *as well as an inadvertent potential for less protection of the resource*. The Proposed Rule deserves a more orchestrated consultation process.

The GOAC3 Board of Directors is comprised of community-based, not corporate fishermen. Because May through August is a primary fishing season for Alaska coastal community residents, GOAC3 is respectfully objecting to the NMFS proposed rule *at this time* based on the following *as indicative of a far greater consultation problem*:

(1) Insufficient review time on the current proposed rule:

- a. The 2007 NMFS publication of trigger questions, web site postings and Council Coordinating Committee (CCC's) strawman proposal does not constitute sufficient outreach attempt for the vast majority of stakeholders. The affected public was not engaged in true consultation nor dialogue, a process that usually occurs in proposed changes of this significant nature. (Even the June 2008 NPFMC meeting in Kodiak, Alaska, referred to the Proposed Rule "as miscellaneous tasking" for the Council to write a letter on their comments, an effort not to be confused with consultation.)
- b. Just learning what the new acronyms actually represent takes a significant discussion.
- c. After reading the proposed rule, having a member of the GOAC3 Technical Team attend the July explanatory meeting in Seattle, learning the new lexicon and reading some of the appropriate related documents, as well as reading preliminary comments of stakeholder groups around the country, it is clear that the commentary period for the currently proposed rule should be extended at least through October 2008, or better, December 2008.
  - i. This will allow Councils to individually conduct discussion sessions with local stakeholders, well advertised at a scheduled Council meeting
  - ii. This will provide a greater opportunity for legal and socio-economic review among stakeholder groups
  - iii. This will help to alleviate fears that the proposed rule process itself is not running headlong into unintended consequences, specifically the potential that an IFEMS (integrated fishery environmental management statement) that was inappropriately fast to completion in two Council meetings could result in negative impacts on fishery dependent communities<sup>1</sup>.

(2) Insufficient consultation in general:

- a. The notice of public meetings was published on *The Federal Register* on June 4, 2008 for meetings to be held less than three weeks from that date in only three locations nationally. *The cost and probability of getting an affordable ticket to Seattle for a two hour meeting, from any location in Alaska in the middle of the tourist season with less than 3 weeks notice is prohibitive.* One GOAC3 board member was able to attend because he happened to be in Washington state during that time period. Everyone else was fishing for a living, or otherwise unable to attend, *or just did not know about this* - including thousands of stakeholders related or not related to the GOAC3.
- b. There were only three scheduled explanatory meetings, in Washington, DC, Seattle, WA, and St. Petersburg, Florida, all in the middle of the summer during fishing seasons everywhere. These sessions were only two hours long and focused on the NFMS power point and not the actual document.

- c. That an explanatory meeting was not conducted in Alaska is to admit that many of the stakeholder groups of the largest fishery management area in the United States would be left out of a preliminary discussion, the very nature of which goes to the heart of consultation process.
- d. *As far as we know, no tribal entity or community organization in Alaska has received any direct notification of this proposed rule*
- e. There are eight management councils around the country. Each of those eight councils represent a multitude of stakeholders who will be greatly impacted by the proposed changes.

(3) Insufficient consideration of the development of a framework

- a. The intent of Congress in the 2006 MSRA translated into requirements for creating a more significant framework for consultation.
- b. The proposed rule states ("Timing and Flow of Process") that "NMFS analyzed different ways to build flexibility and predictability into the timing requirements of the NEPA procedures to assure the appropriate level of NEPA analysis is prepared and to allow for the maximum amount of public participation during the FMCs development of recommended management measures and actions," *but the proposed rule contains too many references to circumventing this process without an appropriate guideline structure for deciding what measures could safely meet the 2-meeting option and what measures could not.* The GOAC3 feels there is a great potential for abuse of this option.

(4) The proposed speed of change is dangerous and lacks adequate checks and balances :

- a. There are many stakeholder groups who feel that the Council processes often do not take sufficient time as it is to thoroughly investigate impacts on communities and on the stakeholders that may be under represented at the national regional council meetings. There are admittedly, times when the process may also seem glacial but the council process should err on the side of caution. *The GOAC3, which has seen countless unintended singular and cumulative consequences on fisheries-dependent communities in the Gulf of Alaska, feels strongly that any attempt to "streamline" council processes may be misused as a tool to further circumvent public stakeholder participation.*
- b. The North Pacific Fishery Management Council (NPFMC) is actively considering ways to increase community and tribal consultations as part of Presidential Order 13175 and other regulatory requirements but this goal may be on a collision with a NEPA/MSRA integration if not more carefully engineered.
- c. The public is *not* served by speeding up a process that does not have appropriate and adequate checks and balances.
  - i. In order for the Council process to be enhanced to reach many of its requirements for community consultation and consideration, *in conjunction with NEPA requirements for the same,* the NEPA

process requirements at the Council level must provide for maximum opportunity for community participation *and not be accelerated at the wrong times for the wrong reasons.*

(5) There are insufficient safety nets:

- a. The Proposed Rule contains very few references to fishing communities and those references offer no realistic consultation or protection procedures
- b. There are insufficient assurances that integrating the EIS (environmental impact statement) requirements with the FMP requirements will result in greater opportunity for assessing cumulative impacts and providing adequate community consultation.
  - i. *GOAC3 is particularly concerned about the language on page 28003 of the proposed rule which discusses "consideration for determining the appropriateness of reductions in minimum time periods for public comments" without specifically discussing the safeguards or parameters that would or would not be attached to this action.*
  - ii. "The National Environmental Policy Act requires that agencies assess the impacts of major federal actions on the environment, including the human environment. Typically, an Environmental Impact Statement will include a description of the social environment, and an assessment of the impacts of alternative policy choices on that environment. .... Other laws and policies mandating attention to impacts on human communities include Executive Order 12898 on Environmental Justice, which directs agencies to assess the costs and benefits of proposed regulations and alternatives, and the Regulatory Flexibility Act (RFA) which requires agencies to assess impacts that may disproportionately affect low income and minority populations, Executive Order 12866 on Regulatory Planning and Review, which requires agencies to assess impacts of proposed policies on regulated small entities, meaning small businesses, organizations, and governmental jurisdictions as defined in the RFA and the Small Business Act."<sup>1</sup>

