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Submitted via electronic mail and U.S. Mail: NEPAprocedures@noaa.gov

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

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 14th, 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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