



August 12, 2008

Via Electronic Mail

Alan Risenhoover, Director
Office of Sustainable Fisheries
National Marine Fisheries Service
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Silver Spring, MD 20910
E-mail: NEPAprocedures@noaa.gov

**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

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

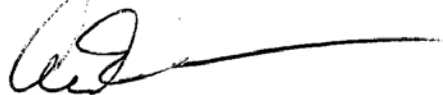
The greatest irony of NMFS's proposed rule is that it would achieve the exact opposite of what Congress intended when it tasked NMFS with streamlining environmental review procedures in compliance with NEPA. Instead of simply adopting the well known NEPA processes and documents that managers have implemented 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

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,

A handwritten signature in black ink, appearing to read 'A. Treece', with a long horizontal flourish extending to the right.

Andrea A. Treece