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<sup>1</sup> "Community Profiles for West Coast and North Pacific Fisheries - Washington, Oregon, California, and other U.S. States" May 2006

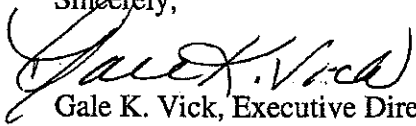
Karma Norman, Jennifer Sepez, Heather Lazrus, Nicole Milne, Christina Package, Suzanne Russell, Kevin Grant, Robin Petersen, John Primo, Megan Styles, Bryan Tilt, Ismael Vaccaro Socioeconomics Program Northwest Fisheries Science Center Economics and Social Sciences Research Program Alaska Fisheries Science Center

In closing, the GOAC3 again respectfully requests that this proposed rule commentary period, given the nature of potentially sweeping changes and subsequent impacts, be extended through October 2008, but preferably December 31, 2008.

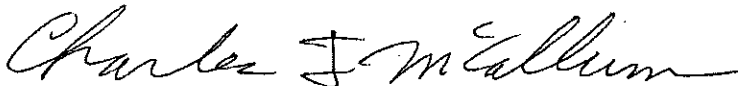
In the spirit of true – and wise – change, the GOAC3 further requests that the NMFS consider this current proposed rule to be an opportunity for creating a positive and more inclusive consultation process. The GOAC3 asks that it be permitted to assist in this effort.

Thank you for your consideration of our comments.

Sincerely,



Gale K. Vick, Executive Director  
Gulf of Alaska Coastal Communities Coalition (GOAC3)



Charles McCallum, Vice-Chair, GOAC3 and member North Pacific Fishery Management Council AP

Cc: GOAC3 Board of Directors and Technical Team

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<sup>1</sup> Please see attached "What is the GOA?"



NATURAL RESOURCES DEFENSE COUNCIL

August 12, 2008

Mr. Alan Risenhoover  
Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, Maryland 20910

Re: MSA Environmental Review Procedures

Dear Mr. Risenhoover:

The Natural Resources Defense Council (NRDC), a national environmental organization with over 1.2 members and online activists, submits the following comments on the proposed rule by the National Oceanic and Atmospheric (NOAA) and National Marine Fisheries Service (NMFS) that revises the agency procedures for compliance of fishery management decisions with the National Environmental Policy Act (NEPA), pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA). See 73 Fed. Reg. 27998 (May 14, 2008). As an environmental organization dedicated to ensuring the sustainability of our nation's fish populations and the health of our oceans and as an organization actively involved in the 2006 reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act including the NEPA provisions, NRDC is very concerned with the adequacy of the proposed rule.

As set forth in these comments and those of the Marine Fish Conservation Network (MFCN) that NRDC helped develop and hereby endorses, NRDC believes that the proposed rule is so flawed that it should be withdrawn and a new rule, one that is fully consistent with NEPA and the CEQ regulations, proposed.

There are numerous serious flaws with the proposed rule. We focus in these comments on three major ones: the elimination of the standard Environmental Impact Statement (EIS) and the substitution of a wholly new document—the Integrated Fishery Management Statement (IFEMS)—that would be different from an EIS, would invite litigation and would set a dangerous precedent for other agencies to each create their own alternative to the standard EIS; the impermissible allowance of a severely truncated public review and comment period on this new draft non-EIS





document; and the proposed elimination of any kind of environmental review for certain actions, even when they may have significant environmental impacts.

Before turning to these specific aspects of the proposed rule, NRDC wishes to express an overarching objection to the proposed rule. The proposal consistently seeks to accommodate the fishery management councils, while giving short shrift to the broader public. This is most evident in the provision allowing a severe truncating of the public review and comment process, but it is a recurrent theme throughout the proposal. While the fishery councils have an important role in the fishery management process, they are by no means the only entities concerned with fishery management decisions. Given the significant impacts that fishing has on the marine environment, as documented in numerous scientific studies, it is imperative that the broader public be thoroughly involved in the decision-making process regarding the conservation and use of this public resource. NEPA provides an important avenue for involvement of that broader public. It requires the engagement of the public in the understanding and assessment of the environmental impacts of proposed fishing activities, of reasonable alternatives and of mitigation measures that will reduce those impacts. When a new proposed rule is developed, as it should be, that rule needs to give greater weight to the interests of this broader public in the environmental review process, rather than deferring so consistently to the fishery management councils.

*1. The proposed elimination of the standard EIS from the fishery management process and the substitution of a new, poorly-defined document that may not meet EIS standards constitutes an illegal end run around NEPA, invites litigation and sets a dangerous precedent*

The proposed rule eliminates the standard EIS from the fishery management process and instead substitutes a new creature the "Integrated Fishery Environmental Management Statement (IFEMS)." This appears to be an effort to substitute a "functionally equivalent" document for the standard NEPA document. However, the Magnuson-Stevens Reauthorization Act calls for NEPA compliance, not functional equivalence. In the MSRA, Congress stated explicitly that the revised procedures are to be established "for compliance with the National Environmental Policy Act." 16 U.S.C. 1854(i)(1).

