



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.¹ In addition, all fishery management plans are required to specify annual catch limits and include measures to ensure accountability.²

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

² 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.³ 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.⁴ 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”.⁵

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.⁶ 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.⁷ 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.⁸ The Guidelines also require the regional councils to adopt the precautionary principle when approaching management decisions.⁹ 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.

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

⁴ 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.

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

⁶ See 16 U.S.C. § 1853a.

⁷ 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.”).

⁸ See 50 C.F.R. § 600.350(d)(3)(i).

⁹ 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 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