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MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT AND ITS RELATIONSHIP TO THE NATIONAL ENVIRONMENTAL POLICY ACT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES AND OCEANS

OF THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

Thursday, April 14, 2005

Serial No. 109-6

Printed for the use of the Committee on Resources

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

20-669 PS WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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OVERSIGHT HEARING ON THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT AND ITS RELATIONSHIP TO THE NATIONAL ENVIRONMENTAL POLICY ACT.

Thursday, April 14, 2005
U.S. House of Representatives
Subcommittee on Fisheries and Oceans
Committee on Resources
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in Room 1334, Longworth House Office Building, Hon. Wayne T. Gilchrest [Chairman of the Subcommittee] presiding.

Present: Representatives Gilchrest, Pallone, Drake, and Bordallo.

STATEMENT OF THE HON. WAYNE T. GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. The hearing will come to order.

This morning, the Fisheries and Oceans Subcommittee will hold a hearing on the process that NEPA plays in fisheries management plans. I have a statement that I will submit for the record, and I ask unanimous consent. Without objection, so ordered.

We appreciate the witnesses coming here this morning to discuss this interesting process of NEPA, and the Fishery Management Council's complying with the Sustainable Fisheries Act, looking for ways to protect the economic and the cultural resources of regions around the country and still fully enforce and implement the idea of fishery conservation.

We are in a process to reauthorize the Magnuson-Stevens Act along with the Senate, and we hope, and are fairly certain, that that can happen in this particular Congress. We do all this in the context of both the Pew Commission and the U.S. Ocean Commission and their relevant recommendations in this most broad arena.

We will be looking at reauthorizing the Magnuson-Stevens Act, and also dealing with some of the recommendations in the study "Oceans 21." We are looking closely at the Ocean Action Plan that the Administration is setting forth. And in that context, we are trying to understand in a broader way the physics and its system in the ocean. How do the oceans work? What makes them dynamic?

What is the interface between the oceans' climate and the atmosphere and the air we breathe? And all of that in the context of fisheries.

This is a small but significant part of that process, the National Environmental Policy Act, and how does it interface, enhance or duplicate, improve or slow down the process of instituting, inculcating science into the councils? Can we do all of this in a timely fashion, a proper fashion, and engage the fishermen, the scientists, and the community for a well laid out plan?

And it is this hearing where we will exchange that information, take advice from all of you, and try to come up with a process that benefits both the conservation effort that we have been pursuing now for some years, and that lone lobsterman off of Bar Harbor, or the lone fisherman facing the treacherous waters of the Bering Sea, or those in the Gulf of Mexico or other areas of the Pacific or other areas of the Atlantic. And also, we don't want to forget our friends in the Caribbean.

We look forward to your testimony. We take it all into consideration. We will try to create a system that will be of great benefit to future generations.

And I will yield now to the great gentleman from the Garden State of New Jersey, Mr. Pallone.

[The prepared statement of Mr. Gilchrest follows:]

Statement of The Honorable Wayne Gilchrest, Chairman, Subcommittee on Fisheries and Oceans

I would like to welcome the witnesses to today's hearing on the relationship between the Magnuson-Stevens Fishery Conservation and Management Act and the National Environmental Policy Act (NEPA). Both Acts are important pieces of this nation's environmental legal framework and fulfill important roles in fisheries management.

In the Subcommittee's efforts to reauthorize the Magnuson-Stevens Act, we have heard a number of times that there may be provisions within the two Acts that may not work well together. In particular, we have heard that some of the time requirements within the two Acts may be duplicative and cause unnecessary delays in making fishery management decisions. If this is the case, and I hope we will hear more from our witnesses about this issue, we need to examine what can be done to maintain the important concepts in both Acts while making fisheries management more responsive, timely, and environmentally friendly.

Since this Subcommittee has not dealt with NEPA in the fisheries management context, I want to thank Ms. Dinah Bear, the General Counsel for the Council on Environmental Quality, who will start us off with an explanation of how NEPA works. We will then hear from other witnesses with their views on whether there really is a conflict between the two Acts.

I look forward to hearing from our witnesses and having a healthy debate about how these two important environmental statutes work in the fisheries management world. I suspect we will not come to any resolution on the issue today and I look forward to working with all of you in examining this issue further as we work on the reauthorization of the Magnuson-Stevens Act.

STATEMENT OF THE HON. FRANK PALLONE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman. I do want to express some concern this morning that, while over the past six months we have received two major reports describing the crisis facing our ocean ecosystems and outlining what Congress needs to do, we are holding a hearing on something that, in my opinion, is a very minor problem, if there is any problem at all.

I appreciate in the past that the National Marine Fisheries Service has experienced a spike in litigation, and has not had a good track record of defending its decisions in courts. However, as described in the National Academy of Public Administrators report released in February, the agency has made dramatic improvements that have reduced litigation and improved NMFS' record in court. In fact, the academy's report identifies inadequate funding for NEPA implementation as the primary challenge to NMFS' continued improvement.

[The prepared statement of the National Academy of Public Administration follows:]

Statement submitted for the record by the National Academy of Public Administration

Mr. Chairman and Members of the Subcommittee:

The National Academy of Public Administration appreciates the opportunity to submit this statement for the record regarding efforts by the National Marine Fisheries Service (NMFS) to improve the nation's fisheries management process. The Academy is an independent non-profit organization chartered by Congress to assist public institutions in improving their performance. The Academy staff recently completed a follow-up effort to determine what actions NMFS has taken to address significant concerns an Academy Panel first identified in 2002.

At the time of our first study, both Congress and the agency's constituents were increasingly vocal in their criticism of NMFS. The Academy Panel, along with a Committee of the National Research Council (NRC) of the National Academy of Sciences, made numerous recommendations to improve fisheries management, including recommended changes in management and regulatory processes, constituent relations, and NMFS' program budget and science activities.

During this follow-up effort, the Academy staff identified numerous fundamental changes underway in NMFS that directly address many of the concerns the Academy Panel and the NRC Committee reported in 2002. NMFS management has expended considerable effort in developing and implementing new management approaches aimed at improving the timing and quality of fisheries management decisions; the agency's ability to set priorities and devote appropriate resources to its many mission goals, including its science mission; and interactions with its constituencies and partners. However, it remains to be seen whether NMFS can successfully implement all of the planned changes, especially in light of what agency officials see as limited resources. Success will depend on the continued support of Congress and the Administration, the fishery management councils, NMFS' constituents and partners, as well as NMFS' own strong and determined leadership.

Below is a discussion of the agency's actions to improve the fisheries management process that relate most directly to the subject before the Subcommittee today.

Concerns Identified in 2002

In 2002 the Academy reported that as NMFS and the fishery management councils (councils) struggled to develop and implement management plans and other management actions, the process had bogged down. The Academy's study confirmed many problems that had already been identified from internal and external assessments, including lack of clarity in responsibilities among NMFS regional offices, centers, and the councils; lack of timeliness in decisions on management actions; lengthy layered reviews; excessive delays; outdated policies and guidance; inadequate analyses; and unpredictable outcomes.

One critical area of concern was NMFS' ability to successfully carry out its responsibilities under the National Environmental Policy Act. The Academy reported that of 42 Fishery Management Plans (FMPs) in place at the time of our study, 30 had not had comprehensive environmental impact statements (EISs) within the last 5 years; 7 had no EIS analysis at all. Recent court settlements and decisions had made updating EISs an urgent concern. Congress began appropriating funding specifically to enable the agency to conduct NEPA activities in FY 2001, but a year later, the agency had made only limited progress in hiring staff or completing NEPA actions.

However at that time, in response to Congressional direction, NMFS was developing its Regulatory Streamlining Project (RSP). The new process was designed to improve the agency's ability to meet its responsibilities under the many applicable

legislative authorities, especially NEPA. NMFS was also attempting to improve its capabilities with regard to its NEPA responsibilities.

The Academy supported those efforts and made several recommendations that focused on implementing RSP, improving NEPA efforts, and revising the Operational Guidelines that support these actions. The Academy also made a number of recommendations aimed at clarifying roles and responsibilities among the regional offices, centers and fisheries management councils; making the process itself more seamless and less bureaucratic; and improving the support for and documentation of council decisions. As envisioned, RSP would address most of these concerns.

NMFS Actions

NMFS is seeking to make a dramatic change in its approach to fisheries management, moving from a laborious, sequential rule-making process to a more collaborative, transparent one. NMFS has directed considerable resources and effort toward developing and implementing RSP, and may be on the brink of a fundamental change in how it operates. Some of the key components of RSP, which are discussed in more detail, are:

- Improving the agency's ability to meet its responsibilities under NEPA
- Reducing review levels and relying more on regional expertise and authority
- Frontloading the regulatory process, ensuring participation by all responsible parties early and throughout the process to better ensure that all important issues are identified and dealt with early in the process, not after a final regional or headquarters review
- Revising the Operational Guidelines

Improved NEPA Capabilities

NMFS has made significant progress with regard to its NEPA capabilities. In 2002 difficulties in complying with NEPA were seen as a primary factor slowing the rule-making process and contributing to many of the judicial challenges to NMFS actions.

Largely funded through specific appropriations,[1] the agency now has 21 positions dedicated to NEPA responsibilities, including a NEPA coordinator in headquarters and in each of the regions. In each year since 2001, NMFS has allocated over $100,000 of the NEPA appropriation to each of the eight councils to improve their NEPA expertise. Academy staff spoke to two Council Executive Directors who said that funding has been instrumental in allowing their councils to hire staff; one specifically noted that the funding allowed completion of several NEPA analyses that, otherwise, probably would not have been done.

NMFS also has established a training protocol for NEPA, specifying key subjects to be covered in a variety of classes for NMFS and council staff, as well as council members. Over 1,000 people have received training in the last two years. Additionally, the agency's NEPA webpage provides "how to" information, as well as examples of NEPA documentation. The NEPA national coordinator has monthly conference calls to monitor progress and identify issues that need to be resolved.

NMFS officials reported that by 2004 EISs for all FMPs had been updated, with the exception of two that had been in process for over five years.

Reduced Levels of Review

Several actions have already been taken to delegate authority and thereby reduce layers of review and streamline the process for approving fishery management actions. Two key delegations are:

- In 2001, signature authority for fishery management actions was delegated from the Under Secretary for Oceans and Atmosphere in NOAA to the Assistant Administrator for Fisheries.
- More recently, in May 2004, NOAA's Office of General Counsel implemented a policy eliminating routine review of fisheries regulatory packages by the headquarters OGC for Fisheries.

Frontloading

Frontloading the regulatory process is fundamental to the RSP design. Conceptually, frontloading is intended to ensure that all parties with responsibility for issues addressed in fishery management actions—those responsible, for example, for legal issues, NEPA, fisheries, habitat, and protected resources—are involved in the process from the beginning and on a continuing basis. This broad and early

[1]In FY 2001 Congress appropriated $8 million for agency-wide NEPA efforts as well as additional funds for some specific NEPA responsibilities, such as those related to Hawaiian sea turtles. Appropriations for agency-wide NEPA efforts were reduced to $5 million in FY 2002 and 2003, and again to $3 million in FY 2004 and 2005.

involvement is intended to ensure that all policy and legal issues are dealt with early in the process, not at the end. The goal is to "get it right the first time." NMFS used the NEPA goals and process requirements as the foundation for developing procedures for RSP. NEPA serves as the umbrella for considering all impacts of a range of regulation options, including socioeconomic impacts and effects on endangered species and marine mammals.

NMFS officials identified two regions that had begun using the interdisciplinary action teams that are a key part of the formal RSP frontloading.[2] Academy staff visited one of those regions, and found that the region had been making wide use of these teams for developing fishery management plans and other key actions. Officials were highly satisfied with the frontloading approach. The officials saw the process as more timely and efficient, and said through the process, they had been effective in identifying and dealing with issues early. Academy staff also spoke to the Executive Director of one the region's councils. He was very satisfied with the team approach.

Revised Operational Guidelines

NMFS Operational Guidelines set forth detailed procedures and standards for fishery management actions. The guidelines were last revised in 1997; NMFS has been in the process of revising them again since 2002. Agency officials recently set April 29th of this year as the expected issue date. Revising these guidelines is a critical step in implementing RSP and the frontloading process. Among other things, the guidelines will:

- Formalize the frontloading process by establishing membership and responsibilities of Fishery Management Action Teams to be created for each major action undertaken.
- Establish at least four "critical feedback points" at which the regional OGC will certify the record to that point is "legally sufficient" and the regional administrator will prepare an assessment statement that the process and documents support and provide a rational basis for decision-making and that the process can move forward. These feedback points are the formal quality control points to ensure the decisions are adequately supported by the record. One such critical feedback point is after identification of the preferred NEPA alternative and adoption of draft analyses. The final one is the regional administrator's decision memorandum which forwards the action for final headquarters approval. Under RSP these regional decisions will receive much less review at headquarters than is currently the case.
- Require written operating agreements among regions, centers and councils establishing regional priorities and responsibilities for achieving those priorities.

Continued Diligence is Needed

Officials have expressed concern about the agency's ability to fully implement plans for RSP, absent sufficient resources. Fully implementing frontloading, a core concept, will require dedication of additional resources. Components to support headquarters oversight of this new, more regionally based process, are not yet being implemented.

Frontloading, a core principle of RSP, is resource intensive. Headquarters officials have cautioned that more staff and funding are needed to fully implement the frontloading process, especially in OGC, the regions and councils. Field office officials that Academy staff spoke with reiterated this concern. They said that the frontloading approach added considerably to the staff workload. All three organizations (regional office, science center and council) had received some additional funding and staffing (largely through the specific appropriations for NEPA and socio-economic analysis) and officials saw these funds as critical to their success thus far in implementing RSP. They all also indicated that, though the teams were working well, staffing was stretched and more personnel were needed. The region specifically noted that they originally had been able to hire 10 additional staff; but three left. Because of the Congressional cut in FY 2004's NEPA funding (from $5 million in FY 2003 to $3 million in FY 2004), they could not refill those positions. Region officials believe the staff is being stretched thin and signs of burnout are evident.[3]

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[2] Headquarters officials stated that although two regions are piloting these teams for several management actions, the concept has been in use in several regions on an "ad hoc" basis for some time.

[3] Officials in the offices visited also cautioned that the use of dedicated access privileges (such as individual fishing quotas or individual transferable quotas) to manage fisheries may increase significantly in the near future. Indeed, in 2004 the U.S. Commission on Ocean Policy recommended that Congress amend the Magnuson-Stevens Fishery Conservation and Management

Continued

At the time of our staff follow-up review, NMFS was drafting a curriculum for the first course in an overall training program for rulemaking. The program will be both classroom-based and web-based and will provide training for council members and staff as well as NMFS field office and headquarters staff. The first course, a "regulatory overview," covers the wide array of laws that mandate NMFS responsibilities, as well as an overview of the revised Operational Guidelines. NMFS was also analyzing data from a survey of regional offices, science centers, and councils concerning training needs, and anticipates developing other courses in the future. Some high ranking needs not being covered extensively in the first course include detailed training on National Standards 1 and 2,[4] and refresher training on the Regulatory Flexibility Act. However, officials noted that the speed at which the training program is developed and the extent to which training is provided will depend in part on the availability of resources.

NMFS also is developing a headquarters-based quality assurance program for regional implementation of RSP. NMFS is adapting a business-based quality assurance program to the regulatory process. The ultimate program will include on-site review of selected projects along with a feedback loop, and the program will also allow "third party" reviewers/auditors to assess quality. NMFS intends to develop baseline measures to allow an overall assessment of quality, in addition to the individual quality checks the system will conduct. A draft quality protocol has been produced and steps are underway to select personnel to form one or more Quality Management Teams. However, officials did not know, at the time of our staff follow-up review, how soon this quality assurance program could be implemented.

NMFS is also taking steps to develop electronic databases to improve headquarters' ability to track actions and assess workloads and to facilitate concurrent review of actions in the regions and headquarters. Two have been completed: one for consultations required under section 7 of the Endangered Species Act and another for litigation. The latter was specifically recommended in the Academy's 2002 report. However, the two databases most directly related to RSP, one for regulatory actions and one for NEPA actions, are still being designed. Again, the agency was not sure when these databases would be deployed and funding, especially for the NEPA database, was a key issue.

In summary, although NMFS has designed new processes that have potential for significantly improving the fisheries management process, and NMFS officials appear committed to implementing them, success is not guaranteed. Without sufficient staff and funding the frontloading process may be only partially implemented. Additionally, not only is the new approach a fundamental change in how the agency does business, but an approach that is more reliant on having final actions taken in the region. Consequently, related headquarters efforts, such as training, quality assurance, development of baseline measures, and development of electronic databases to allow tracking and assessment of progress, take on increased importance. It is important that these oversight and quality assurance mechanisms proceed in tandem with implementation of processes that devolve more responsibility to the field offices.

Mr. PALLONE. And while I welcome the opportunity to learn more about the success of the service in better integrating NEPA and Magnuson, I want to emphasize that there are much more pressing ocean and coastal issues that we should be addressing in this Subcommittee.

Mr. Chairman, I hope we can work together to lay out a plan for how this Committee can meaningfully address the recommendations of the U.S. Commission on Ocean Policy and the Pew Oceans Commission. I know that you in your opening statement did mention that the Committee was going to deal with some of those issues, but I really think that since the U.S. Commission's

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Act (MSA) to affirm use of this management approach, and that NMFS issue national guidelines for implementation. Such an approach, officials said, would increase field offices' workload in terms of monitoring, which would stretch their staff even further—reinforcing the need for additional resources.

[4] MSA lists 10 national standards that FMPs must meet. Standard 1 requires FMPs to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." Standard 2 mandates the use of "the best scientific information available."

recommendations were directed specifically at Congress, and specifically for the purpose of ensuring the long-term sustainability of U.S. fisheries, we really should be having several hearings and trying to deal with both the U.S. Ocean Commission's and the Pew Ocean Commission's report in a comprehensive way. And it is already April, and we really haven't done much, if anything, in that regard.

Now, I am not saying that serious work doesn't need to be done to improve Magnuson-Stevens. It certainly does. It is our nation's cornerstone piece of legislation governing the management of America's fishery resource. And I hope we can begin that work soon. But I really feel that the Subcommittee needs to pay more attention to the Ocean Commission's report and the recommendations, before it gets too late into the calendar year.

Thank you, Mr. Chairman.

Mr. GILCHREST. Thank you, Mr. Pallone. And we probably should have breakfast next Wednesday morning and talk about the strategy that we are working on to do that. About eight o'clock?

Mr. PALLONE. When?