Despite this requirement, the proposed rule's preamble asserts that an IFEMS does not meet the requirements for an EIS: the proposed name change from EIS to IFEMS is intended to make clear that the "*requirements applicable to an IFEMS are distinct from those applicable to an EIS, especially in terms of procedure and timing, but also regarding the identification of alternatives, how to deal with incomplete information, and the requirement to analyze cumulative impacts.*"<sup>1</sup>

With the IFEMS, NMFS appears to be resurrecting a "functional equivalency" proposal. Yet Congress contemplated, but ultimately rejected a bill that would have authorized NOAA to forgo NEPA analyses by devising an environmental review

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<sup>1</sup> 73 Fed. Reg. at 28004 (emphasis added).

processes functionally equivalent to NEPA. In the reauthorization bill proposed by Rep. Richard Pombo, the Secretary of Commerce was to have the opportunity to determine that §§303 and 304 of the MSRA, which control fishery management plan creation and Secretarial approval thereof, were functional equivalents of NEPA.<sup>2</sup> However, the final reauthorization rejected such an approach and does not include any allowance of functional equivalence; rather, the Magnuson-Stevens Act requires NOAA to promulgate regulations that *comply* with NEPA.<sup>3</sup>

NOAA may not now implement functional equivalence by replacing the EIS, the judicially endorsed document for analyzing a federal action that will have a significant impact on the human environment, with a new document that substantively and procedurally differs from an EIS. Nearly forty years of NEPA jurisprudence indicates that an environmental impact statement is the document required for major Federal actions significantly affecting the quality of the human environment. Courts consistently examine the details of an *EIS's* adequacy,<sup>4</sup> contents,<sup>5</sup> and scope.<sup>6</sup> Will 40 years of NEPA case law about what constitutes an adequate EIS be jettisoned with the replacement of an EIS with an IFEMS? According to the proposal, the IFEMS is supposed to be distinct from an EIS. Thus, the replacement of an EIS with an IFEMS will no doubt lead to a whole new round of litigation as to what constitutes an adequate IFEMS. This serves no one's interests and is clearly not in line with Congressional intent.

NMFS' use of IFEMSs in lieu of EISs would also set a harmful precedent and could well encourage other agencies to circumvent the EIS requirement by creating their own version of IFEMS. The result could be a proliferation of documents, each "distinct" in their own way from an EIS, with different rules regarding the adequacy of each. Such a result would cause immense, and unnecessary, confusion on the part of the public (and indeed industry applicants and for government personnel) with respect to the NEPA process.

For all these reasons, NRDC believes that NOAA and NMFS must abandon the IFEMS and reinstate the standard EIS.

## *II. The proposal to allow a drastic reduction in the public comment period violates NEPA and the CEQ regulations.*

The legislative history of the NEPA provision of the MSRA demonstrates that NEPA compliance entailed compliance not only with the statute but with the longstanding CEQ regulations. The Senate Report states: "[t]he intent is not to exempt the Magnuson-Stevens Act from NEPA or any of its substantive environmental protections, *including those in existing regulation.*" Senate Report 109-229, April 4,

<sup>2</sup> H. Rep. 109-567 § 315, at 72 (2006).

<sup>3</sup> 16 U.S.C. § 1854(i)(1) (2007).

<sup>4</sup> See e.g. *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1974).

<sup>5</sup> See e.g. *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

<sup>6</sup> See e.g. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

2006 at 8 (emphasis added). In the House, Representative Rahall confirmed this point, stating:

Notwithstanding efforts by this Congress to undermine the National Environmental Policy Act, H.R. 5946, as amended, requires full compliance with the law. The Secretary of Commerce is directed to update the procedures for complying with NEPA, but *these new procedures will not supersede existing NEPA regulations and guidance issued by the Council on Environmental Quality.*

Statement of Rep. Rahall December 8, 2006 (emphasis added), 152 Cong. Rec. E2243 (December 27, 2006 Extension of Remarks)

The CEQ regulations provide that "agencies shall allow not less than 45 days for comments on draft statements."<sup>7</sup> This comment period may be reduced, but only with the approval of EPA upon a showing of compelling reasons of national policy.<sup>8</sup> Thus the lead agency may not reduce the comment period on its own, nor may the comment period be reduced for convenience or normal policy reasons, but only for *compelling* policy reasons. The proposed rule, however, allows NMFS itself, without EPA approval (only consultation), to drastically reduce the comment period on the draft statement to 14 days. Moreover, the rationale for this reduction is not limited to compelling policy reasons, but may be made if "in the public interest," based on consideration of "seven wide-ranging factors."<sup>9</sup>

This proposal directly conflicts with what the CEQ regulations. First, NMFS may not bypass EPA, the ultimate recipient of EISs,<sup>10</sup> and unilaterally reduce the comment period for IFEMS. Second, the proposed rule contemplates reducing the comment period for reasons that fall short of "compelling reasons of national policy." Most of the enumerated circumstances in the proposed rule at 50 C.F.R. § 700.604(b)(2) are non-exigencies and are not compelling reasons for the comment period to be reduced. Long term harms to fishery resources, the marine environment, and fishing communities call for diligent and thorough environmental review, not shortened comment periods. If a true emergency arose (e.g. a need for emergency action or interim measures to address overfishing), NMFS could consult with CEQ and potentially receive a CEQ-approved comment period reduction.<sup>11</sup>

The allowance of severely truncated comment period contemplated by the proposed regulations is unlawful and must be struck.

*III. The proposal to exempt federal actions that may have significant environmental impact from environmental review is contrary to NEPA and the CEQ regulations*

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<sup>7</sup> 40 C.F.R. § 1506.10(c) (2008)

<sup>8</sup> 40 C.F.R. § 1506.10(d) (2008)

<sup>9</sup> 50 C.F.R. § 700.604(b)(2).

<sup>10</sup> 40 C.F.R. § 1506.9(a) (2008).

<sup>11</sup> 40 C.F.R. § 1506.11 (2008).

The proposed rule impermissibly allows NMFS to avoid the environmental analysis necessary for actions that could have a significant effect on the human environment. Under the proposed rule, a Fishery Management Plan "may establish a Framework Implementation Procedure [FIP] which provides a mechanism to allow actions to be undertaken pursuant to a previously planned and constructed management regime *without requiring additional environmental analysis.*"<sup>12</sup> This would allow NMFS to avoid any NEPA analysis for federal actions with potentially significant environmental impacts.

