

## NMFS's New Environmental Assessment Guidelines

*This summer has brought two major rulemakings, each with indirect, but significant impacts on the fishing industry. Stemming from the 2006 Reauthorization Act, the National Marine Fisheries Service ("NMFS") has issued proposed environmental review guidelines – that is, guidance on integrating the analytical and public comment requirements of the National Environmental Policy Act, better known as "NEPA," with similar Magnuson-Stevens Act ("MSA") requirements – and directions for implementing Congress's requirement that each fishery management plan include annual catch limits and accountability measures, via revision of the National Standard 1 guidelines.*

Each rulemaking is complex and lengthy. Each involves somewhat complicated legal and scientific issues, but they will ultimately impact working fishermen and the management of resources on which you depend. In general terms, the new environmental assessment guidelines have the promise of streamlining the management process, for good or ill, while reducing some of the complexity of fishery management plans and regulatory actions. It has a few critical areas of concern. For its part, the new National Standard 1 guidelines have pretty much the opposite effect—they would introduce new, extra-legal layers of precaution and, if enacted as they currently stand, will significantly complicate fisheries management.

### BACKGROUND ON THE RULES

The proposed environmental review guidelines were published on May 14, 2008 (73 Fed. Reg. 27998),

with comments due by close of business on August 12. The comment period on National Standard 1 guidelines (*see* 73 Fed. Reg. 32526 (June 9, 2008)) is open until September 8, 2008. Kelley Dye will have an editorial in the upcoming September issue of the *National Fishermen* that addresses some of the pressing concerns with the ACL/AM guidance, and will publish a more detailed Advisory to assist industry members in making informed comments prior to the deadline. Given the complexity and importance of the new NEPA guidelines, however, this Advisory explains the genesis, substance, and issues of concern related to NMFS's proposal.

Comments should be sent to [NEPAprocedures@noaa.gov](mailto:NEPAprocedures@noaa.gov) with the phrase "MSA Environmental Review Procedures" in the subject line. Comments are due by 5:00 pm Eastern time on August 12, 2008.

### GENESIS AND PURPOSE OF THE NEW NEPA GUIDELINES

When Congress passed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act in 2006, it directed NMFS to:

Revise and update agency procedures for compliance with the National Environmental Policy Act (42 U.S.C. 4231 et seq.) The procedures shall:

(A) Conform to the time lines for review and approval of fishery management plans and plan amendments under this section; and

(B) Integrate applicable environmental analytical procedures, including the timeframes for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act in order to provide for timely, clear and concise analysis that is useful to

decision makers and the public, reduce extraneous paperwork, and effectively involve the public.

(C) USAGE.—The updated agency procedures promulgated in accordance with this section used by the Councils or the Secretary shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved pursuant to this Act<sup>1</sup>.

Congress sought to minimize the complexity of FMP analysis and allow NMFS and the regional management councils to respond more quickly to changing environmental conditions by merging repetitive analyses and conforming public comment deadlines required by the two laws in a single, MSA process.

This provision was strongly opposed by conservation groups – opposition that continues to be reflected in significant hostility by many environmental non-governmental organizations to the proposed guidelines. In large part, this opposition is driven by the provision stating that the analytical process developed by NMFS “shall be the sole environmental impact assessment procedure for fishery management plans, amendments, regulations, or other actions taken or approved” under the MSA. The objections to this change, based on comments made during congressional hearings, largely revolve around the fear that it will be more difficult for such groups to overturn rules on such procedural grounds as a failure to consider a sufficient array of “reasonable alternatives” (many of which strike the fishing industry as patently unreasonable).

Whether this proves to be the case is yet to be seen. The ability to focus discrete actions, such as setting annual specifications or making modest adjustments to a management scheme, on these narrow objectives without having to consider wide-ranging, non-germane conservation measures, should have a positive effect on the management system. Unfortunately, under the current system, litigation fears drive a lot of unnecessary and complex analysis and make the overall system less responsive to changing conditions.