Mr. GILCHREST. Tuesday.

Mr. PALLONE. Tuesday?

Mr. GILCHREST. Thursday morning.

Mr. PALLONE. Thursday? When?

[Laughter.]

Mr. GILCHREST. We will work that out.

Mr. PALLONE. Thursday morning—We will work that out.

Mr. GILCHREST. Yes, we will figure that out. Thanks.

Mr. PALLONE. We will work that out.

Mr. GILCHREST. Our first panel this morning is Ms. Dinah Bear, General Counsel, White House Council on Environmental Quality; Dr. William Hogarth, Director, National Marine Fisheries Service; Dr. Hogarth is accompanied by Mr. James Walpole, General Counsel; and Mr. Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council. Thank you all very much for attending this morning.

Ms. Bear, you may begin.

STATEMENT OF DINAH BEAR, GENERAL COUNSEL, WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY

Ms. BEAR. Mr. Chairman and members of the Subcommittee, thank you very much for the opportunity to testify this morning about the National Environmental Policy Act. While this is a law that is often referred to as "America's environmental magna carta," it is often misunderstood, and hence mischaracterized.

Despite what you may have heard or may surmise from what you hear, the purpose of NEPA is neither to produce lengthy documents, nor to document a lengthy process. The purpose of NEPA is exactly what its title suggests; which is to implement our national environmental policies.

The process to implement NEPA set out in CEQ's regulations, binding on all Federal agencies, provides a method of both developing and evaluating high-quality information by Federal decision-makers, state, local, and tribal representatives and, very importantly, the public. In the words of our regulations, ultimately,

of course, it is not better documents, but better decisions that count.

NEPA's purpose is not to generate paperwork, even excellent paperwork; but rather, to foster excellent action. And the CEQ regulations in fact were written with the idea of reducing delays, paperwork, and duplication.

CEQ's procedural regulations are generic in nature. In other words, they set out the basic procedural requirements, and ask each agency to develop their own NEPA procedures that take our requirements and bring them down to fit each agency's specific mission activities. We ask each agency in those procedures to identify the typical types of actions that the agency takes that would normally require preparation of an environmental impact statement or an environmental assessment, or actions that can normally be categorically excluded. I will very briefly discuss each of these classes, and then move to the issue of flexibility under our regulations.

The environmental impact statement is the most well-known document in NEPA, but it is also by far the rarest. It basically starts off when an agency publishes a notice of intent, telling the public that they plan to prepare an EIS. The next step is the scoping process, which is a time to get organized. It is a time to identify the other agencies and interested parties that will be involved in the process; to designate cooperating agencies and their responsibilities; to set time lines and page limits for the EIS; to identify studies or information that needs to be obtained early in order to do an adequate analysis. In other words, to get organized. There is no particular timeframe or specific requirements on how to do the scoping.

The EIS itself is supposed to be written in plain English, readable English, and generally to be no longer than 150 pages. It is to contain a brief description of the agency's purpose and need for taking the action; a brief description of the affected environment; the reasonable alternative ways of achieving the agency's purpose and need; the environmental consequences of all of the alternatives, direct, indirect, and cumulative effects. And that draft EIS is put out for public review and comment, generally for a 45-day period. That is what our regulations require, unless the agency asks for an exception to that. In the final EIS, the agency needs to respond to those comments received.

There is occasionally a need to supplement an EIS, either a draft or final. That need arises if the agency itself makes substantial changes to its proposal, or if there is significant new information or circumstances that bear on the environmental effects of the action.

The heart of the EIS is alternatives analysis. NEPA requires that the agency looks at reasonable alternatives. There is no set number of required alternatives, and there is no need for agencies to develop so-called "strawman" alternatives to analyze. There is a requirement that agencies always look at the no-action alternative. That doesn't mean in the context of management of public resources no management; it simply means whatever management regime is in place at the time the EIS is being prepared.

The EIS process concludes with the preparation of a record of decision, and that document contains any monitoring or mitigation provisions that the agency is committed to.

Types of actions that either individually or cumulatively do not have significant effects on the human environment in the agency's experience can be categorically excluded from the NEPA process. We ask for an administrative record that shows the justification for a categorical exclusion; but once that categorical exclusion is promulgated, then there is no requirement under NEPA for any further paperwork for that kind of action.

The agency does have to look for any extraordinary circumstances that in one particular instance may in fact require additional analysis. But if a categorical exclusion is crafted appropriately, then normally that shouldn't happen. There should just be no further analysis at all.

The vast majority of actions fall somewhere between the need to prepare an EIS and categorical exclusions. And those are the kinds of actions for which agencies prepare an environment assessment. An environment assessment is supposed to be a very brief document. Our guidance is ten to 15 pages. I am well aware that it often exceeds that. But an environment assessment is supposed to, again, briefly identify the need for the proposed action; most of the time, reasonable alternatives; environmental consequences; and just simply a list of who prepared the EA.

Agencies have flexibility as to how to involve the public in that process. There are no set time limits. At the end of the environment assessment, an agency needs to determine whether or not it thinks there will be significant impacts from the proposed action. If there are, it would proceed to do an EIS. If it finds there will not be significant impacts, it signs a document called a "Finding of No Significant Impact." In a couple of unusual circumstances, the finding of no significant impact needs to go out for 30 days of public review, but that is the only required time line associated with the EA process.

Agencies do have quite a bit of flexibility under our regulations. The only set time periods in the whole process are the 45-day comment period for a draft EIS; there is a 30-day waiting period between a final EIS and when the record of decision can be signed; and in two rare cases, a 30-day period on a finding of no significant impact.

We encourage agencies to integrate the NEPA analysis with other documents, like plans. They are free to change the recommended format of an EIS. We encourage them to think through carefully what the scope of the proposed action is, and how they can tier from the original analysis to future actions.

There are also provisions in our regulations to develop alternative arrangements to comply with our regulations in several circumstances, such as emergencies or supplemental EIS's or when time periods need to be reduced for various compelling reasons of national policy.

In the case of the National Marine Fisheries Service, we have approved alternative arrangements six times. My testimony references the two most recent circumstances. In one of those earlier instances, we actually developed and approved what are

essentially permanent alternative arrangements for one particular fishery.

There are, just briefly, three Federal agencies that do have a role in overseeing NEPA: CEQ, of course, promulgates the regulations binding on Federal agencies. The Supreme Court has set our interpretation as "owed substantial deference." The Environmental Protection Agency reviews and rates individual EIS's. And in 1998, Congress established a new agency, the U.S. Institute for Environmental Conflict Resolution, that works with us to help resolve conflicts between Federal agencies, and to help implement Section 101 of NEPA, the policy provisions of NEPA.

I think that is really all I want to say in my testimony at the moment. I would ask that my full testimony be entered for the record, and am happy to answer any questions.

[The prepared statement of Ms. Bear follows:]

Statement of Dinah Bear, General Counsel, Council on Environmental Quality

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify about the National Environmental Policy Act (NEPA). In NEPA, Congress set forth a general environmental policy for the nation and mandated a systematic examination of the environmental effects of proposed federal actions to help carry out that policy.

The Council on Environmental Quality (CEQ) oversees implementation of the Act, and promulgates the regulations binding all federal agencies to implement the procedural requirements of NEPA (40 C.F.R. Parts 1500-1508). The purpose of the NEPA process is to inform the decisionmaker of the environmental consequences of his or her proposal, based on high quality, accurate scientific analysis, agency expertise and public involvement. The regulations were written with the goals of reducing paperwork and delay in mind, and state that, "NEPA's purpose is not to generate paperwork-even excellent paperwork-but to foster excellent action." 40 C.F.R. § 1500.1(c).

CEQ's regulations are generic in nature—that is, they lay out the components of the NEPA process, but do not address requirements for specific types of actions. Instead, they require federal agencies to issue their own NEPA procedures that implement the CEQ NEPA requirements in the context of each agency's specific mission. The individual agency NEPA procedures identify which types of actions will typically require preparation of an "environmental impact statement (EIS)", which types of actions may typically be "categorically excluded", and which types of actions generally trigger the need to prepare an "environmental assessment (EA)".

The most well-known type of document under NEPA, but, I must add, also the rarest, is an environmental impact statement (EIS)[1]. The trigger for an EIS is a "proposal for legislation and other major federal actions significantly affecting the quality of the human environment". 42 U.S.C. 4332(2)(C)[2].

An agency initiates the EIS process by publishing a notice of intent in the Federal Register, 40 C.F.R. § 1508.22[3]. The next step, "scoping", is a process to determine the significant issues to be addressed and eliminate from detailed study issues that are not significant or have been covered by prior environmental review; identify interested and affected parties, including state, local and tribal governments as well members of the public; identify cooperating agency involvement and assignment of responsibilities; identify other environmental review and consultation requirements so that analyses and studies required other under federal, state, local or tribal laws may be prepared concurrently, rather than, sequentially, with the EIS; and set time and page limits for that particular EIS. 40 C.F.R. § 1501.7. There are no set time periods for scoping that need to be met prior to preparation of the draft EIS.

[1] There was a total of 597 draft, final and supplemental EISs prepared by all federal agencies in 2004.

[2] The term "major federal action" reinforces, but does not have a meaning independent of "significantly" under NEPA law. Minnesota PIRG v. Butz, 498 F.2d 1314 (8th Cir. 1974), incorporated into the CEQ regulations at 40 C.F.R. § 1508.18.

[3] The NOI should be a very brief notice stating the agency's intent to prepare an EIS for a particular proposed action, including possible alternatives identified, information about the scoping process, and an agency contact person.

Scoping includes internal and interagency discussion, as well as dialogue with the public through whatever form the agency determines is most effective.

The EIS may be prepared either by the federal agency or by a consultant or contractor selected by and working for the agency who must execute a public disclosure statement to the effect that they have no financial or other interest in the outcome of the decision[4]. The EIS is to be written in plain language, typically be no longer than 150 pages, 40 C.F.R. § 1502.7[5], and include a discussion of the purpose and need of the proposed action, alternative ways of achieving that purpose and need, a brief description of the affected environment and an analysis of the environmental consequences (direct, indirect and cumulative) of all of the alternatives set forth in the EIS. 40 C.F.R. § 1502.

As the CEQ regulations state, the "heart" of the EIS is the analysis of alternatives 40 C.F.R. § 1502.14. The agency must identify and analyze reasonable alternatives that meet the agency's purpose and need. It need not develop so-called "strawman" alternatives, nor is there any set number of required alternatives[6]. Outside parties may propose alternatives and the agency must consider whether they are "reasonable alternatives" and therefore need to be analyzed. An agency must analyze a full range of the effects of those reasonable alternatives identified in the EIS, including ecological, cultural, economic, social, and health effects. 40 C.F.R. § 1508.8(b).

Absent modification of the comment period, the agency must allow the public at least 45 days to comment on the draft EIS. In an agency's final EIS, it must consider those comments and either modify the information in the EIS or explain why the comments do not warrant a change. 40 C.F.R. 1503.4. The agency decisionmaker is free to make his or her decision once thirty days has passed following publication of the final EIS. 40 C.F.R. § 1506.10[7] The record of decision includes information about any applicable monitoring of the action chosen, as well as an explanation of the rationale for the decision.

NEPA does not require that the most environmentally preferable alternative be chosen. Agencies may make whatever decision they choose based on relevant factors including economic and technical considerations and agency statutory missions. 40 C.F.R. § 1505.2.

An agency must prepare a supplement to either a draft or final EIS if: i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Supplements are prepared in the same manner as regular EISs, except that scoping is not required. 40 C.F.R. § 1502.9(c). If a draft EIS must be supplemented, the agency should prepare a draft supplement analyzing the specific issue or new information triggering the need for the supplemental EIS. That information, along with the comments and responses to comments, would then be incorporated in the final EIS. A new alternative in a final EIS that is within the range of previously considered alternatives generally does not require a supplement to an EIS, but if the agency develops a new alternative that is so different that the public has not had a fair opportunity to comment on it, a supplement is required.

Types of actions that individually or cumulatively do not have a significant effect on the environment, as demonstrated by an agency's experience with those types of actions, may be categorically excluded. Categorical exclusions must be published in an agency's NEPA procedures, and must allow for the possibility that in a particular circumstance, an action that normally is categorically excluded will require preparation of an EA or EIS. A categorical exclusion is available once it has gone through public notice and comment and is promulgated in final form after consultation with CEQ to confirm that it conforms to NEPA and the CEQ regulations. No additional paperwork under NEPA is required in the agency's record accompanying the proposal to document the use of a categorical exclusion.

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[4] 40 C.F.R. § 1506.5.

[5] An agency may include material substantiating analysis in the EIS, including discussion of methodology, in an appendix to an EIS. The appendix must either be circulated with the EIS or be readily available on request. 40 C.F.R.§§ 1502.18; 1502.24. Agencies may also incorporate existing material by reference when the effect will be cut down on bulk without impeding agency and public review of the action. 40 C.F.R. § 1502.21.

[6] An agency does have to analyze a "no action" alternative in an EIS. In the case of management of public resources, "no action" is whatever the status quo management regime is at the time the analysis is being written. 40 C.F.R. 1502.14(d); also see "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations", 46 Fed. Reg. 18026, Question 3.

[7] An agency may make a decision simultaneous with publication of the FEIS if the proposal at issue is rulemaking for the purpose of protecting public health or safety or if there is a formal internal appeal process that exists within the agency. Id.

For proposed actions that fall into neither an EIS nor categorical exclusion category, or when an agency is uncertain of the level of environmental effect, it must prepare an environmental assessment (EA). An EA is meant to be a concise[8] public document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS, aids in an agency's compliance with NEPA when no EIS is necessary, and includes a brief discussion of: i) the need for the proposed action, ii) identification of reasonable alternatives if there are unresolved conflicts concerning alternative uses of available resources, iii) the environmental effects of the various alternatives, and iv) a list of agencies and persons consulted in the preparation of the EA. 40 C.F.R. 1508.9. If the agency determines that the proposed action will not have a significant effect on the human environment and therefore does not require preparation of an EIS, it signs a "finding of no significant impact". 40 C.F.R. 1508.13.

Agencies enjoy flexibility under CEQ's implementing regulations for tailoring their compliance in several ways to meet their own needs and the interests of the affected public. As mentioned earlier, neither form nor timelines are prescribed for scoping. Agencies may generally fashion public involvement for EAs in whatever manner they believe will be effective[9]. CEQ encourages agencies to combine or integrate the NEPA document with plans or other relevant documents. 40 C.F.R. §§1502.25, 1506.4. They may modify the recommended format for EISs.

There are few prescribed time periods associated with the NEPA process. If a proposed action that requires preparation of an EIS arises in the context of an emergency, CEQ has the authority to develop "alternative arrangements" for compliance with our regulations. CEQ may also develop and sanction alternative arrangements for supplemental EISs. And for all EISs, the Environmental Protection Agency may, upon a showing of compelling reasons of national policy, reduce the 45 day comment period for draft EISs and/or the 30 day period following the final EIS.

There are three federal entities involved in overseeing and assisting in the implementation of NEPA, generally. First, of course, CEQ interprets NEPA's requirements, promulgates implementing regulations and engages in both dispute resolution and development of alternative arrangements for compliance with NEPA in unusual circumstances. The Supreme Court has stated in several decisions that CEQ's interpretation of NEPA is owed "substantial deference".[10]

Second, the Environmental Protection Agency reviews and comments on EISs under Section 309 of the Clean Air Act. 42 U.S.C. §7609. If the Administrator (or by regulation, the head of other federal agencies) determines that a proposed action is unsatisfactory from the standpoint of public health or welfare or environmental quality, the matter must be referred to CEQ.[11]

Third, in 1998, Congress established the U.S. Institute for Environmental Conflict resolution as part of the Morris K. Udall Foundation, an independent federal agency located in Tucson, Arizona. Its primary purpose is to assist parties in resolving natural resource and environmental conflicts involving federal agencies. It was also charged with assisting in achieving the policy goals of NEPA laid out in Section 101.

Given the focus of this hearing, let me say a few words about our recent involvement with the National Marine Fisheries Service/NOAA. First, NOAA last amended its NEPA procedures in 1999. On November 14, 2003, NOAA requested approval of proposed alternative arrangements to complete a supplemental EIS for federal management of pelagic fishery resources in U.S. waters and the Exclusive Economic Zone in the Western Pacific Region. CEQ granted approval on November 20, 2003. On January 29, 2004, NOAA asked for alternative procedures for rulemaking for sea turtle bycatch and bycatch mortality reduction in the Atlantic Pelagic Longline Fishery. CEQ approved these alternatives arrangements on February 4, 2004. On June 3, 2004, NOAA requested a modification of those alternative procedures; that modification was granted on June 22, 2004. In addition, NOAA's marine protected area program recently asked us and Duke's Nicholas School of the Environment and Earth Sciences to develop NEPA training specifically for their staff based on a series of NEPA courses that we co-sponsor with Duke.

I would be happy to answer any questions you might have.

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[8] CEQ's guidance is that the length of an EA should generally be 10-15 pages. Question 36a, "NEPA's Forty Most Asked Questions".

[9] See 40 C.F.R. §§1501.4, 1506.6.

[10] Marsh v. Oregon Natural Resources Council; 490 U.S. 360, 372 (1989) Robertson v. Methow Valley Citizens Council, 490 U.S. 322, 356 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

[11] To date, no action proposed under the Magnuson-Stevens Fishery Conservation and Management Act or its predecessor has been the subject of a referral to CEQ. The process for referrals is laid out at 40 C.F.R. Part 1504.

Mr. GILCHREST. Without objection. Thank you very much.

Ms. BEAR. Thank you.

Mr. GILCHREST. Dr. Hogarth.

STATEMENT OF WILLIAM T. HOGARTH, PH.D., DIRECTOR, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; ACCOMPANIED BY JAMES R. WALPOLE, GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Dr. HOGARTH. Thank you, Mr. Chairman and members of the Subcommittee, for the opportunity to testify on the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act; specifically today, on the relationship between the Magnuson-Stevens Act and the National Environmental Policy Act. My written testimony has been submitted for the record.

To understand where we are today, I think we have to take a look back a little bit at the progress we have made since implementing the 1996 Sustainable Fisheries Act. This Act ushered in a major expansion in fishery management policy. It required us to do things in quite a different manner, and has led us to try to manage targeted species more carefully.

Since 1996, some of the key accomplishments include rebuilding plans for nearly all of the over-fished stocks; addressing the ongoing concern with bycatch by adopting a national bycatch plan and by reducing capacity in many of our more important commercial fisheries through a variety of dedicated access programs.