Under the proposed rule, a fishery management action "does not require additional action-specific analysis if NMFS determines through a Framework Compliance Evaluation [FCE] that the management measures in the action and their environmental effects fall within the scope of a prior analysis."<sup>13</sup> Under this rule, NMFS would be able to take a fishery management action as long as the action and its effects were within the "scope" of the prior analysis. All that would be needed then would be NMFS' proposed Memoranda of Framework Compliance that would "briefly summarize the fishery management action taken pursuant to a [FIP], identifi[y] the prior analyses that addressed the impacts of the action, and incorporate any other relevant discussion or analysis for the record."<sup>14</sup> MFCs are "concise (ordinarily two page) document[s]."<sup>15</sup> NMFS has apparently designed the MFC to take the place of a NEPA-compliant tiering document even though the MFC's level of analysis is inadequate compared to an EA or EIS. This is another effort by NMFS, similar to the IFEMS, to substitute an inadequate "functional equivalent" process for compliance with NEPA.

The MFC is not the same as a tiering document (i.e., an EIS or EA) that duly analyzes site- or project-specific impacts of a federal action in greater detail than the proposed two-page memorandum. A programmatic EIS must provide "sufficient detail to foster informed decision-making, but an agency need not fully evaluate site-specific impacts until a critical decision has been made to act on site development."<sup>16</sup> If a programmatic EIS is vague or does not consider if subsequent actions will have significant impacts, and a decision for subsequent action is made, the programmatic statements will be insufficient. New EISs will be required.<sup>17</sup> If the parent document is comprehensive enough to consider the significant impacts of site-specific actions, the agency may only have to prepare an EA.<sup>18</sup>

To comply with NEPA and the CEQ regulations, NMFS should eliminate this severely circumscribed approach and instead follow the tiering procedures that the

<sup>12</sup> 50 C.F.R. § 700.104(a) (73 Fed. Reg. at 28012) (emphasis added).

<sup>13</sup> 50 C.F.R. § 700.104(b) (73 Fed. Reg. at 28013).

<sup>14</sup> 50 § 700.104(e) (73 Fed. Reg. at 28013).

<sup>15</sup> *Id.*

<sup>16</sup> *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9<sup>th</sup> Cir. 2003).

<sup>17</sup> *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9<sup>th</sup> Cir. 2006); see also *Oregon Natural Resources Council v. U.S. Bureau of Land Management*, 470 F.3d 818, 823 (9<sup>th</sup> Cir. 2006).

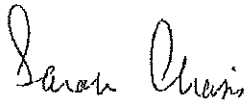
<sup>18</sup> See, e.g. *Sierra Club v. Block*, 576 F.Supp. 959 (D.C.Or., 1983).

CEQ regulations authorize for new federal actions. CEQ encourages agencies to "tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."<sup>19</sup> Agencies may issue a broad environmental impact statement (e.g., a programmatic environmental impact statement) and subsequently issue another impact statement or environmental assessment that is tiered to the original parent document.<sup>20</sup> The tiering EIS or EA "need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action."<sup>21</sup>

NMFS must eliminate its plan to circumvent NEPA by allowing a vague two-page memorandum to stand in place of an EIS or EA for new federal actions that may have significant environmental effects.

For the reasons set forth in this letter as well as in the letter and comments submitted by the Marine Fish Conservation Network, NRDC requests that NOAA and NMFS withdraw this proposed rule and issue a new substantially revised proposed rule that fully complies with NEPA and the CEQ regulations.

Yours Sincerely,



Sarah Chasis  
Senior Attorney and Director, Ocean Initiative



Erin Flannery   
Legal Intern

NRDC  
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NY NY 10011  
212-727-4423  
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<sup>19</sup> 40 C.F.R. § 1502.20 (2008).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



North Carolina Department of Environment and Natural Resources  
Division of Marine Fisheries

Michael F. Easley, Governor  
William G. Ross Jr., Secretary

Louis B. Daniel III, Director

August 12, 2008

Mr. Alan Risenhoover, Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

Dear Mr. Risenhoover,

Thank you for the opportunity to express concerns the NC Division of Marine Fisheries has regarding the National Marine Fisheries Service's (NMFS) proposed rules for compliance of fishery management actions with the National Environmental Policy Act (NEPA). While we support the intent of NMFS to streamline and integrate environmental review procedures with those for development of fishery management actions, we believe the proposed rules are lacking with respect to several areas described below:

**Integrated Fishery Environmental Management Statement**

The proposed rule describes a new category of document, termed an Integrated Fishery Environmental Management Statement (IFEMS), in order to satisfy the requirements of NEPA. In the background information contained in the Federal Register notice outlining the proposed rule, NMFS states that an IFEMS "would be largely similar to an EIS". With the exception of a specific requirement to include consideration of cumulative impacts in an IFEMS, it is not clear what the difference would be between the content of an EIS as currently developed for fishery management actions and the content of an IFEMS as proposed. NMFS states that the goal of the proposed rule is to more fully integrate the development of management alternatives by the regional fishery management councils with the development of the required environmental analyses. However, having participated in fishery management council proceedings for many years, I contend this integration already occurs. Both NMFS staff and fishery management council staff contribute to the development of the draft EIS while potential management actions are being developed. The Division is unclear as to the benefits of creating a new NEPA document (the IFEMS) as described.

**Comment Periods on Draft NEPA Documents**

The Division is concerned by the proposed changes to public comment periods outlined in §700.604(b), which states NMFS and the councils "shall provide at least 45 days for public comment on the draft IFEMS in advance of a meeting where the FMC may take action". However, the agency proposes to reduce this to as little as 14 days based on consideration of factors outlined in §700.604(b)(2), only one of which includes emergency or interim action to halt overfishing. We are concerned that consideration of factors other than the need for emergency action will result in an increased frequency of shortened periods for public review. Despite the best efforts of NMFS and the councils, both NEPA and fishery management documents tend to be complex and lengthy. Shortening the comment period for a draft IFEMS will hinder the ability of this Division, the general public and the fishing community to understand and respond to the impacts of proposed management actions.

