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COUNCIL

Comments on Initial Findings and Recommendations of the Task Force on Improving and Updating the National Environmental Policy Act

February 6, 2006

The Western Pacific Regional Fishery Management Council (Council), one of eight regional fishery management councils established under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 *et seq.*), manages U.S. fisheries and marine resources within the Exclusive Economic Zone around American Samoa, the Commonwealth of Northern Mariana Islands, Guam, Hawaii, and the U.S. Pacific Remote Areas¹. Since its inception nearly 30 years ago, the Council has coordinated with the National Oceanographic and Atmospheric Administration's National Marine Fisheries Service (NMFS) to write and participate in multiple National Environmental Policy Act (NEPA) documents over the years. The Council applauds the U.S. House of Representatives Committee on Resources examination of NEPA and offers the following comments on the December 21, 2005, document containing the Initial Findings and Draft Recommendations of the Task Force on Improving and Updating NEPA.

Recommendation 1.1: Amend NEPA to define "major federal action."

Council comment 1.1: The Council acknowledges that the current Council on Environmental Quality (CEQ) regulations (40 CFR § 1508.17) defining a "major federal action" are somewhat vague and could benefit from clarification. However, the Council does not believe that the definition of major federal actions should only be limited to "new or continuing projects that require substantial planning, time, resources, or expenditures." This definition leaves one to question what is "substantial?" In fisheries management, issues often arise that require swift decisions on what level of NEPA documentation is needed. Regardless of whether an Environmental Assessment (EA) or and Environmental Impact Statement (EIS) is completed, substantial planning occurs during the drafting of the document as well as the decision making process to comply with NEPA and the MSA.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.

Council comment 1.2: It has been our experience that NMFS does not usually complete EISs in a timely manner. For example, it took NMFS nearly 6 years to publish the Final EIS on our Bottomfish and Seamount Groundfish Fishery Management Plan, and to date, no Record of Decision has been filed. The Council supports methods to streamline the NEPA process, and

¹ The U.S. Pacific Remote Island Areas (PRIAs) include Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Wake Island, Palmyra Atoll, and Midway Island. Although physically located in the Hawaii Archipelago, Midway is considered part of the PRIAs because it is not part of the State of Hawaii.

supports the idea of imposing time limits to complete EAs or EISs. Fisheries management often requires decision making to conserve resources while considering socio-economic effects, and therefore there is a need to make timely decisions based on the best available information. To not do so, thereby allowing decision making to wallow in bureaucratic quagmires or to proceed at a snail's pace, is a disservice to stakeholders, our Nation's fisheries resources, and goes against the principles of adaptive management.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS).

Council comment 1.3: The Council supports amending NEPA and CEQ regulations to create unambiguous criteria for the use of CEs, EAs, and EISs. The Council would also recommend that the agency environmental review procedures for implementing NEPA (e.g. NOAA's NOA 216-6) also be revised to include unambiguous criteria for use CEs, EAs, and EISs.

Recommendation 1.4: Amend NEPA to address supplemental documents.

Council comment 1.4: The Council supports amending NEPA or CEQ regulations to clarify the use of supplemental EISs. However, we are not sure why the Task Force recommends limiting the preparation of a supplemental EIS to only 40 CFR § 1502.9(c)(1)(i) which states: "The agency makes substantial changes in the proposed action that are relevant to environmental concerns;" and § 1502.9(c)(1)(ii) which states: "There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." For example, § 1502.9(c)(2) states: Agencies may also prepare supplements when the agency determines the purposes of the Act will be furthered by doing so. CEQ 40 Questions (# 32) suggest that EISs which are more than 5 years old and relate to ongoing programs (e.g. fishery management plans) should be reexamined to see if they meet the criteria in 1502.9. The Council believes that programs should be reviewed and EISs reexamined periodically. However, we do not believe that such reviews leading to supplemental EISs be required or codified.

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.

Council comment 2.1: The Council supports this recommendation and the "home-rule" concept, as it has been our experience that comments are submitted from all over the nation and world, but the action being considered has only small, localized effects. Another way of looking at it, rather than "giving weight to localized comments" per se, would be to give weight to substantive, fact-based, site-specific comments that (may tend to) come from those with local knowledge or stakeholder interest. The Council would also support CEQ regulations that consider giving less weight to voluminous, form letter type e-mails, which are prevalent today from the advent of e-comment portals. We have had experiences where thousands of form letters are e-mailed to the agency, of which many do not come from local stakeholders. These form letters often do not provide substantive comments on the draft or final EIS, make false accusations using junk science, and usually promote the agenda of a specific special interest group.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7.