The SFA presented many challenges, and we have successfully met most of these challenges. Now it is time to reexamine the legal mandates and address new issues. We began this process with the 2003 administrative proposal to reauthorize the Magnuson-Stevens Act which included about 23 amendments. And while many of those were technical in nature, others were pretty significant changes; including distinguishing between the terms ''over-fishing'' and ''over-fish,'' requiring the submission of economic data from the processors, and establishing standards for new IFQ programs.

In light of the President's U.S. Ocean Action Plan, we are reviewing the Administration's June 2003 proposed Magnuson-Stevens amendments, and are considering new issues. We will consider a wide range of possible Magnuson-Stevens Act proposals, and plan to prepare a formal package for internal review as soon as possible.

We anticipate the major topics covered to include ecosystem approaches to management; dedicated access programs; refinement of the essential fish habitat; discussion of the Magnuson-Stevens Act and NEPA intersections, particularly in the fact that we have to, I think, look at the management of this as to how we can make the process more timely. One of the biggest criticisms we get from fishermen is what they see today takes us two years to implement. So I think we have to look at how we can make this whole process more timely.

A few weeks ago, council members, staff, and public discussed many of these issues at the Washington, D.C. conference, ''Managing Our Nation's Fisheries II.'' And we plan to continue working closely with the councils and our stakeholders to better understand their views on the matters that came up.

One issue related to the reauthorization of the Magnuson-Stevens Act that has prompted considerable discussion and debate in recent years is the relationship between the Magnuson-Stevens Act and NEPA. We have always recognized that NEPA provides a useful framework for the fishery management process, and we have used NEPA as our main vehicle for frontloading the process associated with our regulatory streamlining program. A thorough analysis of the ecosystem impacts on a reasonable range of alternatives is a key step in the public process allowing for a more informed public discussion on the management measures.

In recent years, Congress and the Administration have committed significant resources to improve our regulatory process. These efforts have yielded positive results. First, from 1996 to 2002, NMFS won only about 42 percent of our NEPA decision court cases. Since 2003, we have prevailed on the NEPA issues in all eight Magnuson-Stevens cases arising from the NEPA claims. This track record indicates that we are, by and large, doing a credible and defensible job in applying NEPA requirements to our fisheries management actions.

However, I think maybe now, in reaction to making sure that we win these cases, we are now producing documents that fishermen feel, and the constituents, are too long and involved for them to really be able to read and understand. Some of our documents are up to 7,800 pages, and I think that is something we have to work with.

And although we are doing a better job in complying with NEPA requirements, concerns remain regarding NEPA's flexibility and timeliness. While the two laws are not in conflict in principle, there are differences in scope, degree of analysis, and regulatory timeliness.

First, NEPA requires careful consideration of alternatives and a reasonable analysis of why some are selected and others are not. The Magnuson-Stevens Act, on the other hand, does not mandate this assessment.

Second, NEPA mandates the assessment and consideration of the cumulative effects of management measures. However, cumulative impacts are not explicitly addressed in the Magnuson-Stevens Act.

And third, the Magnuson-Stevens Act includes precise time lines that are not always consistent with compatible time lines in NEPA. Even though NEPA may not have specifics, there are timings with how we do the Magnuson-Stevens and then when we can do NEPA documents. And normally, this requires us to take more time.

As we heard during last month's conference, these are complicated policy and regulatory issues, and deserve careful consideration. I think we need to work together with CEQ and Congress and others to have a better understanding between the relationship of these two laws. And if there is the need for legislative changes, we should make sure that this will accomplish what we are intending to do.

Mr. Chairman, thank you for the opportunity to discuss the reauthorization of the Magnuson-Stevens Act and its relationship with NEPA. I will be happy to answer any questions you may have.

[The prepared statement of Dr. Hogarth follows:]

Statement of William T. Hogarth, Ph.D., Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify before you regarding the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). I am William T. Hogarth, Assistant Administrator for Fisheries in the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce. My testimony today will focus on the Administration's ongoing efforts to implement the 1996 Sustainable Fisheries Act and to develop a Magnuson-Stevens Act reauthorization proposal. Per your request, I will also comment on our responsibilities under the National Environmental Policy Act (NEPA) and on the relationship between the Magnuson-Stevens Act and NEPA.

The 1996 Sustainable Fisheries Act

To understand where we are today, we need to look at the progress we have made in implementing the 1996 Sustainable Fisheries Act (SFA). The SFA ushered in a major expansion in fisheries management policy, leading all of us—the Regional Fishery Management Councils, commercial and recreational users, and the National Marine Fisheries Service (NMFS)—to manage targeted species more carefully.

Most significantly, the SFA contained several key new provisions, including: managing fisheries to avoid overfishing and, if managed stocks are overfished, developing rebuilding plans; reducing bycatch; identifying essential fish habitat (EFH) and mitigating the adverse effect of fishing operations on these areas; and, taking into account the importance of fishery resources to fishing communities, providing for sustained participation of these communities and minimizing adverse economic impacts on them.

As a result of these new provisions, we pay more attention to the impacts of fishing operations on non-target species and the marine environment. In addition, we are more mindful of the effects of management measures on people, their communities, and their safety. In the years following passage of the SFA, the Councils and NMFS have made a major and sustained effort to implement these changes. We have faced many challenges, but I believe our marine fisheries are healthier and are managed more effectively than a decade ago.

I would like to outline some of our key accomplishments.

- We have developed rebuilding plans for nearly all overfished stocks, and, as our annual congressionally mandated report on the status of stocks shows, we are reducing both overfishing and the number of overfished stocks.
- To address the ongoing concern with bycatch, we are factoring it into our fishery management process and now have a national bycatch plan that will help us reduce overall bycatch as well as bycatch mortality.
- Through a variety of dedicated access privilege programs, we are reducing overcapitalization in many of our most important commercial fisheries in Alaska. These initiatives could serve as models for dedicated access privilege programs in the rest of the country.
- We are assessing and addressing overcapacity in the harvesting sector through a series of quantitative and qualitative capacity reports, the U.S. National Plan of Action for the Management of Fishing Capacity, industry-funded buybacks, and the development and implementation of individual and community based quotas.

Although we have achieved much, we also face many obstacles. The SFA presented many challenges on several fronts, and we have gone a long way toward successfully meeting those challenges. Now, almost a decade after the enactment of the SFA, it is time to reexamine our legal mandates and address new issues.

The Administration's U.S. Ocean Action Plan

Our discussions of the Magnuson-Stevens Act are taking place within a larger debate on ocean policy and governance. On December 17, 2004, the White House issued the U.S. Ocean Action Plan. I would like to focus on a few aspects of this plan that have significant implications for fisheries management.

The U.S. Commission on Ocean Policy, in their Final Report, urged the United States to move away from the focus on managing single species and toward a more comprehensive, ecosystems approach. The U.S. Ocean Action Plan explicitly endorses ecosystems approaches to management (EAM) and places it in a larger policy framework of working with regional and local authorities. The plan states:

> "The Administration will continue to work toward an ecosystem-based approach in making decisions relating to water, land, and resource

management in ways that do not erode local and State authorities and are flexible to address local conditions.''

We now need to focus on how best to achieve this transition in fisheries management in light of its regulatory complexities and the need for new and additional science. The 1996 amendments to the Magnuson-Stevens Act—in particular the provisions relating to bycatch and essential fish habitat—can support significant progress toward EAM.

EAM is incremental; we are already doing it to some extent in several federally managed fisheries, most notably in the Western Pacific, North Pacific, and South Atlantic. We have a Coral Reef Ecosystem Fishery Management Plan (FMP) in the Western Pacific, and we are developing several EAM pilot projects on the East Coast. Additionally, a number of ''conventional'' FMPs have been substantially modified and expanded in recent years to incorporate principles of EAM.

The U.S. Ocean Action Plan includes several elements that will continue to enable us to take further steps toward ecosystems approaches to management.

1. Regional Fishery Management Councils should continue to make every effort to base their management proposals on the best available science, and NMFS—specifically the NMFS Fisheries Science Centers where stock, economic, and social analyses assessments originate—should continue to play a key role in providing the best possible scientific information. In fact, the U.S. Ocean Action Plan, on page 19, commits NOAA to ''establish guidelines and procedures for the development and application of scientific advice for fisheries management decisions.'' The Administration supports the use of peer-reviewed science in resource management decisions.
2. Regional Fishery Management Councils should have more broadly based membership. The Administration is considering transmitting a proposal to amend the Magnuson-Stevens Act to require governors to submit a slate of Council member nominees that represent a balanced apportionment in marine fisheries in their respective states.
3. Regional Fishery Management Councils and the Administration should promote greater use of market-based systems for fisheries management or dedicated access privilege programs, such as individual fishing quotas (IFQ), as a management measure to mitigate overfishing and overcapacity, as well as to contribute to the economic well-being of the marine fishery sector. NOAA has committed to develop, in consultation with the Regional Fishery Management Councils and interested parties, national standards and guidelines for the development and implementation of IFQ allocations. These guidelines will draw on the 1999 congressionally mandated report Sharing the Fish: Toward a National Policy on Individual Fishing Quotas, as well as the ongoing debate on standards and requirements for IFQs, a type of dedicated access privilege. Dedicated access privilege programs raise many complex and contentious issues, but the key question centers on how best to balance the principles of efficiency and equity under these programs. We have worked closely in the past several years with the Government Accountability Office in their studies of various IFQ-related issues, and this collaboration has helped us refine our views on how to develop and administer these programs.

We have worked with several Regional Fishery Management Councils in the past few years on dedicated access privilege programs in federally managed fisheries. For example,

- In the North Pacific we are implementing an Alaska crab rationalization program that includes IFQs, community quotas, and fishing cooperatives, and we are working on a Gulf of Alaska groundfish rationalization plan that will also include a number of distinct dedicated access privilege programs.
- In the Pacific, we are developing a groundfish IFQ program.
- In the Gulf of Mexico, we are resuming work on the red snapper IFQ program.

Reauthorization of the Magnuson-Stevens Act

In light of the current discussions surrounding the U.S. Ocean Action Plan, last year we decided to review the Administration's June 2003 proposed Magnuson-Stevens Act amendments and consider new issues. The 2003 Administration proposal to reauthorize the Magnuson-Stevens Act included 26 proposed amendments. Many of these were technical in nature but others would make significant substantive or procedural changes. These include:

- distinguishing between the terms ''overfishing'' and ''overfished'';
- requiring submission of economic data from processors;
- establishing standards for new IFQ programs;
- streamlining fishing capacity reduction programs;
- increasing maximum fines and penalties; and

- authorizing the means to fund observer programs.

NMFS is now considering a wide range of possible Magnuson-Stevens Act proposals and plans to prepare a formal package of amendments. We anticipate the major topics covered would include ecosystems approaches to management; National Standards 1 (overfishing), 2 (best available science) and 9 (bycatch); Council operations; dedicated access privilege programs; permits and fees; and essential fish habitat.

A few weeks ago, Regional Fishery Management Council members, staff, and the public discussed many of these issues at the Washington, D.C. conference, "Managing Our Nation's Fisheries II." I plan to work closely with the Councils and other interested parties to better understand their views on these matters. Magnuson-Stevens Act reauthorization is a major topic to be addressed at the Council Chairs and Executive Directors meeting in southern California the last week of April.

The Magnuson-Stevens Act and NEPA

One issue related to reauthorization of the Magnuson-Stevens Act that has prompted considerable discussion and debate in recent years is the relationship between the Magnuson-Stevens Act and the National Environmental Policy Act (NEPA). NMFS applies NEPA in the Exclusive Economic Zone as a matter of policy and has always recognized that NEPA can provide a critical framework for the fisheries management measures that the Regional Fishery Management Councils develop and we approve. NEPA can establish the ground rules for public participation in developing these decisions, the assessment of environmental impacts, and the consideration of alternatives to the selected measures. The NEPA analytical and regulatory framework provides important benefits to the Administration, the Regional Fishery Management Councils, the fishing industry, and the general public.

In recent years, Congress and the Administration have committed significant resources to programs to improve our implementation of the NEPA framework. NMFS has developed and implemented a Regulatory Streamlining Program that highlights the importance of applying NEPA, and hired national and regional NEPA coordinators. For the past several years, with support from Congress, we have worked hard to upgrade the quality of our NEPA assessments, in particular the Environmental Impact Statements. In our FY 2005 appropriation, $3 million is dedicated specifically for NEPA training and other NEPA-related work, and a total of $8 million is requested for FY 2006.

These efforts have yielded positive results. From 1996 to 2002, NMFS won only 42% of the NEPA claims in Magnuson-Stevens Act cases. Since 2003, however, NMFS prevailed on the NEPA issues in all 8 Magnuson-Stevens Act cases raising NEPA claims that resulted in final decisions in District Courts. This track record indicates that we are by and large doing a credible and defensible job in applying NEPA requirements to our fisheries management actions.

Although we are undeniably doing better in applying NEPA requirements, concerns remain regarding NEPA's impacts on flexibility and timeliness of fisheries management actions. Past implementation of some NEPA requirements has duplicated some steps already required by the Magnuson-Stevens Act. Real time within year management decisions on fisheries management actions recommended by the Councils particularly highlight this issue. In other words, while there are obvious and significant benefits flowing from NEPA and we have improved our compliance over the past few years, there have been costs in terms of time spent, resources expended, lack of flexibility and duplicative reviews in complying with the NEPA process.

In your letter inviting me to present testimony at this hearing, the House Subcommittee asked that I comment on "conflicts" between our natural resource statutes, in particular the Magnuson-Stevens Act and NEPA. The two laws are not in conflict in principle, but as there are certain differences in the scope and degree of analysis and in the regulatory timelines, I think it is useful to identify the three key differences.

First, NEPA requires the careful consideration of alternatives and a reasoned analysis of why some are selected and others are not. The Magnuson-Stevens Act, on the other hand, does not mandate an assessment of alternatives. In many cases, the Regional Fishery Management Councils must make difficult choices among a number of options, each with its own benefits and costs. Their decision-making process benefits from careful consideration and assessment of alternatives.

Second, NEPA and, in particular, the Council on Environmental Quality's (CEQ) regulations for implementing NEPA, mandate the assessment and consideration of the cumulative effects of management measures. However, cumulative effects are not explicitly addressed in the Magnuson-Stevens Act. In a sector in which a series

of regulatory actions can have a significant aggregate effect over time, consideration of cumulative impacts is worthwhile and necessary.

Third, the Magnuson-Stevens Act includes precise timelines for the development, consideration, and approval of management measures that are not always entirely consistent with the NMFS' comparable timelines for compliance with NEPA. Magnuson-Stevens Act timelines governing the review and approval of Council actions and their publication in the Federal Register do not always correspond with NEPA timelines. While NMFS consults with CEQ on administrative ways to reduce or eliminate those inconsistencies, application of the two statutes sometimes results in a disjointed regulatory process with inconsistent deadlines.

As we heard during last month's "Managing Our Nation's Fisheries" conference, these are complicated policy and regulatory issues that deserve careful consideration. I would be happy to work with Congress to better understand the relationship between these two laws, and the need, if any, for legislative changes.

Conclusion

Mr. Chairman, thank you for the opportunity to discuss the reauthorization of the Magnuson-Stevens Act. The scope of issues has changed significantly in the past several years. Until a few years ago the major concerns centered on implementing the specific provisions of the 1996 amendments. In the past few years we have gained a wider perspective. Today our attention is focused on ecosystems approaches to fisheries management as opposed to single-species management, dedicated access privilege programs instead of open access fishing quotas, and more broadly representative Regional Fishery Management Councils. Therefore, we have been seriously studying and considering these larger issues and rethinking our views on important regulatory and procedural matters.

I look forward to working with you, other members of this committee, and interested members in both the House and Senate. I would be happy to answer any questions you have.

Mr. GILCHREST. Thank you, Dr. Hogarth.

Mr. Furlong, Dan. Dan, you are up next.

STATEMENT OF DANIEL T. FURLONG, EXECUTIVE DIRECTOR, MID-ATLANTIC FISHERY MANAGEMENT COUNCIL

Mr. FURLONG. Thank you, Mr. Chairman. And good morning. And I would like to point out that the Mid-Atlantic, as your servicing council, both you and Mr. Pallone, is the highest-ranked council of the five East Coast councils by the Ocean Conservancy, related to preventing over-fishing and rebuilding stocks. That is just a preamble to my comments that are to follow.

In your invitation letter, you asked for my views on the relationship between the Magnuson Act and the National Environmental Policy Act; particularly, any conflict between the two acts. In my opinion, there are no technical conflicts between the two acts. However, I believe there are significant and genuine problems between the two acts regarding the duplication of embedded process requirements.

In the Federal budget world, there are two overarching precepts, or perspectives: budget-driven programs, and program-driven budgets. The juxtaposition of these two words tells you which one is the driving force. I think the same can be said with regards to the Magnuson Act and with regards to the National Environmental Policy Act.

The Magnuson Act has a process that is designed to achieve the conservation and management of our fishery resources; whereas the NEPA process is one that is an environmental process, but is really a self-fulfilling process that yields the documentation of the process itself—a very different outcome.

Better than NEPA, the Magnuson Act, in conjunction with the Administrative Procedures Act, provides the public timely notice of its proposed actions, so as to allow for review and comment by the public, and provides a transparent and open public process through the council system that allows for public involvement through the formulation and development of all fishery management measures.

That is why, I believe, that in the 108th Congress Senator Collins of Maine and Congressman Young of Alaska introduced legislation that included the following language: ''that any fishery management plan, any amendment to such plan, or any regulation implementing such plan, that is prepared in accordance with the applicable provisions of Sections 303 and 304 of the Magnuson Act are deemed to have been prepared in compliance with Section 102, Paragraph 2(c) of the National Environmental Policy Act.''

Now, there are those who think that that language would be an exemption from NEPA, much like the exemption that the councils enjoy under FACA. But to me, nothing could be further from reality. The proposed language by Senator Collins and Congressman Young recognized that Sections 303 and 304 of the Magnuson Act are indeed the functional equivalent of NEPA's Section 102(c)(2). Their language does not, in effect, create a FACA-like exemption. Rather, the language unifies and clarifies the relationship between the two acts, and also meets the Magnuson Act's National Standard Seven requirement that conservation and management measures shall minimize costs and avoid unnecessary duplication. These two acts duplicate each other.

For the record, I totally support such legislation.

I will skip my commentary about EPA's double-standard and CEQ's concept of major Federal action. But I would propose and request that my full written testimony be incorporated as part of the record.

