

STRUCTURAL FLAWS AND SELECTED FAILURES OF ANALYSIS

PART ONE: SUBSTANTIVE FAILURES IN THE ANALYSIS

I. The PSEIS Does Not Satisfy the Agency's Obligation Under NEPA and Is Not Responsive To The Court's Order.

A. The PSEIS Does Not Satisfy the Agency's NEPA Obligation Because the Alternatives Do Not Address the Continued Authorization of Fishing in the North Pacific Region

1. *NEPA Background*

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Its goal is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(c). To meet this purpose, NEPA requires that agencies prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS “is more than a disclosure document” and is to “be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.” 40 C.F.R. § 1502.1. It is, therefore, “an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” *Id.*

NEPA requires that an EIS be prepared for major federal actions, including the “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.” *Id.* § 1508.18(b)(2); see also § 1502.4(b) (“Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations.”). For those types of federal actions, the agency is required to produce a “programmatic environmental impact statement” (PEIS) evaluating the broad implications of the proposed policy or program changes. The continued management of the North Pacific Region fisheries is such a broad agency action, and the Court has required NMFS to prepare a PEIS.

Whether it evaluates a broad federal program or discrete, site-specific project, the section of an EIS dealing with the comparison of alternatives “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14; see also *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). That section “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The agency then must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

2. *The Alternatives Identified Do Not Address the Appropriate Federal Action*

“The goals of an action delimit the universe of the action’s reasonable alternatives.” Citizens Against Burlington v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1990); see also Mumma, 956 F.2d at 1520. “[T]he agency thus bears the responsibility for defining at the outset the objectives of an action,” Busey, 938 F.2d at 196, and the agency may not “define its objectives in unreasonably narrow terms.” City of Carmel-by-the-Sea v. United States Dep’t of Transportation, 123 F.3d 1142, 1155 (9th Cir. 1995). Thus, the agency must identify the federal action being considered and the purpose and need for that action; it then must use that information to develop alternatives. See 40 C.F.R. § 1502.13 (“The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”). It follows, therefore, that the agency must consider alternatives that will satisfy the purpose and need for federal action and that the alternatives considered in an EIS must be alternatives to the proposed course of action.

In this situation, the agency has defined correctly the federal action at issue -- the ongoing management of the North Pacific fisheries -- but it has failed to consider any alternatives to the current course of action. Instead, it has created an artificial statement of purpose -- evaluating alternative policy statements -- and developed unreasonable policy alternatives that cannot fulfill the identified need for federal action. Rather than alternate statements of policy, the agency must consider alternative management schemes for the North Pacific fisheries. Thus, rather than broad statements of policy, the alternatives should be various FMPs.

As the PSEIS correctly states:

In this case, the federal action is a continuing activity: the ongoing management of the groundfish fisheries in the EEZ off Alaska, as authorized by the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and pursuant to NEPA and other applicable statutes and executive orders.

PSEIS at 1-1; see also id. at 1-2 (“Rather, the federal action supported by this document is the continuing management of the groundfish fisheries in the EEZ off Alaska.”), 2-1 (same). This description of the action under review comports with the Court’s remand Order, see Greenpeace v. Nat’l Marine Fisheries Serv., 55 F. Supp. 2d 1248 (W.D. Wash. 1999), and is consistent with the scoping notice issued on October 1, 1999:

NMFS announces its intent to prepare a programmatic SEIS that defines the Federal action under review as, among other things, all activities authorized and managed under the FMPs and all amendments thereto, and that addresses the conduct of the GOA and BSAI groundfish fisheries and the FMPs as a whole,

64 FR 53306.

Thus, the proposed federal action under review is the continued authorization and management of the North Pacific groundfish fisheries under the current FMPs. The PSEIS, however, does not consider alternatives to that action. Instead, the document describes four “policy-level” alternatives:

The restructured alternatives (now four in number) range from a relatively less environmentally precautionary approach to an approach that is relatively more precautionary. Toward this end, each policy alternative offers, to varying degrees, an integrated suite of comprehensive policy goals designed to meet the alternative's specific management or policy objective. To capture the breadth of each policy approach, each alternative (with the exception of the first, *status quo* alternative) contains two hypothetical FMPs that serve as "bookends" to illustrate a range of management actions and potential environmental effects consistent with that alternative policy framework.

PSEIS at 1-9; see also id. at 2-41.

That approach does not comport with the need for federal action identified by the agency and the Court. Indeed, "the ongoing management of the groundfish fisheries" involves much more than a set of policy goals and objectives. It involves the entire suite of conservation and management measures that constitute an FMP. Thus, the agency is required to consider alternatives to the current FMPs, not just the existing statement of goals and objectives.¹

Indeed, a supplement was needed to update the EIS prepared in 1978 for the GOA FMP and the EIS prepared in 1981 for the BSAI FMP. NEPA regulations require an EIS to be supplemented when "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1); see also Friends of Clearwater v. Dombeck, 222 F.3d 552, 557-58 (9th Cir. 2000) (describing the standards that are used to determine when an SEIS is needed). According to the Court, the agency "seems to have acknowledged that an SEIS was necessary under both the 'substantial changes to the action' and the 'significant new information' prongs" Greenpeace, 55 F. Supp. 2d at 1271. Nothing has changed in that regard in the new draft:

