

NOAA PROPOSED ENVIRONMENTAL REVIEW PROCEDURES ARE INCONSISTENT WITH CEQ NEPA REGULATIONS

In January 2007, President Bush signed legislation that revised our nation's primary fishing law, the Magnuson-Stevens Act, with bold new provisions to strengthen ocean fish management. So far, however, successful implementation of these improvements is being hindered by the very agency charged with protecting and managing our ocean fisheries. This is evidenced by the National Oceanic and Atmospheric Administration's (NOAA) recent proposal to revise environmental review procedures under the National Environmental Policy Act (NEPA).

NEPA's goal is to ensure that public officials make informed decisions about the environmental consequences of their actions. The law requires a thorough environmental review with full public participation. NEPA reviews have a long history of environmental success; the law has made it possible to protect thousands of square miles of coral formations, reduce mortality of endangered sea turtles and begin the rebuilding of depleted fish populations.¹

Unfortunately, NOAA recently proposed a new environmental review process which severely weakens the application of NEPA to ocean fisheries management. Moreover, the proposed procedures violate the intent of Congress because they are not consistent with the Council on Environmental Quality (CEQ) NEPA regulations, as listed below. For that reason, we are urging NOAA to withdraw the proposed rule and rewrite it so that it is consistent with NEPA and the CEQ regulations.

I. IFEMSs vs. EISs

NOAA's draft proposal creates requirements for the preparation of several new documents. Significantly, it requires an "Integrated Fishery Environmental Management Statement (IFEMS), intended to substitute for the well-known environmental impact statement (EIS). This change creates the potential for substantial confusion over applicable standards and will very likely lead to a significant increase in litigation. NOAA says this change is meant to signal differences between EISs and IFEMSs.

The differences identified in the preamble between the IFEMS and an EIS appear to be a mixture of provisions that truly are inconsistent with the CEQ regulations - for example, time periods, as discussed below - and provisions that appear consistent with the CEQ regulations. An example of the latter is the requirement to analyze reasonable alternatives, a fundamental requirement of NEPA. The definition of an IFEMS omits any mention of a requirement for alternatives but other sections of the preamble and regulatory text include a requirement for alternatives analysis. The preamble discussion of this issue states that the requirement would be clarified to "only" require analysis of alternatives that would satisfy the stated purpose and need in whole or substantial

¹ For more information, please see the Pew Environment Group fact sheet "The National Environmental Policy Act (NEPA) a Success Story": <http://www.endoverfishing.org/resources/FactSheetNEPA-fnl.pdf>.

part, and that alternatives that are impractical or ineffective are not “reasonable alternatives.” The text also states that the “no action” alternative means continuation of current management. Both of these latter statements are entirely consistent with long-standing CEQ and case law interpretation, (“Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense . . . the ‘no action’ alternative may be thought of in terms of continuing with the present course of action . . . to construct an alternative that is based on no management at all would be a useless academic exercise.” CEQ 40 Most Asked Questions, 1981), thus leaving the reader confused as to what changes, if any, NOAA is actually proposing.

To the extent that the differences between an IFEMS and an EIS are inconsistent with CEQ regulations, they run against Congress’ direction for promulgation of these regulations. To the extent they are consistent with CEQ regulations; there is no need for creation of a new document. In any event, any possible differences between IFEMS and EISs would be debated administratively and litigated in the courts for many years to come. Such a change should only proceed if the benefits are clear and substantial.

Sharing responsibilities with advisory councils

Legal obligations under NEPA run only to the federal government. There are no binding requirements on any non-federal entity, whether state government or private citizen. To improve the analysis and the management of the environmental review process, especially because of associated environmental review requirements binding on other government agencies, CEQ’s regulations provide for specific roles (for example, cooperating agencies) for state, local and tribal governments. However, the NEPA process must be undertaken by a government agency. If a consultant prepares an EIS, the consultant must be selected solely by a government agency and must execute a financial disclosure of interest statement to avoid conflicts of interest undermining the credibility of the NEPA process and the validity of the analysis.

The proposed rule shares the Secretary of Commerce’s delegated authority to NOAA with fishery management councils (FMCs), which are advisory groups, composed in large part of representatives of the commercial or recreational fishing interests. For example, the draft proposal permits FMCs to initiate the scoping process, set time limits, review and respond to comments on draft IFEMSs, prepare draft and supplemental IFEMSs, be the contact entity for public inquiry, and select a contractor for preparation of the IFEMS. This muddies the water regarding the legal character of FMCs as well as raising important conflict of interest issues.

Shorter time periods for public involvement

There are a few specific time periods specified in the CEQ regulations for public involvement, the most notable of which is the 45 day minimum comment period for draft EISs. However, CEQ regulations provide for several ways to reduce those time periods for certain reasons such

as compelling national policy, for emergencies, and for supplemental EISs. In these cases, CEQ and/or EPA approve deviations from the norm.

The draft regulation provides for three more instances of reducing comment periods (“in the public interest”, “fishery management emergencies” “insufficient time to meet MSA timeframes”) without any outside review and approval.

Tiering gone wrong

CEQ has long provided for “tiering” from coverage of general matters in broad EISs to subsequent narrower EISs or briefer environmental assessments. Tiering refers to the analysis of broad actions covered by appropriate broad EISs, followed by subsequent narrower levels of environmental analysis for smaller, more focused actions, incorporating by reference the earlier discussion and focusing solely on the issues specific to the new proposal. NOAA fundamentally misconstrues this process by proposing that a “Finding of No Significant Impact” may be appropriate for actions with significant effects. NOAA caveats this proposal with the requirement that the significance and effects must have been previously analyzed, thus demonstrating a fundamental misunderstanding of the tiering process, since under CEQ’s regulations there is no need to revisit issues already decided, in the absence of significant new information or a change in the proposed action. It also appears intuitively incorrect and will further confuse all participants in the process.