I would like to offer some examples of how costly the nature of NEPA is in terms of redundancy to that which is required by the Magnuson Act. The North Pacific Fishery Management Council completed action last year on a 7,000-page programmatic EIS. And Ms. Bear earlier said 150 pages. That is 47 times 150, 7,000 pages.

It covers all of its groundfish fisheries. Because of one finding related to an unknown effect on the overall habitat from allowing these fisheries to commence, the council is now being told that it may have to do an EIS every year to support its specification process. What we are talking about here is setting up the total allowable catch.

Now, understand that for the groundfish fisheries in Alaska the council has a two-million-metric-ton cap on its fisheries, but it has an allowable biological catch of nearly four million metric tons. So there is really a lot of play here, but you would have to develop an EIS every year.

In the Caribbean, to give you another example, it prepared a Sustainable Fisheries Act comprehensive amendment in 1999 which the National Marine Fisheries Service said they could easily review and approve in a few months. In the meantime, a new emphasis on NEPA came into force, owing to a lawsuit brought by the American Oceans Campaign against the National Marine Fisheries Service and the councils.

As a consequence, the Caribbean council had to rewrite its document; include alternatives that did not make any sense, but were required by NEPA; spend lots of money for additional meetings, rewriting of various sections; and finally, end up with a document three times the size of the original one. Consequently—surprise—now five years later, the council has reached the same conclusions that it did in 1999 regarding the management measure that will be submitted for secretarial review.

During this process, the Caribbean council created a 1,000-page document. Now, they are pikers compared to the North Pacific, because that is only six times as big as what Ms. Bear said it should be. Moreover, the fishermen and general public are totally confused by the volume of information, and have accused the council of trying to bury its intentions and agenda under hundreds of pages of bureaucratic gobbledegook.

I have other examples from the remaining six councils. And I would point out that at the recent conference on "Managing Our Nation's Fisheries" the following motion was passed and approved by seven of the eight councils voting: "Following the addition of critical NEPA provisions to the Magnuson-Stevens Act, thereby making Magnuson fully compliant with NEPA's intent, the panel finds that legislation should be developed specifying the Magnuson Act as the functional equivalent of NEPA."

Seven out of eight should send a clear message to this Committee that, indeed, there are problems regarding the integration and obsequious application of NEPA into the Magnuson Act process.

I thank you for having invited me to this hearing, and I sincerely appreciate the honor and opportunity to appear before the Subcommittee.

[The prepared statement of Mr. Furlong follows:]

Statement of Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council

Good morning Chairman Gilchrest and members of the Subcommittee. I am Dan Furlong, Executive Director of the Mid-Atlantic Fishery Management Council. I am also the former Deputy Regional Administrator of National Marine Fisheries Service's Southeast Regional Office, a position I held for over 10 years.

In your March 31 invitation letter, you asked for my views on the relationship between the Magnuson-Stevens Act (MSA) and the National Environmental Policy Act (NEPA), particularly any conflict between the two Acts. In my opinion there are no technical conflicts between the two Acts. However, I believe there is a genuine problem between the two Acts regarding duplication of embedded process requirements.

In the federal budget world there are two overarching perspectives - budget driven programs, and program driven budgets. The juxtaposition of these two words tells you which one is the driving force. The same can be said of the MSA and NEPA. Both statutes are process driven, but their outcomes are very, very different. MSA's process is designed to achieve conservation and management of our Nation's fishery resources, whereas NEPA's process is a self-fulfilling one of documenting the process itself. Better than NEPA, MSA in conjunction with the Administrative Procedures Act (APA), provides the public timely notice of its proposed actions so as to allow for review and comment, and provides a transparent, open public process through the Council system that allows for pubic involvement throughout the formulation and development of fishery management actions.

I believe that is why in the 108th Congress Senator Susan Collins of Maine introduced the "Fisheries Science and Management Improvement Act of 2003" (S 482). And, that is why, in the House, Congressman Donald Young of Alaska introduced a Bill "to amend the Magnuson-Stevens Conservation and Management Act" (HR 3645). Each piece of legislation included the following language: "that any fishery management plan, any amendment to such plan, or any regulation implementing

such plan, that is prepared in accordance with applicable provisions of Section 303 and 304 of this Act are deemed to have been prepared in compliance with the requirement of Section 102 paragraph 2 (c) of the National Environmental Policy Act of 1969".

Some have interpreted this language to be a Magnuson-Stevens Act exemption from the National Environmental Policy Act, much like the exemption that Councils, their Committees, and Advisory Panels enjoy from the Federal Advisory Committee Act (FACA). To me, nothing could be further from reality. The language proposed by Senator Collins and Congressman Young recognizes that Section 303 and 304 of the Magnuson-Stevens Act are the functional equivalent of Section 102 (c) 2 of the National Environmental Policy Act. Under MSA, every Fishery Management Plan must address and contain 14 statutorily required plan provisions. And, every Fishery Management Plan should consider 12 additional discretionary plan provisions. Moreover, as provided by Section 301 in the Act, all Fishery Management Plans must be consistent with the Act's 10 National Standards. Their language does not create a FACA-like exemption, rather such language unifies and clarifies the relationship between the two Acts, and also meets National Standard 7's requirement under MSA that "conservation and management measures shall minimize costs and avoid unnecessary duplication".

For the record, I totally support such legislation.

In preparing for this hearing, I was amazed to find that the Environmental Protection Agency, an agency I believe to be highly associated and identified with NEPA, has benefited from legislation that substantially limits EPA's own impact statement preparation. The Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) specified that statements would be required only for wastewater facilities and new source permits. Yet, as the States assumed responsibilities for water pollution control programs, even these two actions that were subject to EIS requirements are no longer considered Federal decisions, and therefore NEPA is no longer applicable. These 1972 amendments also sanctioned the use of EPA's water quality standards for purposes of compliance with NEPA. Further, the Energy Supply and Environmental Coordination Act of 1974 (P.L. 93-319) provided that no impact statements would be required for any actions taken by the EPA under the Clean Air Act. Courts have also held that waste clean-up procedures constituted a "functional equivalent" of NEPA compliance. What a deal! It appears that EPA is the poster child for the expression, "Do as I say, not as I do".

Speaking of EPA, I would like to address its guidance regarding the concept of "major Federal action". The term "major" applies to the significance of the impact of the proposed action on the environment. Impacts to be addressed include impacts on the physical, biological and human environment. As I believe most things in our capitalistic society can be reduced to dollar terms, I would like to try to put what the Councils and NMFS do in that context. Our Nation's Gross Domestic Production (GDP) is approximately $12 trillion. The value of U.S. commercial fishing landings is about $3.5 billion. The expenditures by marine anglers is estimated to be about $30.0 billion. Taken together, the contribution to our economy by those who are governed by MSA represents less than 1/2 of 1% of the GDP. Likewise, of the $2.4 trillion Federal budget ear-marked for discretionary programs, NMFS receives approximately $825 million. Even after reducing Federal discretionary funding to $818 billion by removing Defense and Homeland Security, NMFS' share is less than 1/10 of 1% of domestic discretionary spending. With fewer than 3,000 full time equivalent employees out of a workforce of 1.9 million Federal civilian employees, NMFS share of Federal employment is less than 2/10ths of 1%. Given the regulated sector's place in our economy, and the National Marine Fisheries Service's place in the Federal Government, what is it that they do that could rise to NEPA's concept of major Federal action? Think about it.

I would also like to offer some examples of the costly nature of NEPA in terms of its redundancy to that which is required by the Magnuson-Stevens Act. The North Pacific Fishery Management Council completed action last year on a 7,000-page programmatic EIS covering all of its groundfish fisheries. Because one of the findings contained in that EIS was that there was an "unknown" (and undeterminable) effect on overall habitat from allowing the fisheries to commence, the Council is now being told that it may have to do an EIS every year to support its groundfish specifications process; i.e., setting the total allowable catch (TAC). Even though the North Pacific Council just did the overall Essential Fish Habitat (EFH) action, and even though it has placed a 2 million metric ton cap on its groundfish fisheries which have an Allowable Biological Catch (ABC) of nearly 4 million metric tons, the Council - because of the time required to do the EIS - will now have to set quotas using the previous year's survey information, rather than using the most recent annual stock assessment survey data. This NEPA created

circumstance requires analyses that are clear violations of the Magnuson-Stevens Act National Standard 2.

The Caribbean Council prepared a Sustainable Fisheries Act (SFA) comprehensive amendment in 1999 which the National Marine Fisheries Service thought could be reviewed and approved in a few months. In the meantime, a new emphasis on NEPA came into effect owing to the outcome of a lawsuit brought by American Oceans Campaign against NMFS and the Councils. As a consequence, the Caribbean Council had to rewrite the document; include alternatives that did not make any sense, but were required by NEPA; spend lots more money for additional meetings, rewriting of sections, etc.; and, finally end up with a document three times the size of the original one. Consequently - surprise - now 5 years later, the Council has reached the same conclusions as it did in 1999 regarding the management measures that will be submitted for Secretarial review. During this process, the Caribbean Council created a document of nearly 1000 pages that is very cumbersome and difficult to read. Fishermen and the general public are confused by the volume of information, and have accused the Council of trying to bury its real intentions under hundreds of pages of bureaucratic gobbledegook.

I have other examples from the Mid-Atlantic, South Atlantic, New England, Pacific, West Pacific, and Gulf of Mexico Councils that reinforce the damage NEPA has caused in the conservation and management of our Nation's marine fishery resources. At the recent "Managing Our Nations Fisheries II Conference", the following motion was passed by seven of the eight Councils:

> "Following the addition of critical NEPA provisions to MSA, thereby making MSA fully compliant with NEPA's intent, the panel finds that legislation should be developed specifying MSA as the functional equivalent of NEPA."

Seven out of eight - that sends a clear message that something is indeed problematic regarding the integration and obsequious application of NEPA into MSA actions.

I thank you for having invited me to provide my views regarding MSA and NEPA. I sincerely appreciate the honor and opportunity to appear before the Subcommittee.

Mr. GILCHREST. Thank you very much. I know that Dr. Hogarth has to leave in about ten or 12 minutes. So if we are not done with the round of questions for this panel, I want to thank Dr. Hogarth for coming up from Florida. And whenever you feel like you have to leave, Dr. Hogarth, please feel free to do so.

Dr. HOGARTH. Thank you, Mr. Chairman.

Mr. GILCHREST. I am just curious, Ms. Bear. You mention in your testimony—and I want to make sure that I fully understand it and what the reasons are for it—EPA. Is EPA exempt from NEPA? Why? And what does that mean for that agency?

Ms. BEAR. Congress in some instances for some statutes, and the courts for other statutes, in EPA's pollution control statutes, have found EPA to be exempt from NEPA. The rationale when you look at a lot of the explanation, both legislative and judicial decisions, is that EPA's primary mission is environmental protection.

The arguments that have been made and that were made by EPA to attain that status have been made by other agencies occasionally throughout the years, including agencies that manage public resources. NOAA has never made that argument, but I believe it was Sea World that once made it for them in court. And the courts have not agreed with that analysis, because all of the other agencies they have viewed as having—

Mr. GILCHREST. So—

Ms. BEAR. What?

Mr. GILCHREST. So the courts have agreed that EPA is exempt—

Ms. BEAR. Yes.

Mr. GILCHREST.—from NEPA, partly on the grounds of the Clean Water Act and the Clean Air Act, that they follow those statutes and acts?

Ms. BEAR. That their primary mission is environmental protection, as opposed to a mixed mission where you are both permitting the use of the resources as well as conserving over protecting them. The courts, frankly, have not done a particularly specific analysis in terms of a sidebar between the statutes, as to whether or not the process and EPA's pollution statutes have precisely the same elements as NEPA. They seem to have enjoyed that primarily because of the sense that they are an environmental protection agency, as opposed to a mixed mission agency.

Mr. GILCHREST. So is there any agency in the Federal Government that is a mixed-mission agency that is exempt from NEPA?

Ms. BEAR. No.

Mr. GILCHREST. Dr. Hogarth, you have the Sustainable Fisheries Act in 1996, with all its standards and provisions for conservation, and you have the SSC. I am sort of going to generalize now, but you have the SSC creating a stock assessment. You have the councils that produce the allocation for a fisheries plan. And then you have NEPA in, I guess, a parallel way, following that process. And those two processes, I guess, have to come together in the end before a fisheries management plan is complete. Is that a generally accurate statement?

Dr. HOGARTH. Yes, sir. Basically, you go through the scoping with the councils and look and work there in the councils. Once they determine the alternative or what they are going to put in place, then the NEPA document has to be produced. Even though the council has gone through a plan process with their scoping and their analysis and public hearings, when it comes to us, we have to go through another public hearing process and to make sure the NEPA documents are prepared.

Mr. GILCHREST. How do you see that those two parallel processes, since we are talking about NEPA here, could be modified so that there is no unnecessary duplication?

Dr. HOGARTH. Well, I think we need to discuss this. This is my personal opinion; not speaking for the Administration or anything, my personal opinion from five years of dealing with it. It is that I think if it was clear that the Magnuson had to look at a series of alternatives. Sometimes, there is not a good discussion of a series of alternatives; the council chooses the main indirectly. But to have a series of alternatives that are fully discussed and rejected, I think, is the main difference that I see now between the NEPA and the Magnuson process.

Mr. GILCHREST. So right now, the fisheries part of this process, whether it is with the SSC or whether it is with the councils themselves, as a general rule—and Dan, you can jump in here—they don't come up with an alternative, or alternatives, as NEPA fundamentally requires?

Dr. HOGARTH. The series of alternatives that are being looked at under the NEPA document, the councils don't have to do it under Magnuson.

Mr. GILCHREST. Dan, do you want to speak to the specifics? Ms. Bear said the heart of NEPA is alternatives. Where do you see

that? And I will just finish with this, and I will yield to the gentleman from New Jersey.

Mr. FURLONG. Yes, I believe, in fact, that is where the problem really lies. I can give you some other examples. In the South Atlantic Council, snapper-grouper amendment 13, it has been delayed because there is a debate between the agency and the council, in terms of what is a reasonable suite of alternatives.

Mr. GILCHREST. Now, the agency is asking that. Do you represent the agency?

Dr. HOGARTH. That is us.

Mr. GILCHREST. And maybe I will come back to Bill. The agency is asking for those alternatives in anticipation of what NEPA requires. Is that why you are asking for the alternatives?

Dr. HOGARTH. Yes. Yes, sir. We feel like there is not a sufficient number of alternatives being discussed by the council to fulfill the NEPA requirements.

Mr. GILCHREST. Let's say there wasn't any NEPA. And don't anybody think we want to do away with NEPA in here. But hypothetically, if there wasn't a NEPA process, would the agency see the need to ask for those alternatives?

Dr. HOGARTH. First of all, let me make it clear that we do not want to get rid of NEPA, either. We as an agency feel like the National Environmental Policy Act has served the public will. I am concerned that we have over-reacted, but we work with that.

But I think there would be probably less demand on the council, particularly right now, in that plan, if we did not have NEPA. We could do what the council is trying to do easier under Magnuson.

Mr. GILCHREST. Yes. Is there some sense that NEPA is being strictly complied with by NMFS because of litigation prospects?

Dr. HOGARTH. I don't think that is the complete reason. I think it has driven us to a point, litigation has driven us to a point, where we are spending a lot more time writing much longer, detailed documents, and I think we have lost our constituency. But, yes, I think to try to be litigation-proof or win the litigation, I think we have taken much longer, sometimes a period of years I think, to get a NEPA document done.

And I think part of that is that we want to win. We don't want to keep losing. We are winning about 80 percent of the cases now. We were winning about 40 percent. And it is just we have got to find a way to get out of litigation and to win litigation.

Mr. GILCHREST. I have a number of other questions, but I am going to close with this last one which is highly controversial, but I will ask it anyway. If the Ocean Commission report recommended that the stock allocation by SSC be strictly adhered to by the council, and that the council would just allocate that stock assessment, if that were the case, would this clear up a number of NEPA problems? Anybody can answer that.

Dr. HOGARTH. In my opinion, no, sir. In my opinion, I don't think that would clear up any of the NEPA problems. Because you have still got a group of people who are going to meet and determine a number.

Mr. GILCHREST. Bill, I don't think your mike is on.

Dr. HOGARTH. I said in my opinion, that does not change that. You just change it to another group of people who will make a

decision. Those people have to be chosen by someone, and it is just a different process.

And my personal opinion is that the science separation has really gotten somewhat blown out of proportion. Because we go through a very thorough, thorough peer review process now on the stock assessments; and then we go through the SSC; and then the councils have ten standards that they have to judge their work by, which requires them to look at things other than just over-fished. They have to look at communities, economics; even though courts have ruled that the number one standard is over-fishing. And then we review it carefully when it comes to the Secretary.

So I think part of the problem is probably reaction to the fact that we have not been diligent about making sure when the councils send something that, if it is not in compliance with all ten standards, we send it back or reject portions of it.

I think we all do our job. And I think the councils definitely have a right to look at things other than just a number. I think they have probabilities they need to look at on rebuilding, and things like that.

Mr. GILCHREST. I see. Thank you very much. Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. I just wanted to say that, based on the panel's testimony and my reading of the second panel's testimony which is to follow, some of the witnesses here today are arguing that Congress needs to change either Magnuson or NEPA so that the statutes are more consistent or cohesive. And others are arguing that Magnuson and NEPA are complementary laws; that NEPA is not always implemented in a manner that aids the councils in meeting their requirements under Magnuson.

So I basically wanted to ask a series of questions. And in my mind, the question is: Do we have conflicting laws for governing fisheries, or do we simply need to encourage and support councils and the agency as they continue to improve their implementation process? That is sort of two questions.

But some of the questions I wanted to ask have certainly been touched upon, but I was trying to get answers in a more precise way. So I just was going to ask each member of the panel to quickly answer some of these questions.

First, NEPA requires the full analysis of the environmental impacts of a proposed action on all facets of the environment, including non-commercially managed species. So does Magnuson require this? That NEPA requirement, does Magnuson require that that be done? If each of you would quickly answer, starting with Ms. Bear, I guess.

Ms. BEAR. Not to my knowledge. But I would, frankly, defer to my colleague, the General Counsel of NOAA, for that question, because we don't interpret Magnuson. But not to my knowledge.

Mr. PALLONE. OK.

Mr. WALPOLE. I listened carefully to the question, and I couldn't quite get the grasp of it.

Mr. PALLONE. Well, NEPA requires a full analysis of the environmental impacts of a proposed action on all facets of the environment, including non-commercially managed species. So does Magnuson require that? Does it include that NEPA requirement when you proceed?

Mr. WALPOLE. That specific one?