The need for a "Supplemental" EIS became apparent to NOAA Fisheries during the 1990s, when the agency was apprised of the legal and scientific insufficiency of the initial EISs prepared for the GOA and BSAI groundfish FMPs in 1979 and 1981, respectively. . . . Significant changes have occurred in the resource and its environment over the past 20 years, and the initial EISs supporting the FMPs no longer adequately reflect the current state of the environment. While fishery management regulatory actions and FMP amendments have all been attended by environmental analyses, mainly EAs or

¹ The agency attempts to remedy this deficiency by identifying the "purpose" of the PSEIS as "analyz[ing] comprehensive policy alternatives in support of the continuing management of the groundfish fisheries of the BSAI and GOA." PSEIS at 1-2. That statement of purpose is unreasonably narrow, not responsive to the Court's remand Order, and does not help the agency evaluate the proposed federal action. Instead, it represents a transparent attempt by the agency to avoid consideration of alternative FMPs. The PSEIS has no purpose other than evaluating the proposed action and alternatives.

EISs, none of those analyses attempted to examine the impact the FMPs in their entirety have had on the environment.

PSEIS at 1-3. Further,

[t]he original EISs for the BSAI and GOA FMPs were finalized in 1981 and 1978 respectively. Although many EAs and several EISs have been prepared for FMP amendments and regulatory actions over the ensuing years, none examined the BSAI and GOA FMPs in their entirety or, in other words, at a programmatic level. Since the original EIS documents were developed, major changes have taken place in the technology of the fishing industry, in the allocation of the resources, in the environmental conditions, and in the FMPs themselves. The accumulation of these changes indicated a need for a revision of those initial EISs that would supplement the original analyses and would hence result in a Programmatic SEIS.

Id. at 1-6; see also Decl. of Steven Pennoyer in support of Defendants' Motion for Stay, filed Aug. 10, 1998, at ¶ 3 ("This SEIS will update previous EISs that were completed for these fishery management plans."). Thus, the agency recognizes that the PSEIS is intended to update and supplement the two earlier FMP EISs.

The 1981 BSAI FMP EIS "examines the direct and indirect impacts upon the human environment of the proposed approval and implementation" of the Fishery Management Plan for the Groundfish Fishery in the Bering Sea and Aleutian Islands Area," and has as its purpose an evaluation of the "approval and implementation of the FMP" and alternatives. BSAI EIS at 4, 9. It then analyzes the environmental implications of the proposed FMP as well as alternative management schemes, including lower and higher catch levels, the adoption of various area closures, different reporting schemes, a trawl gear restriction, three separate methods of calculating Optimum Yield, and Prohibited Species management. Id. at 10-34. Similarly, the 1978 EIS for the GOA FMP states that "[t]he proposed action is to implement a preliminary fishery management plan for the foreign trawl fishery" in the GOA. GOA EIS at 1. It evaluates two alternatives to the proposed plan -- one in which there is no plan governing foreign trawl fishing and one in which the plan allows foreign trawl fishing at a rate lower than that allowed by the preliminary draft plan. Id. at 96-97.²

"Since the original EISs were prepared, significant changes occurred within the fishing industry and the FMPs for the GOA and BSAI were each amended more than forty times." Greenpeace, 55 F. Supp. 2d at 1270-71. In fact, the current management schemes in the GOA and BSAI are so different than those evaluated in 1978 and 1981, that, effectively, each constitutes an entirely new FMP. Accordingly, an appropriate, comprehensive "update" must consider alternatives similar to those considered in the original EISs. An evaluation limited to alternative policy statements only updates a portion of the decisions made more than twenty years ago. In 1978 and 1981, the Council and the

² This comparison is not intended as an endorsement of the analysis undertaken in those EISs. Rather it simply highlights the fact that, in those documents, the agency did identify correctly the scope of the analysis it should have undertaken.

agency understood that an examination of the entire action implemented by the FMPs, and alternatives to those FMPs, was required. No less is required today to update those documents. Indeed, the agency recognizes that “a Programmatic SEIS for the Alaska groundfish fisheries should essentially be a broad environmental review of the GOA and BSAI Groundfish FMPs and alternatives to them.” PSEIS at 2-60.

Moreover, the agency will not be able to remedy this deficiency in the future by preparing EAs or EISs for FMP amendments. Indeed, the agency intends to use the PSEIS as an overarching analysis from which to “tier” future amendments to the existing FMPs. See PSEIS at 1-2 (“Any specific FMP amendments or regulatory actions proposed in the future will be evaluated by subsequent EAs or EISs that are tiered from the Programmatic SEIS but stand as case-specific NEPA documents and offer more detailed analyses of the specific proposed actions.”). It claims that “[a]ny such amendments and actions will logically derive from the chosen policy direction set for the preferred alternative.” Id. This method of management will not satisfy NEPA because there will be no adequate plan-level EIS.

Since the 1978 and 1981 plan-level EISs for the GOA and BSAI groundfish fisheries were promulgated, the only NEPA process with regard to the North Pacific groundfish fisheries has been in response to the annual TAC authorizations and ad hoc amendments to the FMPs. Each of those NEPA documents tiers from one of the original EISs so as to eliminate the need to repeat the analysis conducted therein. The Court and the agency, however, have recognized explicitly that the 1978 and 1981 EISs are no longer sufficient for management of the North Pacific fisheries. See Greenpeace, 55 F. Supp. 2d at 1271. Accordingly, NMFS and the NPFMC no longer can tier from the analysis conducted in those documents. Moreover, just as the intervening amendment-level EAs and EISs have not remedied the deficiencies in the existing plan-level EISs, similar NEPA documents for future amendments to the FMPs will not satisfy the agency’s obligation to have an appropriate plan-level EIS in place.³

Thus, to satisfy its obligation to update the existing FMPs and to evaluate effectively the “ongoing management of the groundfish fisheries,” the agency must consider alternative FMPs. It may not avoid this responsibility by creating artificial, policy-level alternatives.

