

NEPA ACTIVITIES AND CASE SUMMARIES

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I. Activities for Training

A. EIS Activity: Purpose and Need, Alternatives

Facts: The Purple fish fishery takes as bycatch two anadromous species about which relatively little is known: Ana Fish and Drama Fish. There are multiple stocks of each of these species. There is insufficient data to determine the status of these two species. Some studies indicate that the species are relatively numerous, whereas others show diminishing numbers.

For example, one recent study assessed 52 stocks Ana Fish but lacked sufficient data to develop estimates of abundance and fishing mortality for 28 of the 52 stocks. Of the 24 stocks for which data were available, 23 were depleted relative to historic levels and one stock was increasing. By contrast, another recent study relied on Ana Fish's coast-wide population growth rate and concluded that the relative abundance of Ana Fish throughout its range is stable; at least three contiguous populations are either stable or significantly increasing; and from a coast-wide perspective, the trajectory of the population is significantly increasing and all of the stock complexes are stable or significantly increasing.

An NGO petitioned NMFS to list the Ana and Drama Fish as endangered or threatened under the ESA. NMFS determined there was sufficient concern to review the status of the species. After thoroughly reviewing known information about species status and threats, NMFS determined that, at this time, listing the species is not warranted. However, NMFS committed to revisiting the issue after three years.

Your Council wants to take action to address Purple Fish interactions with Ana and Drama Fish and has decided to initiate development of an FMP amendment and an EIS.

Assignment:

1. Draft a statement of purpose and need for the action you will be scoping.
2. Prepare a list of reasonable alternatives.

B. Record-Based Determinations: FONSI and NEPA Efficiencies (Frameworks, Tiering, and SIRs)

Facts: Your Council manages the Green Lobster fishery, which occurs in areas inhabited by the endangered Prime Seal. When the FMP for the Green Lobster fishery was established in 2000, both an ESA Biological Opinion (BO) and a NEPA EIS were prepared. At that time, there was little information on the Prime Seals' food supply. However, the record noted that Prime Seals were opportunistic feeders, and if there were a scarcity of lobsters, they would “probably” be able to switch to other prey. The record also stated:

The predator-prey relationship of Prime Seals and Green lobster is poorly understood and there is essentially no information available on the importance of Green lobster in the Prime Seal diet.

The FMP established a Framework process for setting annual harvest levels based on a formula. Since 2000, annual specifications have relied on the underlying EIS and have not prepared additional NEPA documentation.

Between 2000-2016 Prime Seals continued to decline. Additional BOs were prepared in 2013 and 2016, finding:

2013: competition with the lobster fishery for prey was identified as a factor in the continuing decline of the seals. However, given the healthy status of the lobster stocks, and the relatively small fishing effort expected to occur in key areas, the FMP, as amended, was not likely to jeopardize the seals.

2016: New information about the fishery indicated that the 2016 harvest levels were not likely to jeopardize the continued existence of Prime seals.

On July 8, 2016, NMFS issued final harvest guidelines as a framework taken pursuant to the FMP, relying on NEPA coverage via the 2000 EIS. On the same day, NMFS issued a regulatory amendment dividing the fishery into 4 management areas and authorizing NMFS to allocate the harvest guideline among those areas. This action was accompanied by an EA/FONSI.

Questions:

1. Do the 2016 harvest guidelines have appropriate NEPA coverage? Why or why not?
2. Does the regulatory amendment have sufficient NEPA coverage? Why or why not?
3. What, if any, additional NEPA coverage would you have recommended?

II. Summaries of cases used as models.

A. Summary of *Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102 (D.D.C. 2015). Lost on NEPA. MSB Am 14 (MAFMC)(EIS).¹

Key Message: *Failure to consider adding river herring and shad into MSB FMP (Am 14), after stated objective of Am 14 was to consider adding them to the FMP in order to prevent overfishing violated NEPA.*

Facts: The MSB fishery takes two species, river herring (alewife and blueback herring) and shad as bycatch. There are multiple stocks of each of these species. There is insufficient data to determine the status of these two species. Some studies indicate that the species are relatively numerous, whereas others show diminishing numbers.

For example, in May 2012 the Atlantic States Marine Fisheries Commission ("ASMFC") performed an assessment of 52 stocks of river herring, but lacked sufficient data to develop estimates of abundance and fishing mortality for 28 of the 52 stocks. Of the 24 stocks for which data were available, 23 were depleted relative to historic levels and one stock was increasing. By contrast, in 2013, relying on the blueback herring's coast-wide population growth rate, NMFS concluded that the relative abundance of blueback herring throughout its range is stable; at least three contiguous populations of alewife are either stable or significantly increasing; and from a coast-wide perspective, the trajectory of the alewife population is significantly increasing and all of the stock complexes are stable or significantly increasing. On August 12, 2013, NMFS determined there was no need to list river herring as threatened or endangered under the ESA.