Mr. PALLONE. Yes.

Mr. WALPOLE. In terms of the alternatives, I guess I am not focusing on what provision of NEPA you are talking about.

Mr. PALLONE. Just in general. In other words, NEPA requires it in general. I guess what I am trying to say is to what extent Magnuson is carrying out these NEPA requirements. You know, you guys are sort of suggesting that maybe we need some changes in both laws, or maybe we don't, maybe it is just a question of implementation.

He wants to answer it, so I will go to you. Go ahead.

Mr. FURLONG. Yes, I can answer that question. I believe that a full analysis of environmental impacts isn't specifically statutorily addressed in the Magnuson Act.

Ms. BEAR. Right.

Mr. FURLONG. However, there is a national standard, National Standard Nine that relates to bycatch, that is part of the environment; is very critical. And in terms of the SFA, when it introduced essential fish habitat, it was very specific about minimizing the adverse effect of fishing. But the agency, in its final rule that focused on that aspect of EFH, goes well beyond the statutory language. And in fact, the final rule that implements that encompasses a full suite of environmental considerations. So the agency's rule really addresses this question. The statute does not.

Mr. PALLONE. OK. Now, NEPA requires the consideration of a broad range of alternatives. Some of you talked about that, alternatives to the proposed action; including environmentally preferred alternatives that minimize significant environment impact. Does Magnuson require that? Or how does Magnuson go about dealing with that?

Ms. BEAR. No. I think several of us have already said that Magnuson doesn't require alternatives analysis.

Mr. PALLONE. OK. Anybody else? I have got a few more.

[No response.]

Mr. PALLONE. If not for NEPA, would the councils be required to present a range of alternatives for public consideration and comment? In other words, does Magnuson require that separate from NEPA? Does this not provide significant opportunities for the development and consideration of alternatives that may be viewed more favorably by the fishing industry?

So, without NEPA, would the councils be required to present a range of alternatives for public consideration, under Magnuson?

Ms. BEAR. No.

Dr. HOGARTH. No. No, sir.

Mr. PALLONE. OK.

Mr. FURLONG. Well, I would disagree with my colleagues in the context that when we set specifications specifically—when we are dealing with summer flounder and you are looking at a size season bag limit—we present a range of alternatives, as it relates to the very specific charge under National Standard One to come up with preventing over-fishing.

So we have a range of them. The perverse thing about it is that, if the council chooses some combo that we didn't put on the table, under NEPA we would actually have to go back out on the street

because the public didn't have adequate notice on that decision, because that wasn't one of the options that we had put forward at the time of setting specifications.

In terms of the management plan itself, and any amendment to it, I don't think there are alternatives, per se. It is just an evolutionary process that gets you to a point where you say, "Well, this is the best measure."

Mr. PALLONE. OK. Now, NEPA also requires an agency to respond in writing to public comments regarding various alternatives, and adjust EIS accordingly. Are the councils required to do this under Magnuson, or is that just a NEPA requirement? To respond in writing to public comments regarding various alternatives and adjust the EIS accordingly, are the councils required to do that under Magnuson?

Dr. HOGARTH. The councils are not required to respond. We do, under the NEPA process; but the councils are not required to respond to each comment. No, sir.

Mr. PALLONE. OK. And NEPA requires consideration of any cumulative environmental impact. Is that true under Magnuson, would you say?

Dr. HOGARTH. No. No, sir.

Mr. PALLONE. OK.

Dr. HOGARTH. Particularly when it is not a fishery resource.

Mr. PALLONE. OK. And then the last one, Mr. Chairman, an important policy aim of NEPA is to, and this is a quote, "attain the widest range of beneficial uses of the environment, without degradation, risk to health or safety, or other undesirable and unintended consequences." Now, does that appear consistent? I mean, I think it appears consistent with the Magnuson Act. Do you agree that that is consistent with Magnuson? Do you want me to go over that again?

NEPA says an important policy aim is to "attain the widest range of beneficial uses of the environment, without degradation, risk to health or safety, or other undesirable and unintended consequences." I think that is consistent with Magnuson, but I am just asking you if you agree. You say "Yes," Ms. Bear?

Ms. BEAR. Yes, I do.

Mr. PALLONE. OK. All right, thank you. Thank you, Mr. Chairman.

Mr. GILCHREST. Thank you, Mr. Pallone.

As a follow-up to the questions from Mr. Pallone, having gone through Magnuson now for a number of years and all of the requirements and statutes and standards with the Sustainable Fisheries Act, if we looked at the ten national standards and we looked at 14 required provisions in the Act, the ten national standards, the 14 required provisions, in my mind, present a fairly strict, but reasonable, environmental conservation requirement on the Magnuson-Stevens process, both on the agency, the councils, public input, on all of the fisheries management plans; which to some extent parallel the NEPA process.

Now, I understand that the heart of this NEPA is alternatives. But when you are dealing with a multi-species, multi-gear fisheries management plan, which is pretty extraordinary in and of itself, it seems that Magnuson to a large extent, in the process laid out

especially under the Sustainable Fisheries Act, parallels NEPA in a wide range of ways.

Dr. HOGARTH. Mr. Chairman, I agree. I think that it does. And I think that the heart of the discussion and the debate right now is how much does it, and are there just some things that could be put into Magnuson that would require you not to be doing somewhat duplicate efforts, and that would be more timely in the fact that you would finish Magnuson and you wouldn't then have to do additional NEPA work.

You know, like I say, no one wants to get out of the public having a good process to go through. What we are trying to do is make sure that process is timely, such that what the fisherman sees on the water today is not taking us two years to implement. And so I think that is the debate: Can Magnuson? And in my opinion, it can, with the alternatives, in particular, being added to it. And I think that is what we should work together on, to see how we can get it done.

Mr. GILCHREST. I don't think any of us up here—myself, or Mr. Pallone—want to reduce the environmental protection in a broad way; especially since we are moving now into an ecosystem process. Thank you, Dr. Hogarth.

Dr. HOGARTH. Thank you very much. And I look forward to working with you on this issue. Anything we can do, we will. And I think CEQ and our attorneys just need to sit down, and maybe with your staff, and really take a good look at this.

Mr. GILCHREST. Thank you. We don't want to reduce the science; we don't want to reduce the public input; we don't want to reduce alternatives; we don't want to reduce environmental protection in the big picture. But we don't want to make this system so cumbersome that the science we use is outdated by the time the fisheries management plan is implemented, and that has been the case in a number of situations. So that is our goal.

Mr. Pallone, do you have any other questions?

Mr. PALLONE. I just wanted to ask a budget question, if I could, of the panel. Because since 2003, the President's budgets for NMFS have requested on the order of $8 billion for NEPA compliance—million, I should say. However, in each of the past two years, Congress has only appropriated $3 million of the agency's budget for NEPA activities. So obviously, $5 million less.

If any of you, or each of you, could address the issue, to what degree do you think that inadequate funding is impacting the ability of NMFS to implement NEPA in the fishery management context?

Mr. WALPOLE. Well, I can't speak for the program, since I am in the general counsel's office, but my sense is that the President's request was such that it was to assure full funding for the program, including the NEPA work. When those funds weren't made available, it probably has had an effect on that.

Mr. PALLONE. So it has definitely had an effect, in your opinion?

Mr. WALPOLE. I would say that without the full funding there is an effect there, yes.

Mr. PALLONE. OK. I don't know if anybody else wants to speak. Go ahead.

Mr. FURLONG. Can you see that, Mr. Pallone?

Mr. PALLONE. I just see a white piece of paper.

Mr. FURLONG. Right. Blank piece of paper, exactly right.

Mr. PALLONE. Right.

Mr. FURLONG. That is where the councils start on an EIS. When the agency gets it, they get some sort of text. The agency, together with the councils, developed this document. The councils have never seen any significant funding from Congress, in terms of NEPA requirements.

Bill Hogarth, just departed, has provided, if you will, some supplemental monies to the councils, at about $150,000 per council, for a couple of years. That has been the extent of it. And when you talk about pulling together huge documents, that I think are crazy, you know, their value is really dubious, in my opinion. You know, it is a problem.

Now, continue with the program, yes or no? It is like a toggle switch. If you support it, then it should get funded. Realize that NEPA was Public Law 91, and the Magnuson Act was Public Law 94. It is almost the same Congress that had the sensitivity six years later when it made the Magnuson Act to appreciate what was in NEPA.

To me, the Magnuson Act is a very strong environmental act. And if we honor what is required in that act, I think the environment is not disserved by us.

Mr. PALLONE. Well, thank you. Ms. Bear?

Ms. BEAR. Yes. Just a word going back to your original question about the budget. I certainly would think that the money that was requested by the President's budget is needed and would be well spent, in the context of NMFS' compliance with NEPA. NMFS should be commended, certainly, for responding to the various judicial decisions that found that its compliance was inadequate.

It is very typical, though, for agencies who have gone through that situation where for a while they were found to be out of compliance and then start to comply with vigor, at times to focus on the legal requirements and not on the management of the process.

I couldn't agree more with Mr. Furlong that a 7,000-page EIS is crazy. But I do take issue with his characterization of that as obsequious compliance with NEPA. That, in my view, is not compliance with NEPA. NEPA is supposed to serve the public and decisionmakers, and I know of no member of the public or a decisionmaker that wants to plow through a 7,000-page EIS.

Often, when we dig into the details of these situations—which I would certainly hope to do in the very near future—we find that the problems lie not with legal requirements. That is what lawyers, obviously, usually pay attention to, are the legal requirements. And courts are looking really at assuring that citizens have their rights fulfilled in terms of public involvement, and that the analysis covers the requirements; but courts aren't looking at how the process is actually managed.

And a lot of times, we find that the kind of horror stories that you do hear occasionally about the NEPA process—whether it is length of time, or the 7,000-page EIS—are attributable to management issues; which in turn often find their root in lack of resources.

So the answer to your question, I think, would be, yes; that it would be important for Congress to fulfill the President's budget request.

Mr. PALLONE. OK. Thank you. Thank you, Mr. Chairman.

Mr. GILCHREST. Thank you, Mr. Pallone.

Mrs. Drake?

STATEMENT OF THE HON. THELMA DRAKE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mrs. DRAKE. Thank you, Mr. Chairman. I am just going to make a comment, since I did not hear the testimony of panel one. And I apologize for that. But I would just like to say, Mr. Chairman, I agree with your summary you just made. But I think it is our mission to make sure that we aren't requiring things to be duplicative; that we aren't requiring things to be so lengthy that we lose our best science in making decisions; and that we use our staff time and our resources wisely.

And I am hoping our NEPA task force will dig deeply into this issue and make the recommendations that have a program in place that manages this resource, makes the best decisions, and makes the best use of your time.

So thank you. And I would like to yield my time back to you, in case you have more questions.

Mr. GILCHREST. Thank you, Mrs. Drake.

I do have a follow-up question. Ms. Bear, in your comments about EIS and supplemental EIS's when there are proposed changes, in a number of areas in the fisheries there are adaptive management procedures that generally are only useful if they are done in a timely fashion. Where does an EIS fit into adaptive management?

Ms. BEAR. That is a very important issue. And in fact, it is one of the issues that was highlighted by our NEPA task force as worthy of some additional guidance from CEQ.

But in general, first of all, let me clarify. The requirement to supplement EIS's only arises if the new information rises to the level of significance that triggered the original EIS. In other words, it is not every piece of new information that requires you to supplement the EIS. It is only really big, important, dramatically new, significant information that was not considered in the original EIS.

In terms of adaptive management, this is one of the issues I do want to talk to NMFS about in more detail. But generally speaking, we would be looking for an EIS that covered a range of alternatives and affects analysis in a way that allowed for variation in the future, and a variation that was articulated ultimately in a record of decision with monitoring and provisions for bringing that monitoring back to the councils and to the agencies in a way that they would be able to adjust the management decisions, either without doing any further NEPA analysis at all or, in unusual cases, perhaps some additional analysis.

Another way to look at it is one of the agencies we work with that works in an environment with a lot of changing circumstances has prepared programmatic EIS, multiple, of course, alternatives and analysis, and then issued a record of decision one year on what they are going to do; but then followed that with subsequent

records of decision on the same EIS, but adjusting their decision as time goes by based on the information they are getting. And that has been upheld by the courts. There are several ways to approach it.

Mr. GILCHREST. But do you know how what you just described to us is working, or would work? In the Gulf of Maine, they had three rotating closed areas for scallops. And maybe Mr. Walpole can comment on that. How would what you just described to us, as far as NEPA is concerned, with an EIS with adaptive fisheries management, work in that one particular area? We would like to follow up on that, to see how that process works in New England.

Ms. BEAR. OK.

Mr. GILCHREST. Mr. Walpole?

Mr. WALPOLE. Thank you. And I certainly agree with the comments that Ms. Bear made, in terms that you don't do a new EIS, or a supplemental EIS, unless you get new, significant information. That is the situation that we deal with pretty frequently, in terms of getting big, important information that affects what is going to be allowed in the fisheries each year. And so this is something that comes up frequently to us.

And she makes a good point, that this is something that needs to be managed properly. But in terms of the timeframes in there, it is a challenge for us each year to go through it. I say "for us"; I am speaking from what I know about the program, since I am not in the program. But it is a challenge to get it done.

Ms. BEAR. Mr. Chairman, if I could just add, supplemental EIS's are an area where CEQ has the authority to develop alternative arrangements. And the six circumstances I mentioned earlier where we have approved alternative arrangements for NMFS, including either on an ad hoc or a permanent basis for a particular fishery, are in the context of supplemental EIS's.

We will certainly follow up and discuss with NMFS the situation that you mentioned in the Gulf of Maine, and I will get back to you with our ideas on that.

Mr. GILCHREST. Thank you. The fishery in Alaska, the groundfish fishery with the 7,000-page EIS, now, I am not saying that wasn't necessary, necessarily, because I haven't read it—I'll have Dave read it here, over the weekend, and write me a memo.

[Laughter.]

Mr. GILCHREST. Now, CEQ is going through a NEPA analysis right now? Or who is doing that?

Ms. BEAR. The task force that I mentioned?

Mr. GILCHREST. The task force.

Ms. BEAR. We had an interagency NEPA task force; not to be confused with this Committee's NEPA Task Force, although many people will be confused, no doubt.

Mr. GILCHREST. Members of Congress, most particularly.

Ms. BEAR. It was composed of interagency representatives from a number of agencies that have a lot of experience in NEPA, and were essentially recommendations to us.

Mr. GILCHREST. Is your task force completed?

Ms. BEAR. Yes, it is. And there is a report out, publicly available, on those recommendations.

Mr. GILCHREST. OK, thank you.

Ms. BEAR. And one of those recommendations is for us to issue guidance across the board on how to better use adaptive management with the NEPA process.

Mr. GILCHREST. We have it.

Ms. BEAR. There you go.

Mr. GILCHREST. Do any of your recommendations take into consideration the groundfish fishery in Alaska that required a 7,000-page EIS?

Ms. BEAR. No. That looks at NEPA compliance across the board. Again, I want to say that, in my view, NEPA does not require 7,000-page EIS's. I have not had the pleasure of reading it, and I hope I don't join Dave this weekend in having to read it.

Mr. GILCHREST. Mr. Walpole.

Ms. BEAR. But in my mind, that is actually quite contrary to the requirements in our regulations. I am well aware that agencies at times, because of the information, have to go over the 150-page page limit. And indeed, our regs provide that for proposals of extraordinary complexity, usually national proposals, they can be up to 300 pages.

There are also appendices. We really encourage agencies to put technical information in appendices, or to incorporate other documents by reference, as long as they are available to the public.

But the whole thrust of the process set out in our regs is to cut down and really eliminate those kinds of EIS's, and make the process something that the public and decisionmakers can engage in in a very proactive and easy way.

Mr. GILCHREST. Thank you. Mr. Walpole?

Mr. WALPOLE. And I can't agree more with her comments. No one likes to have a huge document, and 7,000 pages is certainly pretty extraordinary.

I would mention that the basis for this was a programmatic program so that we wouldn't have to do EIS's every year for the fishery up there. The earlier environmental impact statement had been stricken down by the court, and so we had gone back to make changes that were necessary, and we ended up with this extraordinary EIS. But as with any agency, that is something that we try to avoid like the plague.

Mr. GILCHREST. Will you then, as a result, not have to do an EIS on an annual basis, or a regular basis, with the groundfish fishery?

Mr. WALPOLE. We are evaluating that now.

Mr. GILCHREST. I see. Well, any other comments? Dan?

Mr. FURLONG. Yes, Mr. Chairman, a couple of things. Don't forget New England. They had a 1,700-page EIS, plus another 300 pages of appendices. So they had a 2,000-page EIS for New England groundfish, court ordered.

But let me ask you a question for the Committee. Given that the councils have been exempted under FACA rules, are you aware of any abuses, or any, if you will, down side, in terms of adverse impacts on the public or adverse impacts on the resource, because we enjoy that exemption?

I don't think you will find that. That is the question: What is the down-side risk, you know, if NEPA, if you will, disappears and the Magnuson Act prevails? I think you will find that there is not a great risk. It is a very environmentally sensitive act. And I really

would suggest that you recognize, as you have already said, there are ten national standards, there are 14 mandatory requirements.

It is resource-focused. I know we are a mixed bag. EPA, you know: Focused on one thing. We have got a conservation duty; we have got an environmental duty; and here is this process that overlays it. But if you look at, if you will, the organic act of Magnuson, you know, it is a good Act, and it gets the job done.

Mr. GILCHREST. And we want to make it better, Dan.

Mr. FURLONG. We all do.

Mr. GILCHREST. Thank you all very much.

Our second panel is with Mr. David Frulla, attorney, Collier Shannon Scott; and Mr. Eldon Greenberg, attorney with Garvey Schubert Barer; and Ms. Suzanne Iudicello.

Now, I understand that we are going to have a vote in about five minutes on the House floor. So what I think we will do, I think we can get started with your opening statements, then we will take a break while we vote, and come back and ask questions.

And I don't know what the standing-room-only situation is going to be like, but if you are standing in the back of the hearing room, there are more seats. I don't think we will have that problem right now. I should have done this before. But if there aren't enough seats out there, the lower dais is empty, and you can sit in the lower dais. If you see somebody standing near you, just tell them to find a seat. Much more comfortable.

We will start with Ms. Iudicello.

STATEMENT OF SUZANNE IUDICELLO, INDEPENDENT CONSULTANT

Ms. IUDICELLO. Thank you, Mr. Chairman, for the opportunity to be here to offer some views on issues related to the integration of requirements under the National Environmental Policy Act and the Magnuson-Stevens Fishery Conservation and Management Act. My observations are my own. I am not representing anyone or any organization. It is a pleasure once in a while to be an opinionated woman at large, and I guess that is what I am doing today.