### NEPA’S PURPOSE AND WHAT THE NEW GUIDELINES PROPOSE

In order to understand what this rulemaking is about, it is helpful to review NEPA’s two major purposes. First, it seeks to promote efforts to “prevent or eliminate damage to the environment” and to “encourage productive and enjoyable harmony between man and his environment.”<sup>2</sup> Second, NEPA ensures that environmental factors are taken into account by federal agencies during the decision-making process.<sup>3</sup> “The idea behind NEPA is that if the agency’s eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”<sup>4</sup>

By taking a “hard look” at the environmental effects of a proposed action, a federal agency’s attention will be focused on environmentally responsible considerations before “resources have been committed or the die otherwise cast.”<sup>5</sup> This NEPA objective of focusing agencies’ attention on environmental effects of proposed actions also serves the congressional intent to foster the dissemination of information both within the government and to the public.<sup>6</sup> It ensures

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<sup>1</sup> Reauthorization Act, § 107, P.L. 109-476, 120 Stat. 3594 (Jan. 12, 2007).

<sup>2</sup> NEPA, § 2, P.L. 91-190, 83 Stat. 852 (Jan. 1, 1970).

<sup>3</sup> Nicholas C. Yost, *NEPA Deskbook 6* (3d ed. 2003).

<sup>4</sup> *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008).

<sup>5</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); see also *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989) (federal agencies must take a “hard look” at environmental effects).

<sup>6</sup> *Grand Council of Crees (of Quebec) v. F.E.R.C.*, 198 F.3d 950, 959 (D.C. Cir. 2000).

that the *federal agency* will have access to “detailed information concerning significant environmental impacts.”<sup>7</sup> Additionally, *public* access to information regarding the environmental effects of proposed federal actions assures an audience larger than the agency has an opportunity to consider environmental impacts, and, “perhaps more significantly, provides a springboard for public comment.”<sup>8</sup>

The form in which this analysis, including the important requirement to develop and consider alternatives that can mitigate any potential environmental harms from the action under consideration, is the “environmental impact statement” (“EIS”).<sup>9</sup> A less detailed “environmental assessment” may also be initially prepared, in order to assist an agency in determining whether the environmental impacts are likely to be significant enough to require development of an EIS. If not, an agency can make a finding of no-significant impacts, and proceed with the action.

This process should be relatively familiar to those involved in fisheries management. Whenever a council undertakes development of a fishery management plan or amendment, the resulting product is generally an integrated, and often quite substantial, document that includes management alternatives, environmental impacts assessments, and the other analytical requirements imposed by the MSA. In fact, the overlap between what the MSA and NEPA require in terms of public involvement and analysis is virtually complete. The only measure NEPA requires that is not specifically mandated by the MSA are the requirements to analyze cumulative impacts of the proposed action

and an explicit requirement to consider a reasonable set of alternatives.

Accordingly, the proposed environmental review guidelines are intended to fill this gap by adding these requirements, and fully aligning the timeline for public involvement in the FMP development process.

### SPECIFIC PROPOSALS AND ISSUES OF CONCERN

One of the most ripe areas of NEPA litigation is over the question whether an agency failed to consider a reasonable range of alternatives. In the MSA context, for example, this question has been raised in a series of challenges relating to the sufficiency of alternatives designed to meet the MSA’s requirements to practicably minimize adverse fishing impacts on essential fish habitat.<sup>10</sup> In order to address this concern, the proposed guidelines define “reasonable alternatives” as “those derived from the statement of purpose and need of the action, in context of the MSA’s National Standards and requirements and requirements of other applicable laws, and which satisfy, in whole, or substantial part, the objectives of the proposed federal action.”<sup>11</sup> This essentially codifies the rule in some of the recent NEPA cases, and should help insulate narrow actions, such as frameworks and regulatory amendments, from challenges that non-germane environmental alternatives were not considered.

Importantly, the proposed guidelines should also help foster more manageable documents by allowing councils to incorporate prior analyses. In fact, the proposal suggests that the environmental analyses should generally not exceed 150 pages, “but may be up to 300 pages for proposals of unusual scope or

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<sup>7</sup> *Robertson*, 490 U.S. at 349.