Additionally, NMFS staff has stated to the media that the agency is adding a "new 45-day comment period that does not currently exist" and which could be reduced in limited circumstances to 14 days. The Division assumes that this statement is referring to the 45-day comment period described above and contained in §700.604 of the proposed rules.

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CEQ regulations already require that a draft EIS (or in this case, a draft IFEMS) be available for review and comment a minimum of 45 days before a final EIS/IFEMS could be issued. Only upon "a showing by the lead agency of compelling reasons of national policy" could these minimum time periods be reduced (40 CFR 1506.10(d)). According to our reading of the proposed rule and CEQ regulations, the "new" 45-day comment period appears to be that which is already required.

#### **Comment Periods on Final NEPA Documents**

Additionally, the background discussion contained in the Federal Register notice states that when NMFS submits a final IFEMS with a transmittal package for the proposed action (i.e., FMP or FMP amendment), it would publish a notice in the Federal Register of the final IFEMS as part of the notice of the proposed action, and it would solicit public comment on both the final IFEMS as well as the fishery management council's recommended action. NMFS states "this would represent a new opportunity for public comment not provided for under CEQ NEPA regulations or current NMFS NEPA procedures." CEQ regulations already require a final EIS to be available for 30 days of public review (the "cooling off" period) before a Record of Decision can be issued. While this may not be part of NMFS current NEPA procedures, comment on the final NEPA document is certainly provided for under CEQ regulations.

While NMFS proposes to address any comments received on the final IFEMS in the Record of Decision, the agency clearly states that it is not required to respond to any comments raised for the first time with respect to the final IFEMS (proposed rule, §7000.305(d)). We fail to see the utility in soliciting additional public comment if NMFS only intends to address comments/issues raised during the draft IFEMS process, i.e. during the council deliberation process. NMFS states "the proposed rule is intended to discourage the public from seeking a policy change for the first time at the NMFS level when this should appropriately be done via the FMC process." This appears disingenuous and effectively limits public comment to the original 45-day minimum on the draft IFEMS.

#### **Emergency/Interim Actions**

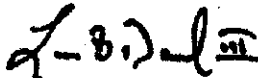
The Division is concerned by the NMFS proposal to develop a programmatic arrangement for NEPA compliance with emergency or interim actions that may result in significant impacts. The conditions under which emergency actions are considered by fishery management councils are usually unique. While NMFS proposes to limit these arrangements to specific types of emergency or interim actions, neither the proposed rule nor the background information contain any detail with regard to what those specific types of actions might be or criteria used to determine them. The statement that the intent is to limit such arrangements to actions "for which public involvement or detailed analyses would interfere with NMFS' ability to control the immediate impacts of the emergency" is troubling. While we agree that emergency actions may require shortened timeframes for public involvement, the lack of detail regarding what constitutes emergency action is worrisome.

#### **Complexity of NEPA Documents and Proposed Fishery Management Measures**

As stated previously, both NEPA documents and proposed fishery management measures (FMPs and FMP amendments) can be complex and lengthy. These documents can be challenging to digest even for professional agency staff, let alone the public. While streamlining of the NEPA process is desirable, efficiencies should be sought from the development of the documents, not from the public's ability to review and comment.

We very much appreciate the opportunity to express the Division's concerns with regard to the proposed rules. Please do not hesitate to contact me or Dr. Michelle Duval of my staff should you have further questions.

Sincerely,



Louis B. Daniel III, Director  
NC Division of Marine Fisheries

LBD/md

Cc: Michelle Duval



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 20 2008

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

Alan Risenhoover,  
Director, Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

**Proposed Rule, Magnuson-Stevens Act Provisions; Environmental Review Process  
for Fishery Management Actions at 50 CFR Part 700**

Dear Mr. Risenhoover,

The U.S. Environmental Protection Agency (EPA) has reviewed the National Marine Fisheries Service's (NMFS's) proposed revisions to its National Environmental Policy Act (NEPA) procedures for fishery management actions developed pursuant to the Magnuson-Stevens Act.

NMFS proposed these regulations to customize and supplement to the Council on Environmental Quality's (CEQ's) NEPA implementing regulations at 40 CFR Parts 1500-1508, and "where there are differences between the two, NMFS intends that these more specific regulations will be followed (in place of the general CEQ regulations) for fishery management actions." While EPA understands that this is the intent of the procedural changes, we must note NMFS's procedural changes do not affect EPA's responsibilities for the EIS filing process established under CEQ's NEPA regulations, at 40 CFR 1506.10(a).

Accordingly, we are very concerned about the potential for significant public confusion that will result from duplicate publications of notices of availability for Integrated Fishery Environmental Management Statements (IFEMSs). Under 50 CFR 700.604 of NMFS's proposed NEPA procedure, NMFS will publish a notice in the *Federal Register* notifying the public of any draft or final IFEMS available for public comment, and that publication date sets the minimum time periods for comment and wait periods. However, 50 CFR 700.603 of the proposed procedure requires that all IFEMS be filed with EPA. As such, EPA will still be required by 40 CFR 1506.10(a) to publish a notice of availability in the *Federal Register* for all of the IFEMSs filed by NMFS. Consequently, it is conceivable (even likely) that NMFS's and EPA's notices of availability for the same IFEMS will have different comment/wait periods.



In April 2008, we discussed, with NMFS and CEQ, the potential confusion that could result from these duplicate noticing processes. As a result of those discussions, we understood that NMFS's proposed NEPA procedures would be clarified to ensure that EPA's notice of availability would set the formal comment/wait periods for IFEMSs; NMFS's notice would include the comment/wait periods established in EPA's notice. Unfortunately, that agreed-to clarification is not reflected in this proposal. Accordingly, EPA strongly recommends that this issue be clarified in the final procedures.