Mr. GILCHREST. I might have some questions about that later on. [Laughter.]

Ms. IUDICELLO. My message today is that the requirements of the National Environmental Policy Act and of the Magnuson-Stevens Act are not in conflict. NEPA is primarily a tool to help decisionmakers highlight possibilities, look at all the alternatives they might have before them; to look at the consequences of what those alternatives would be; to engage the public; and then to evaluate and make a record of their decision process, and make that decision process transparent to the public.

The Magnuson Act, while I would agree with the previous witnesses that it has a conservation policy element to it, is principally enabling legislation to allow our managers to authorize fishing. One is a decision tool; the other is a resource management tool.

NEPA can, and should, be something the councils use to lay the groundwork for better informed decisionmaking. And if the councils and the agency implement it properly in the course of planning, it can be not only an offensive mechanism, if you will, a sword, but it can also be a shield. Because you have a record of decision that

lays out what you considered, why you considered it, how you came to decide what you decided. And as we have heard from Dr. Hogarth, improved implementation of NEPA has actually helped them with their won-loss record in court.

In Fiscal Year 2003, Congress authorized additional money for the agency to hire NEPA coordinators and to work a little harder and better on producing its documents. And that has had a good effect, and will continue, I think, to improve their performance.

This notion of regulatory streamlining has come up in some of the statements. And I think the idea here is that the NEPA process enables the agency to front-end-load information gathering and information consideration. Very often, what happens in the Magnuson Act is a proposal comes out and the council is considering it and debating it, but the only way you get alternatives is that somebody comes in at the back end of the process and disagrees with what has been proposed and is on the table. So you have post hoc rationalization about why you made a decision, or you get information that comes in at the back end of the process. And that is when things get very complicated, very confusing, and very costly.

I think the concerns that you have heard about NEPA implementation, the timing, the length of the documents, the length of the amount of time that is taken, really lie in this area of managing the process; rather than the legal requirements.

Ms. Bear raised several possibilities for how the agency could speed things up. There is no reason, for example, to begin your NEPA process coincident with the triggers that start the Magnuson time lines ticking. I would agree with those who complain that they don't mesh very well, but that is because they try to start them at the same time. If you were doing programmatic EIS's, you could start that at any time before you actually were doing management plan amendment.

It is true that when folks are talking about NEPA documents these days they make this gesture, as in chin-high, rather than even citing the number of pages. But as Ms. Bear said, the law doesn't require that voluminous amount of material.

One thing I would like to mention that hasn't come up yet is the notion that NEPA somehow gets in the way of permitting, especially in cooperative research or experimental fisheries. I was surprised to see a column in the "National Fisherman" magazine by Dr. Hogarth, where he said that it was NEPA's fault that they weren't getting permits out in time for cooperative fisheries research in New England.

I served on a panel of the National Research Council a couple of years ago, exploring for the National Marine Fisheries Service how better to do cooperative research, and NEPA wasn't one of the concerns that came up. A lot of the problem with the delays in the permitting had to do with standardization of agency procedures and how permits are granted from one region to another. So I would suggest that that again is another process management issue, rather than a legal requirements issue.

I would be happy to answer questions. Thank you.

[The prepared statement of Ms. Iudicello follows:]

Statement of Suzanne Iudicello, Author/Independent Consultant on Marine Conservation

Good Morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify at this oversight hearing on the relationship between the Magnuson-Stevens Fishery Conservation and Management Act and the National Environmental Policy Act. My name is Suzanne Iudicello; I offer my remarks today as an independent consultant in marine conservation. You have asked for views on several important issues related to the integration of these two statutes. My observations on NEPA and the Magnuson-Stevens Act are drawn particularly from work in which I have participated. This includes:

- A project conducted for the National Marine Fisheries Service (NMFS) on requirements under multiple statutory authorities;
- Participation on the National Research Council Committee on Cooperative Research in the National Marine Fisheries Service;
- The U.S. Fishery Management Program of the H. John Heinz III Center for Science, Economics and the Environment that produced the book Fishing Grounds; and
- Six years of service on the Marine Fisheries Federal Advisory Committee, MAFAC.

My main message today is that NEPA and the Magnuson-Stevens Act are not in conflict. The former is a tool to help decision-makers engage the public, consider alternatives, and understand the consequences of proposed actions. If used effectively by fishery managers, it could be both a sword and a shield: an offense in the effort to move toward ecosystem-based approaches to fishery management, and a defense against challenges to administrative actions.

The latter has as its stated purposes managing fishery resources, supporting international fishery agreements, promoting fishing, calling for preparation of management plans, establishing councils, encouraging development of fisheries, and, as of 1996, protecting essential fish habitat. Although the Magnuson-Stevens Act has numerous administrative features, it is essentially a resource management statute. NMFS is no different than the U.S. Forest Service, National Park Service or the Federal Aviation Administration in having to follow both programmatic or enabling legislation as well as administrative laws such as NEPA.

Despite complaints you may hear about so-called conflicts among statutes, it appears to me that in the past three years since the Congress last reviewed NMFS compliance with NEPA and other statutory and administrative requirements, the agency has tremendously improved its record. In FY 2003, Congress provided additional resources so that the agency has the capacity in its budget, organization, structure and management processes to meet requirements under multiple statutory authorities and national policies.

What are the signs of improvement? Stakeholders may still be filing lawsuits, but the difference today is that the agency is winning. NMFS has used the additional resources to improve production of documents such as Environmental Assessments, Environmental Impact Statements and Records of Decision. The addition of NEPA coordinators in regions and councils has helped improved performance. Efforts to streamline the regulatory process by front-end loading information gathering within the agency will improve it even more.

Is there room for further improvement? Certainly. It is my view that the system for effective stewardship and procedural compliance exists, but isn always implemented well. There are specific ways to correct problems about which you have heard testimony: the length of time NEPA compliance requires, the meshing of deadlines under NEPA and Magnuson-Stevens, the degree of environmental analysis required for actions such as experimental fishing permits, research, or minor regulatory change. I like to address each of these issues in turn, and finally, say a few words about the concern over lawsuits.

NEPA timelines and Fishery Management Plan deadlines can be coordinated

One of the complaints you have heard is that the Magnuson-Stevens Act contains deadlines and timetables that must be met in the course of fishery management plan development and amendment, and that NEPA's own timetable does not coincide with the council calendar.

The difficulty most cited by council and agency staff is that they cannot mesh the timelines and respective requirements for notice, scoping and comment periods of NEPA and M-S FCMA. Council and agency staff will point out that periodic stock assessments are conducted in the summer, results are available in the fall, council decision meetings occur in November or December, with decisions on TAC-setting necessary by the beginning of the year for many fisheries, at latest by early spring.

They state further that this 4-6 month time frame does not provide sufficient time to conduct the kind of environmental analysis anticipated by NEPA.

This characterization fails to recognize that there is more than one alternative to preparation of a full EIS for every annual adjustment of the catch quota. It does not take into account the possible use of programmatic EIS's, nor does it clearly grasp what NEPA is aiming for in analysis of the "proposed federal action."

In my view, the "federal action" at hand is authorizing fishing, not bumping a TAC up or down by a few thousand pounds in response to a new stock assessment every autumn. The decision to authorize fishing—or not—does not need to be made on an annual basis, and in fact, could be made relative to a sustainable fisheries program, a stock recovery policy, a regional or ecosystem program, a capacity reduction program, or a target range for catch for a period of years. If the agency does a thorough job of environmental analysis in a set of programmatic or supplemental EISs on entire fisheries, or overall fishery management plans—not on an amendment that changes mesh size or ups the catch—such a document would provide the foundation for subsequent EAs and FONSIs or for tiering. (See 40 CFR 1502.20,1508.28; Forty Questions #24(c)).

Both NEPA and M-S FCMA contain sufficient flexibility to be synchronized and integrated. Councils do not have to wait for the delivery of a stock assessment to begin a NEPA analysis if they are analyzing the important action, and putting it in context. Is it a whole new program or fishery? Then start scoping as soon as possible, rather than waiting for the stock assessment. If it is an annual or in-season adjustment to a plan whose alternative measures have already been analyzed, they should consider whether the level of change really warrants an EIS or could be discussed in an EA? Could it be done as one of several tiered decisions that are subsequent to a prior major Record of Decision? Nowhere in the statute or the CEQ regulations does NEPA require that the agency go back and start the entire analytical process over unless the proposed federal action or the new information that changes alternatives and consequences is significant. Other options include doing a new Record of Decision or a short Environmental Assessment to elicit public comment on the new information. The President's Council on Environmental Quality is open to approaches on these and other ways to make NEPA compliance fit the timing requirements of the Magnuson-Stevens Act. Analysis for most of the annual, in-season and similar adjustments that councils make should only take a couple months, not years.

NEPA does not require voluminous documents that overwhelm the system and the public

Irate fishery stakeholders no longer refer to NEPA documents in words or even numbers of pages. They hold a hand at about chest level to indicate the size of recent analyses. Such daunting amounts of material are not required by NEPA. In fact, the law calls for plain language, and the CEQ regulations actually limit the number of pages of text in a final EIS to 150 to 300 for very complex proposals (40 C.F.R. 1502).

While it is understandable that documents prepared in the past 5 years or so were overly inclusive as a defensive tactic, it is time for NMFS and the councils to re-examine the purposes, policies and potential of NEPA.

The point is not to wall off the public from the decision-maker with battlements constructed of paper, but to engage the public, to make the thought process behind decision-making clear, to show a variety of alternatives and what their consequences might be. Not only does this process not require thousands of pages, the spirit and letter of NEPA caution against it. The courts are looking for quality analysis, not quantity of data. As an example, a recent award-winning EIS was in the form of a coffee-table book (See National Association of Environmental Professionals http://www.NAEP.org/COMMITTEES/awardprogram.html#AWARDEES).

How can we improve our environmental documents? In some cases, clearer, tighter, shorter writing is the answer. That comes with training and practice. Although one may jump to the conclusion that it might be better to farm out such tasks to consultants rather than in-house scientists and fishery managers, the record shows that EIS's prepared by consultants are longer than those prepared in-house.

Beyond better writing, the CEQ regulations offer numerous tactics for reducing the paper volume. Analysis is the key. A page of thoughtful analysis is worth 60 pages of statistical tables. Tiering is an approach that begins with a general, programmatic analysis. Subsequent actions are covered in "tiers" that incorporate the prior discussion by reference, and focus on the issues specific to the action under consideration. Incorporation by reference allows agencies to append materials without including them in the text of an EIS. All these methods of cutting down the

paper burden have been approved by the courts, incorporated in the CEQ regulations, and are available to the National Marine Fisheries Service.

NEPA is not to blame for every delay in permitting

It came as quite a surprise to read a recent column by Dr. William Hogarth in National Fisherman magazine wherein he blames NEPA for the slowness in issuance of experimental fishing permits and similar permitting required for cooperative research projects between the agency and the fishing industry.

In 2003, the National Research Council convened a committee on cooperative research at the request of the National marine Fisheries Service. This panel reviewed all aspects of cooperative research, from its history to case studies, to legal and financial impediments. Nowhere in our entire report did we find that NEPA requirements stood in the way. The only mention of environmental analysis in the report is the following:

For some EFP applications, an environmental assessment (EA) may also be required because the environmental impact of the proposed fishing activity is believed to be substantial. The preparation of an EA requires considerable effort and expertise, and the criteria for when an EA is required vary from region to region.

The section concludes that the delays are caused by overall confusion about the NMFS application procedure, and the report recommended that the agency standardize its permitting procedures. No mention was made of NEPA.

The Mid-Atlantic Fishery Management Council has found a way to streamline experimental fishing permits for cooperative research. Their solution was to set aside a portion of the total allowable catch of all managed species for cooperative research. That means that the environmental impact of that fishing mortality already has been analyzed in the course of developing or amending the FMP and annual catch specifications. There is no unaccounted mortality that might arise when an experimental project comes up, and that must then get its own separate analysis before a cooperative research project can be approved. Why can't all the regions take a similar approach? Why hasn't the agency demanded a standard, national policy for permitting cooperative research and expediting experimental fishing permits related to that activity?

Litigation is part of the system, not an indication that the system is broken

Finally, a word about lawsuits over NEPA.

Reading fishing industry publications and listening to the complaints and handwringing of officials and commentators over the past couple years, I get the impression there is a notion afoot in the land that we have somehow become a government of two functions, not three, and that the courts are no longer—or shouldn't be—part of the old "checks and balances." I must respectfully disagree. Litigation, seeking redress in the courts, is part of our system, not an indication that the system is broken.

It is true that the system and the rules changed significantly in 1996, and that litigation over compliance with those rules has taken a heavy toll on the National Marine Fisheries Service. Many of the changes that were advocated by the conservation community in passage of the Sustainable Fisheries Act were precisely for the purpose of providing litigation handles on what previously had been a slippery, unaccountable and largely discretionary system. The law now includes specific targets, timetables, and concrete requirements to stop overfishing, reduce bycatch and protect essential fish habitat. It should not have come as a big surprise that when the new law's deadlines and targets were not met, advocates used litigation to hold the agency accountable, and that environmental groups are responsible for about a third of the action in the courts.

Recognizing that litigation is part of our system, nevertheless, it does have the effect of trumping all other activity, not only for the agency but for stakeholders. Once the agency is in court, it no longer has the flexibility to try different approaches, convene stakeholders for negotiation, or work with councils to improve background and analytical documents. If an organization is not a plaintiff or intervenor, it doesn't have a seat at the table or a role in crafting solutions. Once suit is filed, participants are either on the docket or on the sidelines. Not only does this not elicit diverse ideas, it sucks up resources that are desperately needed to conduct basic business, let alone plan ahead or think creatively to find ways to integrate disciplines and mandates.

What is important to note about environmental group litigation is that while it may be new for the National Marine Fisheries Service, it is not new in the history of natural resource management. NMFS is about 10 years behind the U.S. Forest Service, National Park Service and other resource managers in suffering through litigation, particularly challenges to its analysis of the impacts of fishery manage-

ment actions required in the Magnuson-Stevens Fishery Conservation and Management Act, National Environmental Policy Act, Regulatory Flexibility Act and various Executive Orders. The agency finds itself in what one NEPA expert has described as "Stage II" in the evolution toward compliance, a stage that occurs after numerous court orders and injunctions, where money is made available for contractors and consultations, detailed prescriptions emerge from general counsel, and the agency does enough to demonstrate that it is trying to respond to litigation. NEPA managers in these other agencies can tell you that what the Fisheries Service is experiencing now is familiar ground, and that there are ways to improve performance, comply with the laws, and get resource management done. We can learn from the experiences and approaches tried elsewhere, even if it seems the only relevant lesson is "you are not alone."

The good news is that the National Marine Fisheries Service is no longer in "Stage I," or denial that NEPA applies to fishery management actions. The agency has undertaken numerous activities to tap experience of other resource agencies, use the planning and brainstorming ingenuity of its own and council staff, and employ resources provided by Congress to expand training in NEPA and other procedural requirements, improve consistency in document preparation and get tough on the quality of decision record that will be approved.

This progress should not be thwarted by attempts to exempt the agency from NEPA or to declare that the Magnuson-Stevens Act public participation and decision process is equivalent to NEPA. The two laws are not inconsistent, and in fact are comparable in their policies. But the fishery management planning process and the environmental impact assessment process are neither the same nor redundant. The purpose of a fishery management plan or amendment is, at the most basic level, to authorize fishing. The purpose of an environmental impact statement is to provide decision makers and the public with a full exposition of the alternatives and consequences of authorizing fishing in the manner proposed in the plan. It does not seem unreasonable that decision makers at the council and in the agency would want to know the potential effects of a fishery management proposal on not just the target stock, but related fish, other animals in the ecosystem, the market, participating user groups, communities and so forth. And while fishery management plans do incorporate information about all these aspects of the human and natural environment, they do not provide the alternatives analysis that is the heart of a well-prepared EIS. Whether it is a vote by a council or final approval of a plan by the Department of Commerce, the fishery management plan process does not, without NEPA, provide a mechanism whereby the decision maker and the public can evaluate an array of alternatives and their consequences.

The compilation of information and analysis of alternatives that take place in an EIS can serve the fishery management process rather than thwart it. Issues surfaced through NEPA at the end of the planning process make for inefficient, costly and frustrating outcomes. As first level decision-makers, councils could benefit from having the full disclosure of alternatives and consequences before them early, rather than at the end of their decision process.

It is time they took advantage of the exploratory tools NEPA provides, so they can use them to make better decisions, document and defend them.

Thank you for the opportunity to share these views. I will be pleased to answer any questions.

Mr. GILCHREST. Thank you very much.

Mr. Greenberg.

STATEMENT OF ELDON GREENBERG, ATTORNEY, GARVEY SCHUBERT BARER

Mr. GREENBERG. Thank you, Mr. Chairman. My name is Eldon Greenberg. I am a partner in the Washington law firm of Garvey Schubert Barer. I want to thank you, Mr. Chairman, and the Committee for inviting me to testify this morning concerning the relationship between the Magnuson-Stevens Act and NEPA.

I have long experience with both these statutes. I acted as general counsel to the National Oceanic and Atmospheric Administration in the Carter Administration, when we were just getting started with implementation of the Magnuson-Stevens Act. And since

leaving government some 23 years ago, I have spent a lot of time representing private parties, both in the administrative process and in litigation, under the Magnuson-Stevens Act and NEPA. I thus hope that my perspective will be useful to the Committee this morning.

I would emphasize that I am not testifying today on behalf of any company or organization. The views I express are my own, alone, and I take full responsibility for them. I would ask that my full statement be submitted for the record.

As many witnesses have said this morning, both these statutes, the Magnuson-Stevens Act and NEPA, share the laudable purpose of ensuring that there is a reasoned decisionmaking process with respect to the management and conservation of our fishery resources.

The people have also talked about public participation and openness. And I would underscore that NEPA, on the one hand, may be a full-disclosure statute, as the courts have sometimes said; but there is no process that is more open and more transparent, in my experience, than the fishery management and conservation process under the Magnuson-Stevens Act.

Whether NEPA is truly necessary is a question that has been much debated. You have heard that debate this morning; whether the FMP is a functional equivalent of an environmental impact statement or not. I think there is a lot of merit to the argument that it is. But leaving that broader question to one side, it seems to me to be undeniable that there are some practical problems in implementing the two statutory mandates. And that is what I want to focus on this morning, with reference to three specific problems.