3. The PSEIS Will Not Result in the Implementation of an Alternative Course of Action

³ Nor can the agency tier appropriately from the PSEIS as it is constructed currently to plan amendments because there is a step missing in the analytic chain. While the agency may tier from a program-level EIS to a site-specific determination, it cannot tier directly from a program-level EIS to amendment-level EAs or EISs. So, NMFS could tier from an FMP-level EIS (i.e., one that considers alternatives to the FMP) to a NEPA document evaluating the impacts of an amendment to the FMP. Indeed, the agency has used that process for the past twenty years. Similarly, it could tier from a policy-level EIS (i.e., one evaluating alternative policy goals) to a NEPA document evaluating alternative FMPs that might further those policy goals and objectives. It may not, however, tier directly from a policy-level analysis to NEPA documents evaluating the impacts of amendments to FMPs without having in place an appropriate FMP-level EIS. In other words, without evaluating alternatives to the current FMPs, the agency may not appropriately use the policy-level analysis to justify changes to the current FMP.

As discussed above, the PSEIS is deficient because it fails to consider alternatives to the “ongoing management of the groundfish fisheries” under the existing FMPs. In addition, however, the PSEIS analysis also is insufficient because it does not help the agency decide currently how to best manage the fisheries in compliance with the MSA. Instead, the PSEIS identifies a series of policy-level alternatives that should guide the agency in the event that it decides to implement changes to the FMPs at some point in the future. While such a policy may be advantageous, it is not sufficient. As explained above, it does not comport with the federal action identified by the agency (the “ongoing management of the groundfish fisheries”) and, as explained below, it does not satisfy the Court’s direction. More fundamentally, however, such an approach contravenes Congress’s intent that the NEPA process help “public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment,” 40 C.F.R. § 1500.1(c) (emphases added), and it does not help the agency fulfill its obligation under the MSA to manage the groundfish fisheries.

To foster conservation and effective management of the nation’s fishery resources, the MSA requires that each Council develops an FMP “for each fishery under its authority that requires conservation and management.” 16 U.S.C. § 1852(h)(1). Those plans, and any amendments thereto, must be approved by the Secretary. *Id.* Because the groundfish fisheries in the North Pacific region clearly qualify as “fisheries that requires conservation and management,”⁴ the agency is required to have a valid FMP in order to continue its authorization and management of those fisheries. Thus, at the most basic level, the agency has made a choice already -- it has decided to authorize fishing in the North Pacific region -- and, accordingly, it is obligated under the MSA to have an FMP. It could relieve itself of this MSA responsibility by deciding to ban all groundfish fishing in the region. As it is, however, the agency has continued, and will continue, to authorize and manage fishing in the North Pacific, and, therefore, must have in place a valid FMP.

It is within this decisionmaking structure that NEPA must be implemented. The agency has decided already to authorize fishing in the North Pacific, and, accordingly, it is obligated under the MSA to design an appropriate FMP. The NEPA process is intended to make the agency’s choice -- the choice among alternative FMPs -- an informed one and to ensure that the public is included in that

⁴ The MSA defines “fishery” to mean “one or more stocks of fish which can be treated as a unit” and “any fishing for such stocks.” 16 U.S.C. § 1802(13). Similarly,

[t]he term “conservation and management” refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that -

- (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
- (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and
- (iii) there will be a multiplicity of options available with respect to future uses of these resources.

Id. § 1802(5).

decisionmaking process. To achieve those dual purposes, NEPA requires that the agency create an EIS. That EIS “serve[s] as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal government.” 40 C.F.R. § 1502.1 (emphasis added). Thus, “[a]n environmental impact statement is more than a disclosure document” and “shall be used . . . to plan actions and make decisions.” *Id.* “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 to foster excellent action.” *Id.* § 1500.1(c).

The PSEIS fails to meet these mandates because it does not help the agency choose among alternative FMPs. Indeed, the alternatives designed by the agency do not encompass the choices that must be made by the agency or NPFMC under the MSA. Rather, the agency has created a new level of decisionmaking -- a “policy” level that sits “above the line” in its analysis and overarches the FMPs. Standing alone, that sort of overarching policy is not sufficient to satisfy the agency’s MSA requirements, was not required by the Court in this case, and does not address the decisions that must be made by the agency in managing the fisheries. Further, the fact that this EIS is intended to be broad in scope and cover the agency’s “programs” does not allow the agency to analyze only policy objectives. Rather, the PEIS still must evaluate programmatic choices that are responsive to the decision being made under the MSA to authorize fishing in the region. See 40 C.F.R. § 1502.2(e) (“The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.”).

Moreover, a choice among the four alternatives will not result in any direct, implementable change in fishery management. Rather, the agency has designed the PSEIS purposefully to avoid restricting the Council’s discretion in managing the North Pacific groundfish fisheries. The agency may not abdicate its ultimate responsibility to oversee the management of fisheries to the Council in that manner. See 16 U.S.C. § 1855(d) (“The Secretary shall have general responsibility to carry out any [FMP] or amendment approved or prepared by him . . .”).