We remain willing to work with NMFS to resolve this issue. With that in mind, please feel free to call Robert Hargrove, Director, NEPA Compliance Division, if you have any questions, or would like to discuss approaches for resolving this matter.

Sincerely,



Susan E. Bromm

Director,

Office of Federal Activities

cc: T. Bolling, CEQ  
H. Greczmiel, CEQ  
S. Leathery, NOAA/NMFS

MARINE MAMMAL COMMISSION  
4340 East-West Highway, Room 700  
Bethesda, MD 20814-4447

12 August 2008

Mr. Alan Risenhoover, Director  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
1315 East-West Highway, SSMC 3  
Silver Spring, MD 20910

Dear Mr. Risenhoover:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule (73 Fed. Reg. 27998) regarding environmental review for fishery management actions. The Commission recognizes the challenge inherent in complying with National Environmental Policy Act requirements for actions taken under the Magnuson-Stevens Fishery Conservation and Management Act. The Commission appreciates the Service's efforts to inform decision-makers and protect the environment while attempting to streamline management procedures and avoid unnecessary redundancy and complexity. If used judiciously, categorical exclusions, environmental assessments, integrated fishery and environmental management statements (IFEMSs), and framework implementation procedures all appear to be consistent with that end. Nonetheless, the implementation of these management tools under processes driven by the Magnuson-Stevens Act poses some difficulties, particularly with regard to public involvement in the management process.

## RECOMMENDATIONS

To enhance the Service's efforts to integrate requirements of the National Environmental Policy Act and the Magnuson-Stevens Act, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- establish a minimum comment period of 30 days for scoping notices and for review of draft IFEMSs and provide longer comment periods when there is no compelling reason for such quick review;
- require as standard practice a three-meeting minimum for consideration of proposed actions requiring an IFEMS to ensure public comments are analyzed and incorporated into the draft IFEMS before decisions are made;
- require fishery management councils to submit written responses to the public's comments and questions when transmitting recommendations to the National Marine Fisheries Service to ensure that the public record on their decision-making is complete;
- give full consideration to all public comments during Secretarial review and remove any restrictions on how the Service may act on or respond to those comments due to procedural constraints;
- eliminate the proposed restrictions on public comments on actions initiated by the Service;
- refrain from preemptively ruling out a no-action alternative that might involve no fishing or a reduction in fishing;

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- use no-action alternatives to provide meaningful baselines for evaluating the effects of proposed actions in the context of the broader environmental effects of fishing;
- refrain from categorically exempting experimental fishing permits; and
- describe in its final rule the implications of existing case law for the various elements of the proposed rule and how the timeline of the proposed rule will be integrated with the timeline for section 7 consultations under the Endangered Species Act.

## **RATIONALE**

The rationale for our recommendations is as follows.

### **Comment periods and responses to comments**

The National Environmental Policy Act seeks to ensure that decision-makers responsible for major federal actions are well informed regarding the environmental effects of those actions. The decision-makers are to be informed through several processes, including public review and input into the decision-making process. The essence of public involvement is not simply that the public be allowed to comment, but that those comments be given meaningful consideration in the decision-making process. The Magnuson-Stevens Fishery Conservation and Management Act also mandates an open, public process.

The proposed regulations provide three comment periods on significant management actions, the first during scoping (minimum of 14 days), the second during review of draft IFEMSs (14 to 45 days), and the third during Secretarial consideration of an action proposed by a fishery management council (30 days). The Commission's first concern is the minimum time frame for public comment during scoping and again during review of a draft IFEMS; we consider 14 days to be an inadequate period for reviewing proposed actions and commenting on them in a meaningful way. The Commission's review process itself illustrates the difficulty that the public will have working within such a short time period. In the course of 14 days, staff would have to obtain a copy of the subject material (which often numbers in the hundreds of pages); review the material; prepare a draft letter; circulate that letter to our Committee of Scientific Advisors on Marine Mammals; allow time for their review, deliberation, and input to the Commissioners; adjust the letter based on comments and the decisions of the Commissioners; and submit the letter. That process also assumes that we can devote our full attention to the material as soon as it is available and throughout the review process. Other persons commenting on behalf of an agency or an organization may require the same period of time for review, drafting, oversight and comment, and finalizing comments. Without adequate time for review and preparation of comments, we do not believe that fishery management councils will have the benefit of adequate, well-considered comments. If that is the case, then the environmental protections provided under the National Environmental Policy Act will be compromised, which was not the intent of Congress on this matter. To avoid compromising the public's ability to comment, the Marine Mammal Commission recommends that the National Marine Fisheries Service establish a minimum comment period of 30 days for scoping notices and for review of draft IFEMSs and provide a longer comment period when there is no compelling

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reason for such quick review. If shorter periods are essential under certain circumstances (e.g., certain types of emergencies), then those circumstances should be identified in advance (e.g., as part of this rulemaking) so that the public has an opportunity to comment generally on what should constitute an emergency and what should not. Events that are truly emergencies—as opposed to those that are the consequence of inefficient planning, foresight, or management—can then be identified and handled in a proactive or predetermined manner.