First, there is the problem of who is in charge under NEPA. Senator Magnuson was fond of saying that the Magnuson-Stevens Act created a unique system of government where you had to balance the councils on one hand, and the role of the National Marine Fisheries Service and the Secretary of Commerce on the other.

I think there is considerable uncertainty and confusion as to just who the decisionmaker is under NEPA. In my view, because it is the council that is responsible for making fishery management decisions, it must be the council which is the ultimate policymaker under NEPA. I don't think that the law is clear with regard to that issue at this point, and I think it needs to be clarified.

A second problem, which has already been addressed this morning, relates to the massive and incomprehensible nature of some of the NEPA documentation that has been produced by the agency. I think the problem here is particularly the result of what I call "unmoored programmatic reviews"; broad programmatic statements that have been required by the courts that are, frankly, unrelated to any specific decisionmaking issues before the councils. And you end up with this process that just takes years and years to complete.

The 7,000-page EIS for the Bering Sea, Aleutian Islands, and Gulf of Alaska groundfish fisheries was ordered by the court in July of 1999. It wasn't completed until June of 2004. It took five years to do that document, an enormous amount of resources. And at the end of the day, it was hard to know how relevant it was to

the real decisions that had to be made by the North Pacific Council.

The third problem, which has also been addressed by other witnesses, relates to the dynamic nature of fishery management. There is an overriding imperative in the fishery management process to use the most current data available. Councils have to rely on the most recent survey data in making annual management decisions such as setting tax, establishing bycatch rates, adjusting allocations among user groups.

If you have to prepare a full EIS on your annual management decisions, you find yourself in a quandary as a council. You simply can't accommodate the need to use the most recent data available, and go through the full process that is required for an environmental impact statement.

I want to conclude by mentioning the Federal Advisory Committee Act example, which Dan and Furlong and others have mentioned. Congress faced a situation in 1982 where the councils were suffering under the applications of the Federal Advisory Committee Act. It wasn't that those requirements were bad. It was that they didn't mesh fully with the management needs of the councils.

And the solution that Congress hit upon was to take a hard look at FACA, determine what requirements in FACA made most sense in the council process and what didn't, and then tailor those requirements to the specifics of the fishery management process.

I think it was a very successful effort. And as Mr. Furlong said, if you look at the 23-plus years of history since the FACA amendments of 1982, you will see that there just have not been complaints about the openness and transparency of the councils and their subsidiary bodies, and their ability at the same time to meet all of the full requirements for public disclosure.

That concludes my statement, Mr. Chairman. I would be happy to answer any questions you might have.

[The prepared statement of Mr. Greenberg follows:]

Statement of Eldon Greenberg, Attorney, Garvey Shubert Barer

Good morning. My name is Eldon Greenberg, and I am a partner in the Washington, D.C. office of the law firm of Garvey Schubert Barer.[1] I am pleased to be here today to address the relationship between the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act") and the National Environmental Policy Act ("NEPA"). I have extensive experience with the application of both statutes, having worked on their implementation when I was General Counsel of the National Oceanic and Atmospheric Administration ("NOAA") in the Carter Administration, and having represented numerous private parties in Magnuson-Stevens Act/NEPA administrative proceedings and litigation. I thus hope that my perspective will be of use to the Committee. I am not testifying today on behalf of any company or organization, and the views I express are entirely my own.

Both NEPA and the Magnuson-Stevens Act share the laudable purpose that Federal agencies should engage in a reasoned decision-making process when taking actions that may affect public resources. The Magnuson-Stevens Act contains National Standards, elaborated now over the course of almost three decades, to ensure the wise conservation and management of fishery resources. Its procedures for participation by interested parties and transparency of agency deliberations help guarantee that the environmental implications of resources decisions are fully understood by agency decision-makers and private stakeholders. NEPA, for its part,

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establishes its own procedural mechanisms for environmental review that, in the words of the Supreme Court, "prohibit[] uninformed...agency action."[2]

Whether NEPA is truly necessary to inform Magnuson-Stevens Act decision-making, rather than merely redundant, is a question that has been much debated, especially in recent years. It has been suggested, for example, that, since fishery management plans might be regarded as providing the "functional equivalent" of an environmental assessment or environmental impact statement, NEPA's requirements can be dispensed with altogether, just as such documents are not required for various regulatory actions of the Environmental Protection Agency under the Clean Air and Clean Water Acts. In my judgment, there is much merit to the argument that NEPA adds little to the analytical requirements of the Magnuson-Stevens Act. Leaving that broader question to one side, however, it seems to me to be undeniable that there are practical problems in integrating the two statutory mandates. In such circumstances, there is an incentive to avoid inconsistencies and conflicts, eliminate redundancies and overlap and reduce needless complexity. In my testimony this morning, I would like to focus on three specific problems and then suggest one possible way of going about solving those problems.

(1) **Deciding Who Is In Charge.** The late Senator Magnuson was fond of remarking that the Magnuson-Stevens Act creates a "unique system of government." There is no other statute of which I am aware which utilizes a mechanism quite like the regional fishery management council or establishes a relationship quite like that between the councils and the Secretary of Commerce. In this system, the councils are the basic policy-makers, while the Secretary's responsibility is to ensure that conservation and management measures conform with the law.[3] To date, however, NEPA has been implemented in a way that doesn't quite fit this model. In fact, as documented in a 2002 report for the North Pacific Fishery Management Council, the applicable NOAA Administrative Order governing NEPA compliance (NAO 216-6) "provides little guidance on the role of the regional fishery management councils in implementing NEPA," and "there is no explanation how the council becomes involved in the decision making process, or what happens if the council and NMFS disagree."[4] Thus, there is considerable uncertainty, for example, whether it is the council or the Secretary who should make the ultimate policy decisions embodied in a NEPA Record of Decision. To my mind, since the council sets fishery management policy, this should responsibility plainly lie within the province of the councils. Unfortunately, I am not sure that current law provides quite so definitive an answer.

(2) **Unmoored Programmatic Reviews.** One the most difficult problems under NEPA has been how to prepare "programmatic reviews" of fishery management plans. In the early years of the Magnuson-Stevens Act, where fishery management plans were just being approved, a corresponding programmatic NEPA review was sensible and could be readily integrated into decision-making about specific management measures. More recently, however, particularly as the result of orders in litigation,[5] broad-scale programmatic reviews have been undertaken without reference to specific management proposals before the councils. The result has been massive documents that have taken years to complete and that virtually defy comprehension. Moreover, as the National Academy of Public Administration noted in 2002, such analyses, given the complexity of the task, often set out a bewildering array of combinations of alternatives and impacts.[6] Furthermore, the alternatives presented may bear little relation to real fishery management choices under the Magnuson-Stevens Act. The usefulness of this kind of costly and time-consuming review needs to be carefully assessed.

(3) **Living With The Time Constraints Of The Fishery Management Process.** Fishery management is a highly dynamic process. There is an overriding imperative to use the most current data available, because the status of stocks is so variable. In many fisheries, the councils need to rely on recent survey data in making annual management decisions, such as setting total allowable catch levels,

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[2] See Robertson v. Methow Valley Citizens Association, 490 U.S. 332, 351 (1989).

[3] See, e.g., H. Rep. No. 97-438 at 8-9 (1982) ("The Councils, not the Secretary, are to manage fisheries within their respective areas"); H. Rep. No. 97-549 at 28 (1982), reprinted in 1982 U.S. Code, Cong. and Admin. News 4341 ("[T]he Secretary is not to substitute his judgment for that of the Councils regarding how to manage a fishery").

[4] See Walsh, Rieser and Wilson, "Legal Assessment of the Council's Role under the Magnuson-Stevens Act, the Endangered Species Act and the National Environmental Policy Act" at 34 (Sept. 2002).

[5] E.g., Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996); Greenpeace v. NMFS, 55 F. Supp. 2d 1248 (W.D. Wash. 1999).

[6] See National Academy of Public Administration, "Congress, Courts and Constituencies: Managing Fisheries by Default" at 49 (July 2002).

establishing by-catch rates and adjusting allocations among user groups. While environmental assessments, with their more truncated procedures, may lend themselves to use in this kind of process, the preparation of environmental impact statements, with the extensive review that entails, creates a quandary for the councils, since the full-scale NEPA review often cannot readily be accommodated to the need of the councils to take timely management action. The councils should not be put in the untenable position where, to meet NEPA's procedural requirements, they are forced to abandon reliance on the most current data available and instead rely on inadequate and out-of-date data, contrary to National Standard No. 2 of the Magnuson-Stevens Act.

(4) **A Possible Solution: The "FACA Amendments" Model.** Congress faced similar problems of meshing two statutes with compatible aims but sometimes conflicting procedures that unduly constrained the fishery management process when, in 1982, it amended the Magnuson-Stevens Act to adapt the requirements of the Federal Advisory Committee Act ("FACA") to the realities of the Magnuson-Stevens Act decision-making process.[7] It did so, not by junking the valuable part of FACA's procedural protections but rather by taking the most meaningful elements of FACA, and integrating them into the Magnuson-Stevens Act management system.[8] A similar legislative exercise, reviewing the requirements of NEPA and their application in detail, and then, to the extent any such elements are not already effectively covered by existing provisions of the Magnuson-Stevens Act, adapting and adopting them as part of the Magnuson-Stevens Act, could well produce valuable results. Such an approach would, I believe, be consistent with the recent Main Conference Panel Findings on "Reconciling Statutes" at the March 24-26, 2005 Managing Our Nation's Fisheries II Conference.

Thank you for your consideration. I would be happy to answer any questions the Committee might have.

Mr. GILCHREST. Thank you very much, Mr. Greenberg.

Mr. Frulla.

STATEMENT OF DAVID FRULLA, ATTORNEY, COLLIER SHANNON SCOTT

Mr. FRULLA. Thank you, Mr. Chairman. My name is David Frulla. I am a member of Collier Shannon Scott, here in Washington, D.C. I represent commercial fishing industry associations across the country. I would like to submit my full statement for the record.

I have a couple of perspectives; one as a litigant, both against and for the fisheries service. We have supported their decision-making under NEPA processes, and we have been successful in the cases where we have intervened in that way. I have also been often an advocate for, and a counselor to, commercial fishing associations as they try to navigate the council processes. And I have sat in the council rooms and listened to the debate about how to comply with NEPA and how to get fisheries management measures through.

What I would like to offer today, in addition to my testimony, are just some practical questions that come up that I hear. The first is: I get a phone call from a scientist we work with who wants to use a fishing vessel to go out and do some research. And he says, "Dave, can you write me an environment assessment? They say I need one to go out and do this work, and we need to get it done this summer."

Another is: Should NMFS hire port samplers, or should they hire NEPA compliance officers when they get to a budget crunch?

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[7] See Pub. L. No. 97-453, sec. 5 (Jan. 12, 1983).

[8] See H. Rep. No. 97-549 at 14-17 (1982), reprinted in 1982 U.S. Code, Cong. and Admin. News 4327-4330.

I do work with the scallop industry in the Atlantic. And Mr. Chairman, you raised a good question. How do you get out in those areas on George's Bank? How do you decide where to go fish, and when? Well, what is happening is they are using data that is sometimes a year or two old, rather than reacting to resource conditions that we see.

We have a situation this year where with the Nantucket Light Ship area, which is an area off the cape that has some of the oldest scallops in the ocean, the management measure to go out there and fish these areas didn't get done in time. It wasn't implemented until November. There was only a three-month season. The quota didn't get caught. And now we can't get back out there, because of process issues. It is not all NEPA. Part of it is the council's workload. Part of it is the Administrative Procedures Act. But there is an issue there that needs to be considered.

Another issue is, how do you get your new survey information used, if you do surveys in the summer and then you need to get that implemented into annual specifications by the beginning of the year or the springtime?

Again, these are practical issues. How do you make this work? And do you limit the councils' flexibility through the alternatives consideration process? Again, no one is going to say you don't need to consider alternatives. It makes a lot of sense.

We have been working with the herring fishery up in New England, and they are starting an amendment process. And with the most scrupulous observance of NEPA, if you were working on, say, seven or eight different sets of management measures within your amendment, and you have alternatives of each, the most scrupulous NEPA requirement would say every permutation of possible alternatives needs to be analyzed.

It doesn't happen in practical reality, clearly, but what we are starting to see now as a result is the council saying, "Well, early on in the management process we need to package all of our alternatives together, just so we can do the analysis." If at some point down the road you want to mix and match, you want to learn a little more, we are running into a process where we could be hamstrung to try to get constructive management measures that address the full range of Magnuson-Stevens Act requirements.

And then, what I have spent my testimony discussing is the issue of: What do you gain for that? Magnuson, as you have heard, and the other laws do provide for a wide range of environmental considerations.

Is NEPA working as an enforcement tool for the environmental community with the Magnuson-Stevens Act? We took a look at the case law, and in many instances you find that the NEPA problem is paired with a substantive problem under the Magnuson Act, probably more times than not. So NEPA standing alone isn't the bulwark. There is an issue with the decisionmaking more generally that needs to be resolved.

And then, the second is, to the extent that that may be equivocal, are you actually getting a gain in the fisheries management process from having NEPA? And again, I would say the experience there, at least as NEPA is being implemented by the agency at this time, is equivocal.

We think that this is an issue—and I am speaking again here for myself—that this is an issue that the Committee and the Subcommittee should consider very fully in the context of the Magnuson reauthorization. It is a worthy thing to consider. Thank you.

[The prepared statement of Mr. Frulla follows:]

Statement of David E. Frulla, Attorney, Collier Shannon Scott, PLLC

Mr. Chairman, and Members of the Subcommittee, thank you for providing me this opportunity to present my views on the intersection between federal fisheries management laws and more general environmental laws, such as the National Environmental Policy Act ("NEPA").

I am an attorney in private practice in Washington, D.C. with Collier Shannon Scott, PLLC. I have represented associations of commercial fishermen from across the country, including in New England and the Mid-Atlantic, Alaska, and the Gulf of Mexico and Caribbean, since the early 1990's. I have litigated cases involving the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), Regulatory Flexibility Act, Endangered Species Act ("ESA"), and NEPA. In certain of these cases, my clients have opposed NOAA Fisheries. However, in the NEPA context, we have generally supported agency decision-making. We have prevailed in the half-dozen-plus NEPA cases in which we have been involved on NOAA Fisheries' side. I have also been retained to provide testimony to the North Pacific Fishery Management Council on NEPA's intersection with the Magnuson-Stevens Act.

I do not believe that anyone here today disagrees with the general premise that NOAA Fisheries should, as NEPA requires, take a "hard look"[1] at the wide range of impacts on the human environment of the consequences of its fishery management programs. The Magnuson-Stevens Act itself mandates consideration, via its national standards and other required and optional provisions for fishery management plans, of a wide range of environmental factors.[2] In response to a handful of court decisions, most occurring at or around 2000, NOAA Fisheries, guided by its Office of General Counsel, made NEPA compliance, or perhaps over-compliance, a priority.

Meticulous NEPA compliance is no small task. According to the Commerce Department's latest Semi-annual Regulatory Agenda, NOAA Fisheries had approximately seventy-five actions from the regional fishery management councils at the proposed rule stage alone,[3] not to mention long-term on-going rulemaking proceedings. The question presented today, however, is whether NEPA, as NOAA Fisheries is currently implementing it, fosters or impedes timely, high quality federal fisheries management. The record is equivocal at best.

NEPA is a procedural statute. It imposes no substantive conservation obligations.[4] That said, the environmental community has often used NEPA as a litigation device to attempt to force a substantive reconsideration of an agency action with which it did not agree. Accordingly, there are two elements of NEPA that should concern the Subcommittee: (1) whether it serves as an effective independent mechanism to ensure quality agency decision-making; and (2) whether it actually also serves to improve the quality of NOAA Fisheries decision-making. Regarding the first point, the litigation record shows that NEPA is, quite simply, over-rated as an enforcement tool. As to the latter, I submit that a wide array of substantive statutes independently help to ensure environmentally-aware decision-making. In fact, NEPA obligations may actually inhibit timely, science-based management.

I will address these two points in order. There is a more refined question than NOAA Fisheries' (improving) won-lost record in NEPA cases that the Subcommittee should consider in determining NEPA's independent value as an enforcement tool. It is whether these NEPA violations occurred in the context of agency actions that

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[1] NRDC v. Hodel, 865 F.2d 288, 294 (D.C. Cir 1988).

[2] For instance, in a NEPA case, U.S. District Court Judge Gladys Kessler explained, "[NOAA Fisheries has] numerous—and oftentimes competing—statutory objectives to contend with in managing the New England waters; preservation of essential fish habitat is only one of many." Conservation Law Foundation v. Mineta, 131 F. Supp. 2d 19, 27 (D.D.C. 2001). These measures are also subject to the substantive and procedural requirements of the ESA, the Marine Mammal Protection Act, the Coastal Zone Management Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and various executive orders governing rulemaking, in addition to NEPA.

[3] 69 Fed. Reg. 72974, 72978-81 (Dec. 13, 2004).

[4] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-51 (1989).

were flawed under the substantive environmental laws. If so, then NEPA, as an independent enforcement tool, is not necessarily adding much to the application of Administrative Procedure Act decision-making standards to the substantive fisheries management standards contained in the Magnuson-Stevens Act.

Environmental plaintiffs have prevailed in recent years on NEPA claims regarding federal fisheries management in approximately a half-dozen contexts.[5] However, our research has identified only one of these contexts in which an environmental plaintiff prevailed on a NEPA claim when it did not prevail on a Magnuson-Stevens Act based claim in the same case: American Oceans Campaign v. Daley ("AOC").[6] A similar perspective obtains in the Endangered Species Act context.[7]

The AOC case is worthy of review. It addressed NOAA Fisheries' efforts to comply with the essential fish habitat provisions of the 1996 Sustainable Fisheries Act ("SFA").[8] An environmental plaintiff challenged essentially all the regional fishery management councils' EFH plans. Most if not all of the plans concluded that, within the two year time limit the SFA and NOAA Fisheries guidelines had set to develop a plan, there was not sufficient information to warrant adopting habitat-specific measures in order to protect EFH from the adverse impacts of fishing gear in addition to the fishery management regimes then in place. While the court found the councils' decisions in this regard were reasonable as a matter of substance (in the main, because there was little information at that time on which to act), the court then concluded the councils failed to consider a sufficient array of alternatives under NEPA because they only considered their current management measures, versus having done nothing at all. Since then, all the councils have developed more comprehensive EFH plans under a circa four-year time table set forth in a post-judgment settlement agreement entered in that case.