The impotence of the analysis in the PSEIS is revealed by the explanation of the hypothetical “bookends.” As the PSEIS states, “the bookends do not reflect the actual specific measures that will be chosen in the future. Rather, they represent the outer bounds of the range of management decisions and measures specific to any policy alternative and serve, also, to provide the basis for a solid scientific analysis of the effects of each specific policy alternative.” PSEIS at 2-41; see also id. at 2-42 (“[T]he bookends establish the likely range of management actions the NPFMC will examine . . .”). Indeed, the PSEIS goes so far as to admit that “[f]indings contained within this analysis could result in FMP amendments that, in turn, could lead to formal rule-making and implementation of changes to the current management regime governing the groundfish fisheries off Alaska.” PSEIS at 2-60 (emphases added). By choosing one of the four alternatives, however, the agency does not obligate itself to take specific actions but asserts only that any actions it might take in the future likely will fall within the range identified by the “bookends.”⁵

⁵ The PSEIS does state that “[o]nce the NPFMC and NOAA Fisheries choose a policy-level alternative (and accompanying bookends), it will be committing, to the extent practicable, to devise and implement FMPs and management actions consistent with the goals and objectives of that chosen alternative.” PSEIS at 2-42. Nowhere,

Such an analysis does not constitute an adequate evaluation of management alternatives under NEPA. Indeed, the Court required, quite plainly, that “[t]he SEIS will provide reasonable management alternatives, as well as an analysis of their impacts, so as to ‘sharply define[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.’” Greenpeace, 55 F. Supp. 2d at 1258 (quoting 40 C.F.R. § 1502.14) (emphasis added). By definition, a “management” alternative must concern actual “management” changes and must be capable of being implemented. Programs are not mere articulations of policy goals and objectives. See 40 C.F.R. 1508.18 (Defining “Major Federal action” as the “(3) Adoption of programs such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.”) (emphases added); see also Ronald E. Bass, et al., The NEPA Book 30 (2001) (“Programs” are the “[a]doption of concerted actions intended to implement a specific policy or plan or that allocate agency resources to a specific statutory program or executive direction.”).

These comments do not suggest that an agency may never prepare a PEIS without detailing the precise actions to be taken in each geographic or project area. Indeed, such a requirement would eliminate the advantages inherent in programmatic analysis. Nonetheless, a PEIS must identify strictures within which future agency actions will take place and require that those actions, in fact, are implemented. A useful comparison can be drawn to the programmatic EISs that are prepared to accompany land and resource management plans implemented under the National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1600, et seq. Such a land management plan “sets logging goals, selects the areas of the forest that are suited to timber production and determines which ‘probable methods of timber harvest’ are appropriate [but] does not itself authorize the cutting of any trees.” Ohio Forestry, 523 U.S. 726, 729 (1998) (internal citations omitted). Thus, a PEIS accompanying such a plan must identify alternatives for each of those parameters -- logging goals, areas of the forest that are subject to timber production, etc. See Mumma, 956 F.2d at 1511-12, 1521-22. Similarly, an appropriate programmatic analysis in the MSA context would, among other requirements, identify alternative “conservation and management measures,” allocations of the allowable catch, reporting requirements, essential fish habitat designations, and criteria for designating overfished fisheries. See 16 U.S.C. § 1853(a) (specifying provisions required in an FMP); see also Greenpeace, 55 F. Supp. 2d at 1255 (“The FMPs typically contain a high level of detail concerning all the variables involved in fishing, including Total Allowable Catch (TAC) limits for targeted species, time and area closures, gear restrictions, bycatch limits of prohibited species, and allocation of TACs among vessels delivering to different types of processor groups, gear types, and qualifying communities.”) (internal quotation omitted). In this case, the PSEIS does not identify any such direct limitations to be put in place or actions to be taken to meet the policy goals identified.⁶

however, is this statement explained, and there is no description of what those “FMPs and management actions” might be. Instead, the PSEIS simply asserts that the agency’s “approach to developing the programmatic alternatives sets a distinct course for decision-making.” Id. at 2-41. In fact, the policy choice made by the agency does nothing of the sort; it simply provides a set of boundaries within which management techniques, if implemented, may fall.

⁶ To compound its error, the agency also fails to consider an appropriate range of alternatives. Policy Alternatives 1 and 3 are indistinguishable from the Preliminary Preferred Alternative, and Policy Alternatives 2 and 4 do not present

B. The PSEIS Does Not Comport With the Court's Order

The Court rejected NMFS's first PSEIS because it was too narrow in scope. It held specifically that the agency could not limit its analysis to alternative TAC setting processes. The Court found, first, that, although they might be ambiguous, the scoping notices indicated that the PSEIS would encompass more than just the TAC setting process. Greenpeace, 55 F. Supp. 2d at 1273 (“[T]he weight of the language pointed to a broader scope.”). In addition, however, the Court stated explicitly that

a narrow SEIS dealing only with TAC levels would not satisfy NEPA. The FMPs involve “a myriad of interrelated regulations to manage the fisheries.” In light of the significant changes to these FMPs and the new information about the broad range of issues covered by these regulations, the Court concludes as a matter of law that NEPA required a broad programmatic SEIS in order to fairly evaluate the dramatic and significant changes which have occurred in the GOA and BSAI groundfisheries.

