

Center for Regulatory Effectiveness

Impact of CEQ Proposed NEPA Regulations on the Fishing Industry

I. Introduction

On February 18, 2010, The Council on Environmental Quality (CEQ) released four proposals to amend NEPA guidelines. These proposals include: (1) -revision of the use of categorical exceptions, (2) -revision of monitoring and mitigation procedures, (3)-consideration of Greenhouse Gases, and (4)-enhanced public tools for NEPA reporting. The proposals to revise categorical exclusions and to require binding mitigation and monitoring requirements will cause substantial harm to commercial fishermen. This is discussed in greater detail below.

II. CEQ's draft guidance on Categorical Exceptions Harms Commercial Fishermen

Categorical exclusions are groups of actions that do not individually or cumulatively have a significant impact on the human environment. Categorical exclusions play two important roles under NEPA: (1)-they conserve agency resources by not wasting agency resources on actions that will have little or no environmental impact to those that will have a significant impact; (2)-expedite routine activities. CEQ's proposed revision to categorical exclusions would require agencies to propose new categorical exclusions in the Federal Register for public comment and review by CEQ for compliance. These revisions overlay existing NEPA compliance procedures, thus undermining the function of categorical exclusions to preserve agency resources.

In particular, the proposed revision to categorical exclusions adversely affects commercial fishermen. The National Marine Fisheries Service (NOAA Fisheries Service) manages fish stocks by implementing Fishery Management Plans. Fishery Management Plans establish the regulations for commercial fishing and are typically subject to NEPA procedures. Thus, activities by commercial fishermen are subject to NEPA because they are regulated by Fishery Management Plans and require permits or licenses. Thus, commercial fishermen have a substantial interest in ensuring agencies, namely NOAA Fisheries Service, implements NEPA and its goals effectively and efficiently.

CEQ's proposed revision to categorical exceptions requires greater resources of NOAA Fisheries Service for actions that do not have significant impact on the human environment. The proposed revision detracts resources from NOAA's environmental analysis of actions that do

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substantially impact the environment and commercial fisheries. In sum, the proposed reporting and documentation requirements for categorical exceptions undermine NOAA Fisheries Service's mission to protect fish stocks. Commercial fishermen rely on the NOAA Fisheries Service to protect the country's fisheries and the proposed revision diminishes the agency's ability to do so.

III. Monitoring and Mitigation Requirements Unnecessarily Burden Commercial Fishermen

Under NEPA, mitigation is an important concept when considering environmental impacts of federal activities. Mitigation is used by agencies to reduce significant impacts on the environment to support a Finding of No Significant Impact (FONSI). More specifically, mitigation has been particularly useful in permitting agencies to satisfy the NEPA process using an Environmental Assessment (EA) accompanied by a FONSI rather than the resource intensive Environmental Impact Statement (EIS). However, NEPA does not require agencies to prepare a detailed mitigation plan before it acts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989).

The proposed revision by CEQ would require that a FONSI achieved by mitigation would be subject to monitoring and reporting of mitigation requirements. Under the draft guidance, mitigation actions adopted by agencies should be enforceable and binding. In the case of a mitigation failure, the agency must respond by drafting an EIS and avoiding actions that have adverse environmental impacts.

The proposed revision on mitigation and monitoring unnecessarily harms commercial fishermen. The proposed mitigation requirements are duplicative of already existing substantive law. Commercial fishermen are subject to NEPA documents for actions pursuant to the Magnuson-Stevens Act. The Magnuson-Stevens Act manages domestic fisheries and promotes conservation of existing fish stock. Actions taken under Magnuson-Stevens Act are subject to NEPA procedures. Fishery Management Plans implemented pursuant to the Magnuson-Stevens Act already incorporate mitigation procedures in order to ensure the stability of fisheries.

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Furthermore, the requirement of continued monitoring of mitigation measures for FONSI's focuses resources on actions that have no significant impact on the environment. This detracts resources from the NOAA Fisheries Service's ability to ensure the health and stability of more fragile domestic fisheries.

IV. Conclusion

In sum, CEQ's proposed revisions to NEPA guidelines will have a detrimental impact on the country's commercial fishermen and should not be adopted.