As it embarks on the re-authorization process, however, the Subcommittee should consider whether the councils' and NOAA Fisheries' failure to comply with NEPA in the EFH context was actually the result of flawed decision-making that requires NEPA as an enforcement mechanism. Another explanation for the failure in this singular instance may be that the SFA and NOAA Fisheries in its EFH implementation guidelines simply did not provide the councils and the agency itself sufficient time and resources to develop the necessary range of practicable alternatives that would have complied with the SFA's EFH mandate. The Magnuson-Stevens Act's practicability requirement for EFH measures does require reasonable precision in decision-making.[9] Congress needs to be careful about mandating any additional substantive and analytical requirements that it imposes on NOAA Fisheries in this re-authorization process. Care in legislating new requirements and their timelines may thus serve a more vital function in ensuring quality decision-making by NOAA Fisheries than NEPA.

The second question is whether NEPA actually improves the quality of agency decision-making. A major issue here is one of timing. The Magnuson-Stevens Act imposes its own timelines which ostensibly require prompt council and agency

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[5] These include the Pacific groundfish fishery, the Alaska groundfish fishery, the Hawaii longline fishery, the Hawaii lobster fishery, the Magnuson-Stevens Act's essential fish habitat ("EFH") requirements, and the Pacific salmon fishery.

[6] 183 F. Supp. 2d 1 (D.D.C. 2000).

[7] For instance in Greenpeace v. NMFS, 55 F. Supp. 2d 1248 (D. Wash. 1999), the court held that the agency had violated NEPA by not preparing a programmatic environmental impact statement for the Alaska groundfish fisheries, but that holding was made in conjunction with a substantive determination under the ESA that the agency had failed to consider adequately reasonable and prudent alternatives to protect Steller sea lions. Two times, a court did conclude the agency had not violated the Endangered Species Act, but failed to comply with NEPA because it had not recently prepared an environmental impact statement. Leatherback Sea Turtle v. NMFS, 1999 U.S. Dist. LEXIS 23317 (D. Haw. 1999); Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996). These types of issues can be addressed by ensuring that the fishery management process includes some measure of reflection and does not simply react from year to year.

[8] See 16 U.S.C. §§ 1853(a)(7) & 1855(b)(1)(A).

[9] 16 U.S.C. § 1853(a)(7)(practicability requirement). A federal court recently explained in upholding the New England Council's new EFH measures implemented in connection with its groundfish rebuilding plan amendment:

Similarly, the range of alternatives that the Secretary should have considered here is not defined solely in terms of percentage of EFH areas that are closed, but rather must include a variety of forms of closures in combination with other EFH protection methodologies, as well. Of course, the range of alternatives warranting consideration is also defined in terms of the regulatory action's purpose...and therefore options that are inconsistent with the Magnuson-Stevens Act] need not be considered.

Oceana v. Evans, Civ. No. 04-811-ESH, slip op. at 63 (D.D.C., Mar. 9, 2005) (citation omitted).

decision-making.[10] Often in my experience, fisheries management decisions are delayed as the councils and NOAA Fisheries struggle to finalize and implement their rule-making packages, that now often-times approach or exceed one thousand pages. The Atlantic scallop fishery in which I am involved represents an example. In that fishery, despite the resource being rebuilt ahead of schedule, annual management measures subject to rulemaking are very often not able to be implemented at the start of the fishing season.[11]

Moreover, the scallop fishery recently embarked on a new, adaptive area-based management system, in which the goal is to distribute scallop fishing across the resource in a way that directs the fleet to relatively large concentrations of mature scallops, while allowing new "sets" of juvenile scallops to grow to maturity. However, scallops can be fast-growing, and new concentrations of juvenile scallops can appear unexpectedly in the middle of the fishing year. It is an open question whether the management process, burdened as it is with procedural requirements, can be sufficiently nimble to allow for the effective implementation of adaptive, area-based management. Scallops are not the only example of fast-growing species that require prompt management; certain-federally managed squid species found in the Mid-Atlantic generally live for less than a year.

All fisheries are facing these challenges to some degree. Most NOAA surveys occur in the temperate months, and it is a challenge—and an increasingly unmet one, at that—to ensure that the rulemaking process can happen swiftly enough to allow this new information to govern the fishery for the next fishing season. More often, fisheries have to be managed on older survey data. It is an open question whether this represents the best we can do to ensure that federal fisheries are managed according to the "best scientific information available," as Magnuson-Stevens Act National Standard Two provides.[12]

Finally, it will be worth considering whether NEPA's requirement to ensure the development and consideration of a wide range of alternatives promotes flexible fishery management council decision-making. On the East Coast, many proposed fishery management programs (whether amendments or framework adjustments) address a wide range of subjects. If alternatives need to be developed and then analyzed for each permutation of possible outcomes, the analytical task becomes insuperable. For its part, the New England Council is seeking to cope with the analytical burden by artificially limiting its ability to "mix and match" the final suite of recommended alternatives. While that approach may simplify procedural compliance in analyzing alternatives, it may limit a council's ability to strike the needed "delicate and nuanced balance—between its duties to maximize OY [optimum yield] among all managed species while rebuilding overfished stocks and to concurrently minimize harm to fishing communities."[13] Procedural obstacles should not constrain constructive management efforts in this way.

We look forward to assisting the Subcommittee in addressing these important issues as the Magnuson-Stevens Act re-authorization process proceeds.

Mr. GILCHREST. Thank you very much, Mr. Frulla. They haven't called a vote yet, so I guess we will proceed.

On that last comment, Mr. Frulla, the last comment you made I interpreted as saying: Is fishery conservation improved because of the NEPA process? Could I ask each of you to just give me a very short response to that question? Mr. Frulla?

Mr. FRULLA. Fishery conservation is improved through a robust consideration of the range of environmental and human consider-

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[10] 16 U.S.C. § 1854 (a)-(b) (imposing detailed procedural requirements and timelines for development and promulgation of fishery management council plans, amendments, and implementing regulations).

[11] For instance, Scallop Framework Adjustment 14 governing the 2001 and 2002 fishing years was not implemented until well into the fishing season because NFMS decided to undertake an environmental impact statement-level review for this bi-annual adjustment measure, in the wake of the NEPA litigation in 2000. 66 Fed. Reg. 24052 (May 11, 2001). In addition, largely due to purported procedural requirements, NMFS was not able to provide timely access to a highly-abundant scallop area near Georges Bank, called the Nantucket Lightship Access Area, until the heavy weather months from November 2004 through January 2005. 69 Fed. Reg. 63460 (Nov. 2, 2004). The truncated season presented a safety issue and contributed to the limited use of the access program.

[12] 16 U.S.C. § 1851(a)(2).

[13] Oceana v. Evans, supra, slip op. at 32 (upholding nearly all elements of New England Fishery Management Council's rebuilding plan for Northeast multispecies).

ations. Whether that has to be done through NEPA is another question. Whether NEPA in practice is thwarting that is yet a second question, if that is a fair answer.

Mr. GILCHREST. Right on the mark, I guess. That was black and white. Perfectly clear. Unequivocal. Mr. Greenberg?

Mr. GREENBERG. You will be surprised that I agree with Mr. Frulla.

Mr. GILCHREST. OK.

Mr. GREENBERG. And I also agree with Mr. Furlong, that when you look at the ten national standards and the 14 mandatory elements of fishery management plans, you really cover just about the full range of issues that are covered in a NEPA review. So that I don't think NEPA adds very much to that.

Mr. GILCHREST. Thank you.

Ms. IUDICELLO. And Mr. Chairman, you will probably not be surprised that I disagree with the previous two statements. You mentioned earlier that the councils and the agency are trying to move more toward ecosystem-based management of fisheries. You are not going to get the kind of consideration of the full potential of a mix of management tools, that includes closed areas and consideration of protected resources and a whole variety of topics, under the Magnuson Act. It is going to keep you constrained in a single-species management, one stock or, at best, mixed-stock approach.

Furthermore, you are not going to consider non-fishing alternatives. A lot of people have made some remarks about the 7,000-page environmental impact statement that had come out of the North Pacific. And granted, that is a ridiculous size document. It was in response to litigation. But there were some substantive issues in that litigation that did not arise simply from not dotting the "i's" and crossing the "t's" of NEPA compliance.

The point in issue was that the council, even though it is a transparent and public process, did not have any participation in its decisionmaking function by many stakeholders and interest groups who were concerned about components in the ecosystem that were not part of the target fishery. And it was not until the document was forced by the courts and by litigation to consider the ecosystem in its largest functioning way that those issues got on the table.

So I do not think that you get the full consideration of everything from the seven national standards. I think you need NEPA,

Mr. GILCHREST. You raised, to some extent, one of the legs that hold up the table, the crux of the issue. We want to continue to move and actually begin in a few years to start implementing an ecosystem fisheries management plan regime. We want to do that when we reauthorize Magnuson. And when we do that, like you say, there is an enormous number of variables in there: seasonal closures, looking at essential fish habitat, ocean currents, prey-predator relationships, water quality, human activity, you name it. There is an enormous amount. And I think the next natural step in conservation is ecosystem fisheries management plans.

You did talk about up-front discussions, rather than back-stage discussions to deal with some of the NEPA problems. I think that absolutely has to be done. One of the reasons we are holding this hearing is to try to understand the dynamic between Magnuson, how we are going to improve Magnuson, improve the standards

and improve the processes, improve the relationship between the science and the councils, get research vessels out there in a very timely manner, have cooperative research, all those things. We just don't want NEPA to slow the conservation process down. We want it to be complementary to the process. So hence this hearing.

But I want you to be assured that our sense here is that the more we get exchanges of information, the more open the public participation process is, the better the ecosystem approach will be. But we can't have a scientific vessel that needs to go out to check on the scallops in the Gulf of Maine, or the Gulf of Alaska for the groundfish, slowed down in that process unnecessarily. So that is the kind of fine-tuning that we are taking a look at.

My time has expired, and I will yield to Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. In her testimony in the previous panel, Dinah Bear noted CEQ's track record of openness to new approaches to helping NMFS better implement NEPA. And similarly, in this panel, Ms. Iudicello in her testimony noted flexibilities inherent to NEPA itself that allow councils and the agency room to be creative in synchronizing and integrating their responsibilities to both statutes.

But the remaining members on the second panel, both litigators, appear to disagree, and they state that the NEPA process is not nimble enough to respond to Magnuson's demands for annual and seasonal rulemaking. So given this conflict of opinion, I was going to ask each of the panelists if you would address the following.

First of all, to what degree can the apparent conflict between NEPA and Magnuson time lines be addressed by better training in preparing NEPA documents and more funding for personnel to do the work?

And then, second, given NMFS' improved track record for addressing NEPA compliance issues over the past three years, why would we amend the law now, rather than continue to support the agency as it improves its process for producing concise and timely NEPA documents?

I know you have kind of gotten into this to some extent, but I just wanted to hear each of you directly on those questions. It doesn't matter the order, but whoever wants to start.

Ms. IUDICELLO. On the training and funding issue, I think perhaps I should disclose that I have worked with the National Marine Fisheries Service several years ago on an internal process to improve NEPA compliance; not just NEPA, but the Endangered Species Act, and the Administrative Procedures Act, and others.

And the agency came up with quite an innovative and aggressive action plan for how they were going to do it. And a lot of it was supported by the NAPA report and an internal report by Ray Kammer, all of which were delivered to Congress. And Congress saw fit to respond to that action plan with increased funding; which the agency has employed, in my view, very successfully.

And so, in response to your question: Why would you change things when they see to be moving along? I would say: Well, you wouldn't. You would continue to support their improved work and performance. And I think a lot of it need not be as expensive as $8 million a year. Certainly, now that the litigation burden has backed off a little bit, some of that might not be as necessary.

But I think there are some simpler things that we can do. It is harder to write short than it is to write long. I am a professional writer. I know this. That is what good editors are for. A NEPA expert mentioned to me in passing over the course of years that he or she could take a pencil to these 7,000-page documents—or maybe not the 7,000-page ones, but the multiple hundreds of pages—and really reduce it down. So I think training is a key issue.

But I think what Mr. Greenberg brought up about who is in charge here is another really important issue. And that is where you might have to look at some clarification in the Magnuson Act. The councils kind of have the burden and pay the consequences of NEPA compliance, but it is the agency which is at least legally, as the courts construe it now, the decisionmaker. So some councils prepare the documents themselves. For other councils, the agency provides the preparation. It is all mixed up. There is no standardization. And I think that increases the problem. So clarifying who is the decisionmaker—I mean, certainly the councils are a first-phase decisionmaker—that would help.

Mr. PALLONE. Thank you. Mr. Greenberg?

Mr. GREENBERG. Well, I think the problem in trying to reconcile the conflicts with the Magnuson-Stevens Act does relate in part to the need for the councils to move very quickly when they are acting on an annual basis. Fisheries management is a highly dynamic business.

And I think it is very difficult to accommodate the requirements for a full environmental impact statement, if the courts or the agency should determine that that is what is required, with the need to act on an annual basis to set total allowable catch levels, for example, to allocate the resources among the user groups, to set bycatch limits. I frankly don't think that that is able to be accomplished consistent with the level of review that is required for a full EIS.

Mr. PALLONE. Mr. Greenberg, why is it necessary to do a full EIS? Why can't they just do the simpler environmental assessments?

Mr. GREENBERG. Well, that used to be the way, Congressman Pallone. For many, many years, for example, in the North Pacific, when the annual catch levels were set, what the North Pacific Council did was prepare an environmental assessment, and that was deemed to be adequate. My understanding is that more recently, as a result of concerns that have been raised, there is now an issue before the council of whether really they have to prepare a full environmental impact statement, rather than the EIS.

Mr. PALLONE. In your opinion, they don't, right?

Mr. GREENBERG. I don't think they do. But that doesn't mean that the agency is not going to conclude that a full EIS is necessary. And that really gets to your second question, Congressman Pallone; which is, you talk about the record in litigation. And as Dr. Hogarth said, the record has improved since 2003. I think one reason the record has improved is that the agency is throwing paper at NEPA in order to bulletproof decisions, because there is a risk of litigation and there are lots of very clever litigators in the

world who are very familiar with NEPA and all the ways to challenge NEPA compliance.

And my advice to the agency when I was general counsel was: We can always beat a NEPA claim if we just throw enough paper at it. And unfortunately, that is the path of least resistance. And I think one reason that the agency has a better track record is it is doing a better job with the paperwork. But that doesn't necessarily translate into a better decisionmaking job.

Mr. PALLONE. Mr. Frulla?

Mr. FRULLA. Thank you, Mr. Pallone. I think I would first like to say I am in the process of litigating as a defendant in the second NEPA case this year. So the litigation burden is still there for the agency. Again, as Mr. Greenberg said, what they are doing is throwing voluminous analyses and the lack of flexibility in terms of deciding how in depth to comply with NEPA at the litigation problem.

On the funding issue, I think we do need to be clear that at some point in these days of tight budgets you could either have NEPA compliance officers or people trying to figure out how to develop ecosystem management. So you can't just say, "Fund more for NEPA." You may want to use those funds for another thing.

And then finally, on the point of the time lines, just let me give you an example of how it works in the New England Council. You have a council with a limited budget. And you have a handful of staff persons, each who specialize in a species, and they can get some help. And that one staff person needs to essentially chair the scientific plan development team, coordinate with the advisors, provide assistance to the species-specific committee, develop the documents, and write all the analyses.

Mr. GILCHREST. If I could just interrupt, because we have a vote. Thank you. Mrs. Drake has a question just before we leave.

Mrs. DRAKE. Well, and this really may be an over-simplification of everything I have heard this morning, but I think we are greatly concerned about these conflicts we are talking about, about the timeframe and having the most up-to-date information which we think is required under the Act. And of course, NEPA is adding the additional timeframe to it, or even issues of judicial review and time framing in the two competing acts.

Isn't there a way, Mr. Chairman, for people who have dealt with this and the agencies to look at: Should there be one more comprehensive act that addresses the points that you are talking about that are important, and giving the guidance to the agencies, to the industry, that this is exactly what we are working with, and not having a conflict of two? I mean, that is my question.

Mr. GREENBERG. Well, to some extent, that was my suggestion. What you need to do—and I think this is something that the Committee is already doing with its task force on NEPA—is to look at the two statutes and identify those areas where there are conflicts; identify those areas where NEPA may provide a useful supplement to the current process that exists under the Magnuson-Stevens Act; and then integrate those processes through the reauthorization process for the Magnuson-Stevens Act.

Mr. GILCHREST. Thank you very much. Thank you, Mrs. Drake. The gentlelady from Guam.

Ms. BORDALLO. Thank you, Mr. Chairman. I know we are in a real rush here. Misters Frulla and Greenberg, I don't know which one wants to answer it, but you indicated that the NEPA provisions that are not currently included in the Magnuson could easily be added to the law to make it the functional equivalent of NEPA. Would you please tell us exactly which provisions of NEPA would need to be incorporated into Magnuson to do this?

Mr. FRULLA. The places in NEPA where you may not get the holistic treatment that you want in Magnuson would involve ensuring that a range of alternatives are considered. Although you do see already in the NMFS guidelines implementing National Standard Eight a discussion that when you look at alternatives, if there are equivalent conservation benefits from different alternatives, you ought to gravitate toward the one that has the least economic impact on shoreside communities. So that is in the guidance. It is not necessarily in the law, but it is something that the agency is essentially doing.

And then I would say—again, speaking for myself here—that you want to make sure that the Magnuson Act is reflective, as opposed to just reactive. I don't think a 7,000-page programmatic EIS fits with "reasonably reflective." But I do think that you want to make sure that you do that. And I think that very often the amendment process itself provides for that level of reflection, whether or not there is NEPA.

Ms. BORDALLO. Thank you. Thank you very much, Mr. Chairman.

Mr. GILCHREST. Thank you, Ms. Bordallo. Did someone get a PhD from that dissertation, 7,000 pages?

Mr. GREENBERG. I think there were a lot of individuals with PhD's who were involved. I am not sure anyone was actually awarded the degree, Mr. Chairman.

Mr. GILCHREST. Well, we want to protect the fisheries.

Thank you very much. Your testimony has been very helpful to us as we move through this process. The hearing is adjourned.

Oh, the hearing has come to order, just for a comment.

[Laughter.]

Mr. GILCHREST. I want to thank Daisy Minter, Water and Power's clerk, for assisting us with this hearing today. Daisy, thank you very much.

The hearing is now officially adjourned. The record will remain open, for a little while anyway. Thank you.

[Whereupon at 11:47 a.m., the Subcommittee was adjourned.]

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