Id.

The Court went on to criticize the TAC-only approach because it did not “sharply [define] the issues and [provide] a clear basis for choice among options’ related to the FMPs” and did not “help future decision-makers assess whether the fisheries should continue to be conducted under the current structure of the FMPs, or whether other alternatives would be more beneficial.” Id. at 1274. The Court quoted approvingly from the EPA’s final comments on the SEIS, which

correctly note that NEPA’s requirement that NMFS “rigorously explore and objectively evaluate all reasonable alternatives,” dictates

inclusion of more comprehensive alternatives which look at and programmatically address all elements of the FMP (i.e. location and timing of each fishery, harvestable amounts, exploitation rates, exploited species, groupings of exploited species, gear types and groupings, allocations, product quality, organic waste and secondary utilization, at-sea and on-land organic discard, species at higher and lower trophic levels, habitat alterations, and relative impacts to coastal communities, society, the economy, and the domestic and foreign groundfish markets) and varies TAC levels outside of the present status quo range.

As written, however, the SEIS does not provide decision-makers with any way of assessing the trade-offs between gear-restrictions and bycatch, for example, or the way that the timing of the various fisheries interact.

an adequate or concrete range of possible choices.

Id. at 1274-75 (emphasis added).

The new policy-only approach does not remedy these deficiencies because it does not allow agency decisionmakers to choose among alternative management schemes. Indeed, the new PSEIS is flawed in a manner directly parallel to the first attempt; NMFS simply has exchanged a PSEIS with alternatives that focused only on the TAC-setting process for one focused solely on statements of policy and goals. In so doing, the agency has repeated the same mistake it made in the first attempt by “focusing narrowly on one aspect of” the FMPs. Id. at 1276. Thus, this PSEIS is deficient for the same reasons identified in the Court’s Order with regard to the TAC-only approach. See id. at 1274 (“For the same reasons, NMFS cannot then break the FMPs down ‘into small component parts’ by analyzing only the setting of TAC levels rather than these FMPs in their entirety.”).

Moreover, the analysis of potential impacts to the environment from implementing the hypothetical “bookends” does not render acceptable the agency’s choice to limit the alternatives to statements of policy. Indeed, it was “[t]he Court’s determination that the SEIS must be treated as a broad, programmatic analysis of the FMPs as a whole [that led] directly to its conclusion that the range of alternatives considered was inadequate.” Id. Thus, regardless of the impacts analysis, the Court clearly expected the agency to consider alternatives comprised of complete FMPs.

II. The Chosen Baseline and Cumulative Impacts Analysis are Inappropriate Because the PSEIS Fails to Consider the Impacts of the FMPs Themselves.

A second major deficiency in the PSEIS is the lack of a comprehensive evaluation of management under the existing FMPs since they were implemented more than 20 years ago. The PSEIS does attempt to analyze the impacts of the numerous amendments to the two FMPs, but it never provides an assessment of the impacts of the FMPs themselves. To remedy this failure, NMFS must either include a comprehensive discussion of these effects in its cumulative impacts discussion, or change the baseline for its impacts analysis so that it begins when the FMPs were promulgated.

NEPA requires that the agency evaluate the cumulative impacts of the proposed action. PSEIS at 4.1-24. Cumulative impacts are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. These impacts, along with the more direct impacts on the environment from each alternative, are evaluated against a baseline description of the potentially affected environment. See PSEIS at 4.4-1.

In the PSEIS, NMFS has chosen the current state of the fisheries as this “comparative baseline.” Id. (stating that the PSEIS compares alternatives to the state of the affected environment in “2002 for physical and biological resources, and 2001 for socioeconomics”). As it is described in the PSEIS:

The baseline does not represent a static ‘snapshot’ of the resource. Instead, it represents the trend of the resource, incorporating the past history of influences on the

resource. The cumulative past effects of groundfish fishery activity, as well as effects external to the groundfish fishery such as other fishery impacts, human-induced impacts or climatic events influencing the resource, all contribute to the state of the baseline condition.

PSEIS at 4.4-1. This baseline is described in more detail by tables summarizing the descriptions of the affected environment as provided in Chapter 3 of the PSEIS. See id.

The choice of a particular point in time as the comparative baseline for an ongoing management scheme obligates the agency to evaluate the cumulative impacts of its past management practices. Thus, in order to render appropriate its choice of the current state of the fisheries as the comparative baseline, NMFS must undertake an evaluation of the cumulative impacts to the fishery, environment, and other resources that have occurred since the prior NEPA process. In that time, there have been impacts and changes caused by environmental factors, the fisheries themselves, and amendments to the FMPs. The PSEIS presents only a cursory overview of the numerous amendments to the GOA and BSAI FMPs since the original EISs were prepared. PSEIS at 3.2-1. Although the Court clearly required such an analysis, see Greenpeace, 55 F. Supp. 2d at 1274 (“The Court has no doubt that the vast changes to the FMPs have reached the threshold of ‘cumulatively significant impact on the environment,’ thereby requiring preparation of an SEIS addressing these vast changes.”), an evaluation of the effects of the FMP amendments alone does not satisfy the cumulative impacts requirement.

