THE NATIONAL ENVIRONMENTAL POLICY ACT
SUBCOMMITTEE ON FISHERIES AND OCEANS
COMMITTEE ON RESOURCES
April 14, 2005

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

---

[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.

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

---

[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.

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

[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

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.

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].

---

the agency. Id.

[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.

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]

---

[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.

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.