<sup>8</sup> *Id.*

<sup>9</sup> NEPA § 102(2)(C); see also *Oceana, Inc. v. Evans*, 2005 U.S. Dist. LEXIS 3959, \*24 (D.D.C. Mar. 9, 2005) (“The heart of an EIS is its analysis of a reasonable range of alternatives to the agency’s proposed action.”).

<sup>10</sup> See, e.g., *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1 (D.D.C. 2001); *Conservation Law Foundation v. Evans*, 131 F. Supp. 2d 19 (D. Mass. 2001); *Oceana v. Evans*, 384 F. Supp. 2d 203 (D.D.C. 2005).

<sup>11</sup> 73 Fed. Reg. at 28017 (50 C.F.R. § 700.212(b)).

complexity.”<sup>12</sup> One of the key means by which this objective is to be achieved is by allowing documents to integrate prior analysis – in NEPA terms, to “tier off” of related documents in prior related actions – when making minor adjustments to a management program. If utilized correctly, these guidelines should both reduce the complexity of fishery management plans and expedite needed management adjustments done by framework/regulatory amendment.

The rule does not, however, go as far as it should in reducing the litigation risk and burden NMFS faces. Like a moth to a flame, NMFS in the NEPA rule has set itself up with an extra-statutory obligation to require consideration in connection with each rule “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”<sup>13</sup> The second major flaw of the proposed guidelines relates to their failure to incorporate and provide guidance for preparing parallel analysis for the required “fishery impact statement” (“FIS”), including the important new elements added by the Reauthorization Act. These two key issues are taken up in turn.

### Mitigation Measures

In many instances, the proposed guidelines reproduce language, verbatim or practically so, from current NEPA regulations. As a general matter, this is not problematic, except in instances where, as with the failure to integrate the requirements for the FIS noted above, the general NEPA guidance poorly accommodates the unique statutory scheme governing fisheries management. NEPA is a statute of general application meant to cover all types of federal actions. Paradigmatic activities for which NEPA is designed

include permitting of logging in a national forest, exploration and extraction of natural resources on public lands, or the construction of a federal highway. In other words, these are discrete activities that may have a significant impact on the human environment.

In the context of ongoing fisheries management – a federal action whose overriding purposes are conservation and derivation of economic and recreational benefits from sustainable use of marine resources – the project-specific framework laid out in the NEPA guidelines can be difficult to apply. In certain instances, the substantive MSA requirements trump the terms of the NEPA guidelines.

One of these ill-fitting “imports” of existing NEPA regulatory language relates to the suggestion that NMFS and the Councils develop and analyze “mitigation measures” for “adverse environmental impacts” stemming from proposed conservation and management measures.<sup>14</sup> In particular, the guidelines go too far by including language suggesting that a substantive duty exists to enact not only to enact “mitigation measures,” but to do so to the extent practicable. Specifically, in the requirements for the Record of Decision (“ROD”), NMFS is required to “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”<sup>15</sup>

Even in the context of NEPA, this language appears to be a stretch. NEPA is purely a procedural statute that does not require that federal agencies adopt the least environmentally damaging option; only that all impacts be analyzed and considered in the decisionmaking process.<sup>16</sup>

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<sup>12</sup> *Id.* at 28015 (50 C.F.R. § 700.205).

<sup>13</sup> *Id.* at 28021 (50 C.F.R. § 700.502(b)(3)).

<sup>14</sup> *See, e.g.*, 73 Fed. Reg. at 28017 (50 C.F.R. § 700.212(g); *id.* § 700.214(h)).

<sup>15</sup> *Id.* at 28021 (50 C.F.R. § 700.502(b)(3)).

<sup>16</sup> *See Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”)

NEPA “simply prescribes the necessary process for preventing uninformed – rather than unwise – agency action.”<sup>17</sup>

Thus, while the duty to consider mitigation measures may be implicit in NEPA requirement to “consider alternatives” to proposed major federal actions, 42 U.S.C. § 4332(2)(C)(ii), there exists no NEPA mandate to employ all, or even any, means to mitigate any environmental harms, although substantive laws governing the activity may so require.