Rather, the evaluation of “Internal Events and Actions,” for each fishery resource must contain an analysis of the impacts of the fisheries, as managed under the existing FMPs, since the earlier NEPA documents were finalized. Those assessments should begin with the state of the resources in 1981 (or 1978) and explain the impacts of FMP-governed fishing since that time. Indeed, the Court found that NEPA “requires NMFS to analyze the ways in which the groundfisheries effect the North Pacific ecosystem, and to provide decisionmakers and the public with a document that will help further informed decision-making as to the consequences of these plans.” Id. at 1276. Thus, it held that that NEPA required more than just an analysis of the amendments to the FMPs, but also the “creation of a document that thoroughly analyzed the cumulative effects of the FMPs” themselves. Id. at 1273 (emphasis added).

Similarly, NMFS recognized in its statement of need for an SEIS, that a comprehensive evaluation of management under the existing FMP framework was lacking. See PSEIS at 1-3 (“While fishery management regulatory actions and FMP amendments have all been attended by environmental analyses, mainly EAs or EISs, none of those analyses attempted to examine the impact the FMPs in their entirety have had on the environment.”). The PSEIS should contain such an analysis and does not.

That failure renders the impacts analysis insufficient. In particular, the cumulative effects are measured against the current state of the environment without proper consideration of changes that may have resulted from the past twenty years of management.

Further, the lack of a comprehensive evaluation of the impacts of fishing under the existing FMPs renders improper the choice of 2002 as the baseline. As noted in the PSEIS:

As part of the programmatic review of the groundfish fisheries, however, it is necessary to review the cumulative impacts of the groundfish fisheries on the human environment, including both the incremental impacts of the FMP amendments, and the impact of groundfish fishery management in addition to other past external impacts on the environment affected by the groundfish fisheries, in order to establish a baseline condition against which to compare the Programmatic SEIS alternatives for direct, indirect and cumulative effects.

Id. at 3.2-1 (emphasis added). Thus, the agency cannot evaluate effectively the future impacts of management decisions without understanding how management under the FMPs has affected the resources over the past twenty years. It cannot choose to begin its comparison at some arbitrary point in time without presenting an accurate picture of the changes in the resource caused by the existing management scheme prior to that point. In order to use 2002 as the proper baseline from which to compare alternative policies, therefore, the agency must undertake a comprehensive evaluation of the effects of management under the current FMPs.⁷

III. The Public Process Did Not Allow for Sufficient Comment on the DPSEIS.

NEPA regulations require that NMFS “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a); see also 40 C.F.R. § 1500.2(d) (“Federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”). Similarly, NOAA’s Environmental Review Procedures for Implementing NEPA, issued in 1999, recognize that

[p]ublic involvement is essential to implementing NEPA. Public involvement helps the agency understand the concerns of the public regarding the proposed action and its environmental impacts, identify controversies, and obtain the necessary information for conducting the environmental analysis. RPMs must make every effort to encourage the participation of affected Federal, state, and local agencies, affected Indian tribes, and other interested persons throughout the development of a proposed action and to

⁷ Further, NMFS has not fulfilled its obligations when confronted with uncertain information. If there are information gaps, the agency is required to obtain the missing information if “the overall costs of obtaining it are not exorbitant.” 40 C.F.R. § 1502.22(a). If the costs are exorbitant, NMFS must provide: (1) a statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information; (3) a summary of the existing, relevant scientific evidence; and (4) the agency’s evaluation of the potential adverse impacts based upon theoretical approaches or research methods. Id. § 1502.22(b). In this case, NMFS appears to assume that the costs of obtaining all missing information would be exorbitant, but it then fails to comply the second part of the regulation. Indeed, there is estimation of the relevance of missing information or summary of existing, credible scientific evidence. These failures to evaluate the significance of these readily apparent holes in the agency’s science render insufficient NMFS’s evaluation of the potential adverse impacts of its actions.

ensure that public concerns are adequately considered in NOAA's environmental analyses of a proposed action and in its decisionmaking process regarding that action.

§ 5.02(b).

NMFS has not abided these regulations. Instead, it has limited public participation improperly by allowing an inadequate comment period and prohibiting certain methods by which the public previously was able to submit comments.

A. The Public Comment Period Was Insufficient.

The agency's failure to allow for meaningful public participation is evidenced by its refusal to allocate a sufficient time for public comment. The PSEIS is more than 7000 pages long and consists mainly of complex scientific analysis, detailed descriptions, and many charts, figures, and graphs. Moreover, its structure -- four policy alternatives that are evaluated using hypothetical case studies as "bookends" -- is a novel approach to NEPA analysis and one that requires comprehensive evaluation.

Nonetheless, when it first issued the PSEIS, NMFS allowed only 48 days for public comment - three days longer than the statutory minimum. See 40 C.F.R. 1506.10(c). Based on objections voiced to the agency, that comment period was extended by three weeks, to 69 days. By contrast, for the previous draft, which was less than half as long, the agency initially scheduled a 90-day comment period. That comment period was deemed inadequate and, at the request of a number of public stakeholders, was twice extended; it did not close until over 180 days had passed.

The current comment period is too short to allow the public to conduct a detailed evaluation and garner a complete understanding of the PSEIS. Thus, it will not permit the public to submit meaningful comments. Moreover, NMFS has not provided any justification for maintaining such a limited time period. The agency is "encouraged to set time limits appropriate to individual actions." 40 CFR 1501.8. In setting those limits, the agency may consider:

- (i) Potential for environmental harm.
- (ii) Size of the proposed action.
- (iii) State of the art of analytic techniques.
- (iv) Degree of public need for the proposed action, including the consequences of delay.
- (v) Number of persons and agencies affected.
- (vi) Degree to which relevant information is known and if not known the time required for obtaining it.
- (vii) Degree to which the action is controversial.
- (viii) Other time limits imposed on the agency by law, regulations, or executive order.