The Commission's second concern with regard to the proposed comment periods pertains to the two-meeting minimum for consideration of a proposed action. If an action is proposed prior to a meeting (i.e., meeting one), it is reasonable that a council could consider that proposal, identify alternatives, and assign responsibilities for drafting an IFEMS. For the council to vote on that action at the next meeting (i.e., meeting two), drafters must complete the draft IFEMS and make it available for public review and comment, and the council must consider those comments prior to voting. Under such circumstances, we do not believe that the public's comments can be fully considered because they cannot, with much assurance, be adequately analyzed and the results incorporated in the draft IFEMS, which is supposed to inform the council. Instead, any council deliberation of public comments (including hearing of oral comments) would require immediate response to those comments without the benefit of their full analysis in the IFEMS. If there were no public comments on a proposed action, then it is reasonable that the council could vote on a proposed action at the second meeting. But proposed actions that require an IFEMS are likely to stimulate public comment so we do not anticipate those situations will be common. Therefore, the Marine Mammal Commission recommends that the Service and councils require as standard practice a three-meeting minimum for consideration of proposed actions requiring an IFEMS to ensure public comments are analyzed and incorporated into the draft IFEMSs before decisions are made.

The Commission also believes that if the councils are to be the main arbiters of public comments on a proposed action, then they must also provide written responses to those comments to explain their conclusions and maintain a full written administrative record. The use of meeting transcripts alone does not ensure that such responses are made or that the public's questions are adequately addressed. If the councils are to be given the authority to make recommendations for proposed actions, then they also ought to be held responsible for providing sufficient response to public input on those actions. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the fishery management councils to submit written responses to the public's comments and questions when transmitting recommendations to the Service to ensure that the public record on their decision-making is complete. Such a requirement seems essential to match the councils' authority and prominence in these proceedings with a corresponding requirement for accountability.

The Commission also is concerned that meaningful public comment could be unduly constrained for the sake of expediency during Secretarial review. The proposed rule suggests that during his or her review, the Secretary will not or need not consider public comments on a proposed rule if those comments are more applicable to consideration of alternatives and council consideration but were not submitted to the council. This constraint seems unreasonable in two regards. First, we do not believe that, if a public comment period on a draft IFEMS under

consideration by a council is limited to as few as 15 days, the public will have had adequate time for comprehensive review. Thus, any useful comments that they may develop after that 15-day period could be excluded on what we consider to be unreasonable procedural grounds. Second, the value of a comment should be judged, first and foremost, on its merit. If the Service is to retain full responsibility and accountability for fishery management actions and ultimate compliance with the National Environmental Policy Act, then it must be responsible for taking into account and responding to all comments received during the process. To exclude potentially valuable or even vital comments on a procedural basis when procedures are excessively constrained will likely lead to errors on the side of timeliness rather than substance. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service give full consideration to all public comments during Secretarial review and remove any restrictions on how the Service may act on or respond to those comments due to procedural constraints.

Finally, we note that the proposed rule would include different regulations for public comments on actions initiated by the councils versus those initiated by the Service. This distinction likely will lead to confusion among the public and, again, unnecessarily constrains its ability to comment and meaningfully participate in the management process simply for procedural reasons. To avoid such confusion and ensure full participation of the public, the Marine Mammal Commission recommends that the Service eliminate the proposed restrictions on public comments on actions initiated by the Service.

### **Integrated fishery and environmental management statements**

The proposed rule indicates that IFEMSs will be similar to environmental impact statements except in the way that they address identification of alternatives, cumulative impacts, and incomplete information. The proposed rule adds the requirement for a cumulative effects analysis to the IFEMS. The Commission supports that addition because the effects of individually insignificant actions may be significant when combined. The proposed rule also provides specific guidance for addressing areas of incomplete information in IFEMSs. The Commission believes that such guidance will be useful in providing a more complete assessment of the strengths, weaknesses, and uncertainties regarding a proposed fishery management action. In contrast, we note that the constrained time periods for public comment also will constrain the preparation of environmental analyses (e.g., EAs, IFEMSs) and could result in analyses that are less comprehensive and useful to decision-makers. Given the intended prominence of these analyses in the decision-making process, the reduced time frames raise questions about the potential to sacrifice quality for expedience.

With regard to alternatives, the Commission has two main concerns. The first pertains to the no-action alternative that, depending on circumstances, can be defined as continuing with an ongoing action (i.e., maintaining status quo) or actually taking no action (i.e., ceasing the action). The proposed rule indicates that this alternative is used solely for the purpose of providing a baseline and that truly taking "no action" will not be contemplated. Although this may be appropriate in many or even the majority of cases, actually ceasing an action may also be an appropriate consideration under certain circumstances. Councils and the Service often are attempting to maintain a precarious balance between competing fishery interests and complicating environmental considerations (e.g.,

where stocks are overfished or habitat is being degraded by fishing), and in those cases a true no-action or no-fishing alternative may be entirely reasonable. The Commission considers the exclusion of such a no-action alternative to be an unnecessary constraint on the decision-making process that may preclude the most beneficial management course based on a careful weighing of the costs and benefits of a proposed action. All proposed actions need not be taken, and it would be unjustly prejudicial to assume that the environmental costs cannot outweigh the benefits of a proposed action. If the process works as intended, fishery management considerations should be weighed against various environmental costs, and decision-makers should refrain from forming conclusions until the necessary analyses are completed. For these reasons, the Marine Mammal Commission recommends that the councils and the National Marine Fisheries Service refrain from preemptively ruling out a no-action alternative that might actually involve no fishing or a reduction in fishing.

The second concern regarding the no-action alternative is that it provides an accurate baseline for consideration by decision-makers. A description of the incremental effect of fishing based on a single action may not be sufficient under a number of scenarios. One would be that the full effects of fishing (i.e., in the absence of the proposed action) have not been sufficiently described elsewhere. A second would be that a full description has been provided in the past but new information subsequently has become available that has not been evaluated or taken into account in an environmental analysis. Tiering of analyses and incorporation of previous analyses by reference are both reasonable strategies as long as those tiered or incorporated analyses are complete with respect to the full effects known at the time they were completed and new information gathered after those analyses were completed has been taken into account in subsequent analyses. Properly structured, a management framework should provide decision-makers with not only a description of the incremental effects of an action but also a clear understanding of the broader environmental effects of fishing that is necessary to evaluate a proposed action in context. To that end, the Marine Mammal Commission recommends that the National Marine Fisheries Service and the councils use no-action alternatives to provide meaningful baselines for evaluating the effects of proposed actions in the context of the broader environmental effects of fishing.

