Statement of Suzanne Iudicello
before the
Subcommittee on Fisheries Conservation, Wildlife and Oceans
of the
House Resources Committee
14 April 2005

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's 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't 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'd 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 hand-wringing 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 management 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.