Id. at § 1501.8(b)(1). Those factors favor an extensive comment period in this case: the potential for grave environmental harm resulting from mismanaged fisheries has been well documented; the "proposed action" covers the entire North Pacific region; there are few consequences of extending the

comment period -- the deadline to issue a ROD is more than ten months away; the huge number of persons affected was made apparent by the number of comments received on the first draft; and, as evidenced by the fact that it has taken more than five years and three drafts, the action is very controversial.

The undersigned groups note also that, by limiting the comment period to 69 days, the agency has failed to account for the difficulties faced by Alaskan Natives in participating in the public process. Executive Order 12898, entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires that federal agencies conduct their “programs, policies, and activities that substantially affect the human health or the environment, in a manner that [does] not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.” § 2-2. In implementing that directive, “[a]gencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.” CEQ Guidance Regarding Environmental Justice at 9 (December 10, 1997).

Native populations have a direct and important interest in the management of the North Pacific fisheries. For many, the oceans are an important source of subsistence and cultural heritage. Nonetheless, many Natives have not accessed the PSEIS and could not attend the public meetings because they were not scheduled in accessible locations. Despite the significance of the Native populations’ stake in the process, the agency set a public comment period that is too short to allow for effective communication with such populations.

For those reasons, the decision to limit the comment period to 69 days impermissibly precluded meaningful public comment on the DPSEIS. The public should have been given the same opportunity to comment on this draft -- 180 days -- as it was given in the past.

B. NMFS Impermissibly Restricted Public Participation by Limiting Faxed and Electronic Comments and by Scheduling the Public Meetings Too Early in the Comment Period.

In addition to allowing a sufficient time period for public comment, the agency must “[s]olicit appropriate information from the public.” 40 C.F.R. 1506.6(d). Thus, it must create clear and sufficient methods by which members of the public can submit their comments. Indeed, “[t]he purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.” Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n, 673 F.2d 525, 530 (D.C. Cir. 1982). Rather than heed these requirements, the agency has limited the methods by which the public may submit comment and has scheduled public meetings in such a way as to preclude meaningful participation.

For the first time in this process, NMFS has restricted the methods by which the public may submit comments. First, it will not accept faxed comments. Second, it has created a new system for e-

mail comments whereby the interested party must log onto the NMFS website and submit comments through the interface created by the agency. This new e-mail system is a deliberate attempt to reduce the number of comments generated. Indeed, e-mail is an extremely common method of communication, and constituents are entitled to submit comments without a text-rich interface. The extra steps involved in NMFS new system will serve no discernable purpose other than to discourage interested individuals from participating in the public process.

Moreover, NMFS has scheduled public meetings in such a way as to preclude meaningful public participation. The PSEIS was made available to the public on August 29. Public meetings were scheduled for September 8 in Silver Spring, MD, September 11 in Seattle, WA, September 17 in Juneau, AK, September 24 in Kodiak, AK, and October 7 in Anchorage, AK. No public meetings were scheduled after October 7. It is absurd of the agency to presume that meaningful comments on the substance of a 7000-page EIS could be prepared and ready to present one week after the document was made available to the public. The agency simply could not expect to receive useful or meaningful comments at the September 8, 11, or 17 meetings. If the agency were serious about encouraging and considering public participation, it would have scheduled public meetings late enough in the process to allow stakeholders to formulate meaningful comments. Moreover, the agency set the meetings in Maryland, Seattle, Juneau, Kodiak, and Anchorage -- locations easily accessibly to industry, but far from the remote villages most directly impacted by management of the fishery resources. In so doing, the agency again failed to take simple steps, such as scheduling public meetings closer to the impacted people, to accommodate Native populations.

PART TWO: SUBSTANTIVE FAILURES IN THE ANALYSIS

I. The draft PSEIS analysis hides the true effects of the groundfish fisheries on the marine environment

One of the more fundamental analytical and presentation flaws in this draft PSEIS is its failure to provide the public and the decisionmaker with a credible evaluation of the effects of the groundfish fisheries on the marine environment. This failure is evident both in the Fisheries Service's analysis of overall effects and cumulative effects.

The Fisheries Service defines whether or not the overall effects of the groundfish fisheries on marine resources are "significant" by reference to the environmental conditions that existed last year. Thus, unless there is a significant deviation from the status quo, the Fisheries Service tells the public and the decisionmaker that the effects of continued authorization of the fisheries are "insignificant." This overall effects ratings scheme hides from the public and the decisionmaker the true effects of industrial scale fishing, denying them the information needed to participate effectively in the decisionmaking process and predetermines a rating of "insignificance" for the status quo regime.

For example, with regard to habitat, the Fisheries Service tells the public and decisionmaker that

continuing the status quo policies would result “insignificant” environmental effects.⁸ This is extremely misleading because the cumulative effects analysis rates historical habitat impacts (up until 2002) as “conditionally significant adverse.”⁹ This “continued mortality and damage to living habitat” would continue under the status quo (from 2002 forward).¹⁰ The Fisheries Service’s analytical framework, however, proclaims these “long-term and possibl[y] irreversible loss of living habitat” to be “insignificant.” Ultimately, the Fisheries Service is not presenting to the public an analysis that considers the environmental effects of the alternatives, but instead considers the change in policies from the status quo.