### **Categorical exclusions**

The Commission believes that categorical exclusions reasonably can be invoked in a number of circumstances where there is a high level of confidence that a proposed action, particularly one that is a relatively routine function of the management cycle, will not result in meaningful consequences for the human environment. The management framework incorporated in this proposed rule may help identify such circumstances and, by doing so, reduce the amount of unnecessary analysis and delay in management procedures.

However, the identification of a categorical exclusion cannot be taken lightly, and we believe the example used in the proposed rule illustrates a situation where adequate consideration was not given to the use of a categorical exclusion. The proposed rule indicates that an exclusion might be used for experimental fishing when the amount of fish to be taken has already been accounted for in fishery quotas. The Commission disagrees that a categorical exclusion is appropriate in such instances because the effects of an experimental fishery may extend well beyond the amount or

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biomass of fish caught. For example, the experimental fishery may occur in sensitive areas where it could cause habitat destruction or at sensitive periods in the year where it might result in the removal of undersized fish or have other effects that might vary seasonally. Similarly, it could involve the use of fishing gear that is prone to entangle or otherwise interact with non-target species including other fish species, invertebrates, seabirds, and marine mammals. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service refrain from categorically exempting experimental fishing permits.


### **Other considerations**

Finally, the Commission raises two additional issues that are not addressed in the proposed rule but that the Service should consider as it develops its final rule. The first is the extent to which the proposed rule is consistent with the extensive case law on the implementation and interpretation of the National Environmental Policy Act, particularly with respect to fisheries management. In this regard, the procedures and terminology introduced in the proposed rule might create uncertainty and spawn litigation. A description of the proposed changes in the context of that case law would be helpful, and we encourage the Service to use existing terminology and link the new process as closely as possible to the traditional review under the National Environmental Policy Act.

The second issue is how the Service will integrate the timeline set forth in the proposed rule with the timeline for section 7 consultations under the Endangered Species Act whenever a proposed action may affect a listed species or its habitat. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service describe in its final rule the implications of existing case law for the various elements of the proposed rule and how the timeline of the proposed rule will be integrated with the timeline for section 7 consultations under the Endangered Species Act.

Please contact me if you have any questions regarding our recommendations or rationale.

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

September 12, 2008

Dr. James W. Balsiger  
Acting Director  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, Maryland 20910

Re: Hearing on Proposed NEPA Rules in Seattle and Reopening Comment Period

Dear Director Balsiger,

I am writing to express my disappointment in National Marine Fisheries Services's (NMFS) public hearings for its proposed NEPA rule, particularly the Seattle hearing, and to request a 45 day reopening of the public comment period.

The Seattle hearing on the environmental review procedures (NEPA rules) was held from 1:30 to 3:30 pm on Thursday, July 24, 2008. The hearing was held at the Hilton Seattle Airport and Conference Center, far from downtown Seattle. This location has poor public transit options and expensive parking. The timing and location made this hearing awkward and time consuming for the majority of the public in the Seattle area.

Before the hearing, the Marine Fish Conservation Network had repeatedly complained to NMFS that these factors would unacceptably reduce public comment. In fact attendance was very poor; only five people commented on the proposal from the entire West Coast. The hearing ended at 2:45 pm instead of the Federal Register notice time of 3:30 pm. That may have resulted in additional people not being able to testify. With nearly 200,000 written comments on this rule from around the country, poor attendance at the hearing was not due to a lack of public interest.

It appears that NMFS did a poor job of notifying the public about this significant rulemaking. Aside from the Federal Register notice, I am unaware of any public notices, advertisements, or news items highlighting the hearings.

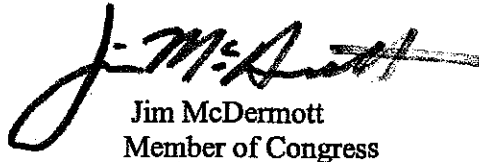
More puzzling is that NMFS ignored one of its own regional councils, the Pacific Fishery Management Council, which explicitly asked NMFS to hold the environmental review procedure public comment period open an additional 45 days until they had a chance to hold another council meeting with enough time for staff and council members to review and discuss the proposals in detail. (See the enclosed document "Agenda Item C.2.a Supplemental Attachment 1" from the PFMC's June 2008 meeting.)



The National Environmental Policy Act is the Nation's premier law requiring federal agencies to solicit and consider input from the public on decisions that affect the environment in significant ways. Your proposed rules for using NEPA in fishery management decisions would substantially change how those considerations are handled in the future.

Due to the limited opportunity for the public to participate in the Seattle hearing, I request that NMFS consider extending the comment period for 45 days to ensure all members of the public can comment on the NEPA proposal. Thank you for your consideration of this request.

Sincerely,



Jim McDermott  
Member of Congress

**COUNCIL STAFF PERSPECTIVES ON REVISED MAGNUSON-STEVENSON ACT NEPA PROCEDURES,  
PROPOSED RULE (50 CFR PART 700)**

**Opportunity for the Council to provide comments**

The proposed rule was published on May 14, providing scant time prior to the deadline for materials to be included in the June advance briefing book. Therefore, there was not an opportunity to include developed staff comments helpful to the Council members and Council advisory bodies. The comment period closes on August 12, 2008, before the next Council meeting.

**Council Staff perspective:** ~~The Council staff recommends the Council request that NMFS extend the comment period for an additional 45 days, to September 26, 2008.~~ This would allow further consideration of the proposed rule at the Council's September meeting. It would allow time for staff to develop schedules showing the potential changes to various Council processes (e.g., groundfish biennial harvest specifications; salmon, CPS, and HMS management measures; amendments) and a listing of workload impacts, which would be presented at the September Council meeting.