Council comment 2.2: In recent years, the Council in coordination with the National Marine Fisheries Service has striven to write concise NEPA documents within 150 and 300 pages. While we support the development of concise NEPA documents, we do not feel that codifying page limits will benefit the public or decision makers. For example, an EIS on a regional fishery management plan is often large in scope and contains a great deal of information. Whether the information provided is used in the decision making is arguable, but the information is there for the public and decision makers to review.

Recommendation 3.1: Amend NEPA to grant tribal, state, and local stakeholders cooperating agency status.

Council comment 3.1: The Council supports this recommendation to grant tribal, state, and local government subdivisions cooperating agency status. However, we recommend that the term “local stakeholders” be clarified to apply only to local government subdivisions such as counties and not involve private or community stakeholder groups. The Council also supports the idea that the regional fishery management councils be given cooperating agency status, because it is often the case that Council staff prepares much of the NEPA document, with the only credit being given in the “list of preparers” section. Providing regional fishery management councils cooperating agency status would allow the authority and expertise of the councils to be recognized in a formal manner, thus reducing confusion amongst the public and decision makers alike.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA.

Council comment 3.2: The Council supports this recommendation and the concept of “functional equivalency” to reduce duplication between NEPA and other environmental review processes. However, the Council does recommend that each state’s environmental review process be scrutinized and certified by the CEQ to make sure that it captures the spirit and intent of NEPA, provides for the similar public participation processes, and requires the analysis of similar impacts on the human environment.

Recommendation 4.1: Amend NEPA to create a citizen suit provision.

Council comment 4.1: The Council supports the clarification of judicial review of NEPA processes, but does not support creating a citizen suit provision under NEPA as we are concerned that it could lead to additional litigation. Page 11 of the finding document states environmental commentators noted that of the approximately 50,000 EISs filed each year only 0.2 % resulted in litigation. The 50,000 figure must include state EISs or their equivalents, because on page 18 of the findings document it is mentioned 597 EISs were filed with EPA in 2004. Page 11 also states that 156 NEPA cases were filed in 2004, which by dividing 156 by 597 suggests that nearly 26 percent of EIS processes in 2004 resulted in NEPA litigation—a big difference than 0.2 percent! The Council supports the concept of providing time-limits for NEPA challenges, but questions the lengthy proposed time period of 180 days, as the action may be fully implemented and

agency or private resources already committed or spent. We would support a 90 day time-limit to bring a legal challenge under NEPA.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre-clear” projects.

Council comment 4.2: The Council does not support this recommendation as it is vague and does not clearly define how the CEQ would advise federal agencies in regards to court decisions or agency administrative decisions. For example, would CEQ’s “advice” be mandatory or discretionary? Currently, there are differences in how federal agencies undertake NEPA processes, and NEPA should remain flexible enough to allow agencies to develop their own methods to develop NEPA documents that cater to their specific management responsibilities and authorities.

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible.

Council comment 5.1: The benefit of amending NEPA to require that alternatives are economically and technically feasible would be 100 percent contingent on how “economically and technically feasible” is defined. However, protecting and maintaining the human environment is not always going to be the most economically viable alternative, nor should it have to be. The Council does support clarifying “reasonable alternatives” as we have had experiences where a range of alternatives has become unwieldy. For example, we were recently involved in an EIS that included 26 alternatives, which lead to an analysis that was confusing for the public and decision maker alike. The Council recommends that the definition of “reasonable alternatives” be narrowed to include only alternatives that are within the agency’s jurisdiction or authority.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project.

Council comment 5.2: The Council supports the general clarification of NEPA, however, we were not aware that this was an issue as it is our common practice to fully analyze and consider the no-action alternative in our NEPA documents and believe the CEQ regulations already provide that the no-action alternative should be analyzed.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.

Council comment 5.3: Although the Council generally believes that that “talk is cheap” and that federal agencies should be held accountable to implement their proposed mitigation measures, we do not feel that NEPA is the appropriate vehicle to do. Therefore, the Council does not support this recommendation as it could lead to lengthy and costly NEPA documents.

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.