Under the MSA, there is only one reference to a duty to mitigate adverse impacts. That is found in 16 U.S.C. § 1853, which, as discussed below, states that the *fisheries impact statement* “shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for – participants in the fishery and fishing communities affected by the plan or amendment.”<sup>18</sup>

Beyond this specific duty to investigate economic mitigation measures, the MSA contains a few specific mandates with respect to conservation duties. Of course, National Standard 1 requires the prevention of overfishing.<sup>19</sup> Furthermore, the councils and NMFS are required to practicably minimize adverse effects of fishing on essential fish habitat and to minimize bycatch.<sup>20</sup> What the proposed guidelines appear to mandate, however, is a broader charge to develop measures to ensure that no ecological harm of any type occurs from authorized fishing activities, and if not adopted, a detailed explanation as to why not.

Given that removals of fish by commercial and recreational fishing activities could itself be considered “environmental harm,” it appears that each IFEMS<sup>21</sup> could have to consider, and presumably reject, the cessation of fishing altogether.

The ROD will have to patiently explain that fishing was not ended because the agency’s statutory mandate is to promote sustainable fishing and achievement of optimum yield from each fishery for the U.S. fishing industry.

While this may appear farfetched, a more pressing concern is that the imported mitigation language will be interpreted as trumping the statutory mandate to achieve optimum yield, and to put in place a substantive requirement that extra precaution be incorporated in the management of fisheries. Such a result would be driven by fear that the failure to develop and/or adequately justify rejection of “mitigation measures” may become an ongoing subject of litigation by environmental groups. Whether successful or not, this would have an adverse impact on the fisheries management process.

The bottom line is that neither NEPA nor the MSA, or any other substantive law, for that matter, require the development of generalized mitigation measures for the types of activities authorized by the MSA. The Magnuson-Stevens Act defines NMFS’s and the councils’ duties with respect to fisheries management, and provides the universe of issues that need to be analyzed, considered, and often addressed in the fisheries management process. These guidelines should not be used to import additional substantive duties not imposed by the agency’s governing authorities.

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<sup>17</sup> See *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (holding that the agency merely had to “consider[ ] the environmental consequences of its decision” but that “NEPA requires no more”).

<sup>18</sup> 16 U.S.C. § 1853(a)(9) (emphasis added).

<sup>19</sup> 16 U.S.C. § 1851(a)(1).

<sup>20</sup> *Id.* §§ 1851(a)(9), 1853(a)(7),(11).

<sup>21</sup> This is a new acronym added by the guidelines that stands for “integrated fishery environmental management statement,” and is intended to replace the environmental impact statement or EIS as part of an fishery management plan or amendment.

### Failure to Integrate New Reauthorization Act Requirements for a Fishery Impact Statement

The MSA has always required development of a “fishery impact statement” (“FIS”) as a mandatory element of any fishery management plan or amendment.

Honored more in the breach than as an essential element of the management process, Congress made important changes to this provision that increase the scope and importance of the FIS, as well as providing new substantive mandates designed to revitalize the agency’s duties to minimize economic harm and provide for the sustained participation of fishing communities under National Standard 8.<sup>22</sup> In full, the MSA states that every plan shall:

include a fishery impact statement for the plan or amendment . . . which shall assess, specify, and analyze the likely effects, if any, *including the cumulative conservation, economic, and social impacts*, of the conservation and management measures on, *and possible mitigation measures for—*

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; *and*

(C) *the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;*<sup>23</sup>

The parallels between these analytical requirements and those of NEPA are striking—an FIS is, in essence, the equivalent of an environmental impact statement as it relates to the social, economic, and conservation impacts on fishermen and their communities—and yet NMFS has never developed a comprehensive set of guidelines to inform development of the FIS.

