THE PEW CHARITABLE TRUSTS

PEW ENVIRONMENT GROUP

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.

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.