Council comment 6.1: The Council does not feel that CEQ regulations to encourage more consultation with stakeholders is necessary and could lead to further delays in the NEPA process. As the Task Force is well aware, there are competing stakeholder interests that would be difficult to meld prior to the release of the draft EIS. The Council does support public participation and feels that its current fishery management process (exclusive of NEPA) allows for ample opportunities for the public and stakeholders to voice their opinion. For example, in addition to its own meetings, which are open to the public, the Council’s decision making relies on the assistance of several advisory groups such as its Science and Statistical Committee, fishery management plan teams, advisory panels, etc. The meetings of each of these groups are open to the public, and public comment periods are provided on the agendas.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.

Council comment 7.1: The Council supports the general clarification of NEPA, but as the recommendation is written, it is unclear how codifying the lead agency process would be more beneficial than what currently exists under CEQ regulations.

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the CEQ.

Council comment 7.1: The Council does not support the creation of a NEPA Ombudsman within the CEQ, because the CEQ can be viewed as too political and perhaps easily swayed. In addition, a CEQ NEPA Ombudsman may not have the institutional knowledge needed to make decisions that relate to conflicts within the NEPA process, especially if there are conflicts related to controversy over technical or scientific information. For example, stock assessments of various fish populations involve complex mathematical models and data sets, of which the National Marine Fisheries Service (NMFS) has particular experience. Although a challenge to such information is well within the purview of NEPA, the Ombudsman would likely have to defer to NMFS as it has the expertise and knowledge to make decisions regarding complex models and data sets used in stock assessments.

Recommendation 7.2: Direct CEQ to control NEPA related costs.

Council comment 7.2: The Council supports CEQ studying costs of NEPA compliance for federal agencies and that a potential recommendation to Congress may be standardizing NEPA costs across agencies. Some agencies are likely receiving more funding to comply with NEPA than others. It has been our experience that NEPA costs are increasing within NMFS due the agency’s fear of litigation.

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.

Council comment 8.1: The Council supports this recommendation to clarify the evaluation of past actions in regard to cumulative impacts and further recommend that the CEQ update its 1997 cumulative effects guidance to be more practical and easier to read.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

Council comment 8.2: The Council supports the promulgation of regulations to clarify what types of future actions are appropriate to include for cumulative impact analysis. The Council further recommends that the CEQ update its 1997 cumulative effects guidance to be more practical and easier to read.

Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws.

Council comment 9.1: The Council feels this recommendation is paramount in relation to the relationship between the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and NEPA. The regional fishery management council process promulgated under the MSA is a public participation and disclosure process. Often, the regional fishery councils make management recommendations after considering a range of options and the potential effects such options would have on, inter alia, target and non-target stocks, habitat, protected species, and fishing sectors and communities (socio-economically and culturally). Council recommendations are made at a series of meetings provide opportunities for public comment and participation.

NEPA dictates a similar process where a range of alternatives are analyzed for their impacts on the human environment. The MSA and NEPA process are somewhat duplicative, however, they require different public review schedules (e.g. *Federal Register* notices, proposed rules, agency actions, etc.) which can lead to severe timing problems for fishery management actions. In addition to problems with timing when complying with both statutes, NMFS often seems to use NEPA to bureaucratically hold-up fishery management measures recommended by the regional councils. NMFS does this by stating that NEPA analyses for fishery management actions are ultimately NMFS documents, even though a council may have written the actual document. As the current system operates, the public and decision makers are often confused by which timelines and procedures under MSA or NEPA the fishery management process is following for any given action.

For the reasons discussed above, the Council recommends that reauthorization of the MSA either exempt the MSA fishery management process from NEPA or include an environmental review process that is developed by the regional fishery management councils, NMFS, the Environmental Protection Agency, and the CEQ that would be certified as “functionally equivalent” to NEPA. This would benefit the public and decision makers as well as reduce the burden on agency and council employees to produce duplicative environmental reviews and follow timelines that are often in discord.

Recommendation 9.2: CEQ study of current Federal agency staffing issues.

Council comment 9.2: The Council supports this recommendation, but feels that this is not a major problem of an agency's ability to comply with NEPA. The CEQ will likely find that there are many agency staffs with NEPA experience and that the problems are likely to run deeper than staffing issues and are more likely to pertain staff members willingness to dedicate their time to NEPA documents, whether it be writing sections or simply reviewing them.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws.

Council comment 9.3: The Council supports this recommendation and hopes the CEQ can find solutions to reduce duplication in environmental review processes. The Council also recommends that the CEQ investigate the rate of compliance for state agencies and their associated "mini-NEPAs."