This failure has not been rectified by the proposed guidelines, despite the Reauthorization Act’s mandate to “integrate applicable environmental analytical procedures, including the timeframes for public input, with the procedure for the preparation and dissemination of fishery management plans, plan amendments, and other actions taken or approved pursuant to this Act.”<sup>24</sup>

Inclusion of such guidance is well within the scope of this rulemaking. Beyond the straightforward congressional command to integrate the procedural requirements of NEPA and the MSA, NEPA itself also requires similar analysis. NEPA guidelines, for instance, define an “impact” (synonymous with “effect”) as including “ecological . . . aesthetic, historic, cultural, *economic, social*, or health, whether direct, indirect, or cumulative impacts.”<sup>25</sup> Discussion and analysis of these effects are, of course, at the heart of an environmental analysis.

It would be difficult, moreover, to overstate the importance of guidance to implement these new (and previously existing) FIS requirements. Guidelines on implementing the development of such measures would serve to both underscore the importance of this task and provide practical direction in implementing the new law.

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<sup>22</sup> 16 U.S.C. § 1851(a)(8).

<sup>23</sup> *Id.* § 1853(a)(9) (italicized portion added by the Reauthorization Act). In addition to cumulative impacts analysis, mitigation measures, and vessel safety impacts analysis, the law also changed the phrase “*describe* the likely effects” to “*analyze* the likely effects,” a subtle change that brings the analytical requirements FIS on a par with NEPA required analysis.<sup>20</sup> *Id.* §§ 1851(a)(9), 1853(a)(7),(11).

<sup>24</sup> Reauthorization Act, § 107 (emphasis added).

<sup>25</sup> 40 C.F.R. § 1508.8 (emphasis added).

For instance, a call for development of “mitigation measures” to ease the adverse social and economic impacts of conservation measures (something now required by the MSA, as opposed to the free-floating obligation in the proposed rule to “mitigate” general environmental harm) gives new life to National Standard 8,<sup>26</sup> the meaning and impact of which has been eroded by a series of adverse court decisions.

More specifically, courts have essentially reduced National Standard 8 to a mere paper exercise, instead of a proper assessment of the economic harm that would likely flow from the conservation measures imposed.<sup>27</sup> In so doing, they have rejected claims that the verbs “provide for” (as in the sustained participation of fishing communities) and “minimize” (as in adverse economic impacts on fishermen) created a duty by NMFS and the councils actively to develop alternatives to minimize such harms—in other words, mitigation measures.

The judge in *North Carolina Fisheries Association*, for example, aptly summarized the pre-Reauthorization Act law on the watered down National Standard 8 thusly: “[C]ourts have consistently rejected challenges under this standard where the administrative record reveals that the Secretary was aware of potentially devastating economic consequences, considered significant alternatives, and ultimately concluded that the benefits of the challenged regulation outweighed the identified harms.”<sup>28</sup>

The new FIS requirements should be implemented to restore congressional intent by substantively requiring the development and analysis of mitigation measures, along with realistic and in-depth analysis of the potential adverse consequences of any and all conservation and management measures.

There is always the danger, however, that without a meaningful set of guidelines to implement these new provisions, the FIS requirement will remain essentially marginalized. Comments on the NEPA proposed rule should address these issues, as well.

## CONCLUSION

In sum, while overall, the new environmental review procedures are generally deserving of support, NMFS included mitigation measures it shouldn’t have, and omitted those that should have been included. It is well worth the time to review the proposal and for industry participants to provide input on the issues raised here, or in relation to any of the specific proposals set forth in the proposal. One thing is for certain: NMFS will be deluged by emails, postcards, and legal comments by environmental groups seeking more process, heightened environmental mandates, and more litigation opportunities with which to tie-up the fishery management process. Reasoned and informed industry comment will assist the agency in arriving at an improved set of guidelines that fully reflect the lawful considerations NMFS is charged with administering under the MSA.

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<sup>26</sup> *Id.* § 1851(a)(8).

<sup>27</sup> *See, e.g., North Carolina Fisheries Ass’n v. Gutierrez*, 518 F. Supp. 2d 68 (D.D.C. 2007), *appeal pending*.

<sup>28</sup> *Id.* at 92.

