



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,



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Ocean Conservancy



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Oceana