In 2012, the Mid-Atlantic Fisheries Management Council ("the Council") set out to study 32 stocks of American and hickory shad. The Council found that it lacked sufficient information to make any conclusions about eight of the 32 stocks. However, it was able to conclude that 11 stocks were depleted relative to historic levels, 2 were increasing, and 11 were stable.

The lack of adequate data has prevented any reliable assessments of the stock abundance and fishing mortality of shad. The Council decided to address this issue through an FMP amendment and will be preparing an EIS.

Notice of Intent, Iterative Public Process, Reasonable Alternatives

The original scoping notice stated that Amendment 14 may address:

- the need for additional monitoring to determine the significance of river herring and shad incidental catch in the MSB fisheries; and
- the effectiveness and impacts of management measures to minimize bycatch and/or incidental catch of river herrings and shads.

¹ See also Flaherty v. Bryson, 850 F.Supp.2d 38. (Atl Herring AM 4)(NEFMC). Lost on EA with similar facts. Failed to analyze reasonable range of alternatives in EA (alternative to add river herring to FMP was relevant to the proposed action and it should have been analyzed as an alternative rather than deferring analysis to a subsequent action.)

As the document developed, the Council added an additional factor:

- consider adding river herring and shad as managed stocks in the MSB FMP so as to improve overall river herring and shad conservation."

DEIS. The DEIS included alternatives that would have added river herring and shad species as managed stocks in the MSB FMP.

Before finalizing amendment 14, the Council initiated a separate amendment, Amendment 15 to the MSB FMP, to explore the need for conservation and management of these species more thoroughly, and analyze all of the MSA provisions (i.e., management reference points, description and delineation of essential fish habitat, etc.).

FEIS. The FEIS for Amendment 14 did not include any alternatives for adding river herring and shad into the FMP.

The Court held.

NMFS failed to consider the reasonable alternative of immediately including river herring and shad stocks in MSB Fishery in order to prevent overfishing, failed to explain in EIS its decision to exclude these stocks, and, by failing to consider this alternative, also failed to adequately consider the direct, indirect, and cumulative impacts of decision. I.e., NMFS failed to take "hard look" at environmental effects of decision in EIS.

The court wrote:

NEPA requires an agency to explore and objectively evaluate a reasonable range of alternatives and the associated impacts on the environment. 42 U.S.C. § 4332(C). *See also Flaherty*, 850 F.Supp.2d at 71. A key objective of Amendment 14 was to consider adding river herring and shad to the MSB Fishery, in order to prevent overfishing. Given that objective, it is hard to understand why the Government, which is statutorily obligated to consider an adequate range of alternatives in the EIS, failed to include the alternative of adding river herring and shad to the stocks.

Moreover, it is striking that NMFS never provided an explanation of why it did not consider the alternative of adding river herring and shad when such consideration would clearly have brought about the "ends of the federal action."

B. Summary of *Greenpeace Foundation v. Daley* (2000)(Hawaii Monk Seals and WPFMC lobster)

Greenpeace Found. v. Daley, 122 F. Supp. 2d 1110 (D. Haw. 2000).

Facts: Between 1983 and 2000, the Western Pacific lobster fishery occurred in areas inhabited by monk seals, which are both endangered and known to consume lobster.

An environmental group sued NMFS alleging violations of NEPA and the ESA.

In conjunction with implementation of the FMP, NMFS had completed an ESA consultation in 1981. Noting a scarcity of information on the monk seals' food supply, BO noted that monk seals were opportunistic feeders, and if there were a scarcity of lobsters, they would "probably" be able to switch to other prey. The BO also stated:

There is insufficient information available ... to be able to insure that the proposed activity will not jeopardize the continued existence of the monk seal [because] the predator-prey relationship of monk seals and spiny lobster is poorly understood and there is essentially no information available on the importance of spiny lobster in the monk seal diet.

Monk seals continued to decline. Additional BOs were prepared in 1996 and 1999, finding:

1996: competition with the lobster fishery for prey was identified as a factor in the continuing decline of the monk seals. However, given the healthy status of the lobster stocks, and the relatively small fishing effort expected to occur in key areas, the FMP, as amended, was not likely to jeopardize the monk seals.

1999: New information indicated that the 1999 harvest levels were not likely to jeopardize the continued existence of monk seals.

NEPA:

On July 8, 1999, NMFS issued final harvest guidelines as a framework taken pursuant to the FMP (Presumably under the 1983 EIS). On the same day, NMFS issued a regulatory amendment dividing the NWHI into 4 management areas and authorizing NMFS to allocate the harvest guideline among those areas. This action was accompanied by an EA/FONSI.

The court held that an EIS was required under NEPA to evaluate fishery interactions with monk seals; and NMFS had failed to meet this requirement.

In terms of relief, the court enjoined the lobster fishery pending completion of a new BO and EIS. The order read, "defendants are enjoined from implementing the Crustacean FMP until the Court receives notice that both the Biological Opinion and the EIS ... are complete and have been issued. Accordingly, the lobster fishery is to remain inactive until such time."