This approach to overall effects also enshrines the status quo degraded environment as the benchmark for successful fisheries management. This EIS was supposed to examine how we got to the currently degraded environment, what the combination of past and future effects would be under alternatives, and whether there are better ways to manage our marine resources. By choosing last year as the baseline against which effects are measured, the Fisheries Service makes such an inquiry virtually impossible. The use of this 2002 baseline predetermines the outcome of the analysis by ensuring that the continuation of the fisheries as currently prosecuted will not receive a negative rating.

The Fisheries Service’s analysis of cumulative effects further denies the public and the decisionmaker the information necessary to make informed choices about fisheries management. The cumulative effects analysis is not presented as a major source of information for evaluating effects, and does not even appear in the main body of the document. More fundamentally, the cumulative effects analysis fails both to look backward and to look forward. The primary time series of data used in the cumulative effects analysis is from 1997 to 2001. In the first programmatic EIS in over two decades, a cumulative effects analysis largely consisting of looking backward to only 1997 is simply insufficient. Further, the cumulative effects analysis fails to consider and analyze the reasonably foreseeable effects of continuation of the groundfish fisheries, looking forward only 4 years in their primary analysis. Nowhere does the Fisheries Service sufficiently evaluate the past, present and reasonably foreseeable effects of the groundfish fisheries on the marine environment. Such a failure goes to the heart of the agency’s NEPA obligations to the public and the decisionmaker and renders this EIS fatally flawed.

These flaws in the analysis of effects deny the public and the decisionmaker the information necessary to participate effectively in the NEPA process.

II. The draft PSEIS fails to analyze critical core assumptions

Another key feature of this draft PSEIS should have been the critical evaluation of the core assumptions and policies that drive fisheries management decisions in the current management regime. The Fisheries Service fails in this regard, accepting the underpinnings of the status quo system without consideration.

For example, the Fisheries Service acknowledges in this draft PSEIS that one of the management

⁸ RDPSEIS IV, 4.10-14.

⁹ Id.

¹⁰ Id.

measures with the single most significant effect on the marine environment is the overall fishing rate as expressed in the annual allowable catches.¹¹ Increases or decreases in allowable catch can have significant effects on a variety of marine resources. Nevertheless, the Fisheries Service fails to analyze critically the status quo fishing rate policy of $F_{40\%}$. Instead, the agency asserts simply that the $F_{40\%}$ policy is “safe” without an explanation of its simplifying assumptions and limitations in an ecosystem context.¹²

The $F_{40\%}$ policy, which by design seeks to reduce target fish populations at 40% of their estimated unfished biomass, is expected to reduce the total consumption by higher trophic levels and predator populations by a similar amount (Goodman et al. 2002). The Fisheries Service, however, fails to consider these cumulative and ongoing effects on the marine environment. Instead, the agency uses the “safe” $F_{40\%}$ policy as the basis for an “insignificant” rating on the effect on the forage availability of competing consumers in the ecosystem (such as endangered Steller sea lions and depleted northern fur seals) under the status quo and Preliminary Preferred alternative and example FMP bookends.

Rather than examine issues such as the effects of $F_{40\%}$ on competing marine consumers, for example, the draft PSEIS summarily states:

There is a fairly widespread consensus in the scientific literature that, for a range of typical groundfish life histories, $F_{40\%}$ is a safe harvest rate.¹³

This statement, however, misses the core issue: analysis of the effects of the $F_{40\%}$ policy on elements of the marine ecosystem other than “typical” targeted groundfish.¹⁴

Similarly, the Fisheries Services fails to assess the existing Optimum Yield (“OY”) values in the North Pacific to determine whether the $F_{40\%}$ policy complies with statutory guidelines for achieving an OY that protects marine ecosystems and addresses ecosystem considerations. Although NMFS makes claims that the 2 million metric ton cap in the Bering Sea/Aleutian Islands 1981 Final EIS achieves conservation benefits, there is no analysis of whether this cap, which was put into place to approximate harvest levels attained in the recent past, meets the needs of dependent and related species in the ecosystem.

In addition, NMFS fails to adequately analyze the overfishing regulations. Tiers 1-3 contain no explicit Minimum Stock Size Thresholds.¹⁵ The rules in the North Pacific allow fishing on some stocks until they reach 5% of $B_{40\%}$. For Tiers 4-6, there is not information to even establish a stock’s biomass in relation to an MSST. NMFS must explain why they have not set MSSTs.

Further, NMFS fails to reconcile how claims that $F_{40\%}$ and its assumptions about density-dependent

¹¹ NMFS 2001 North Pacific Groundfish Draft PSEIS, Section 4.1, pg. 46.

¹² RDPSEIS VIII, F-1-117.

¹³ RDPSEIS VIII, F-1-17.

¹⁴ Even the Fisheries Service’s analysis of the effects on target stocks is inadequate, as described in detail in the attachments.

¹⁵ In response to the terms of the mitigation plan for ESA listed Steller sea lions, NMFS has recently designated MSSTs of $B_{20\%}$ for important prey stocks (pollock, Atka mackerel, and cod).

stock productivity at B_{40%} are consistent with the countervailing claims throughout the document that density-independent extrinsic environmental forces are driving species populations and productivity. As long as fishery yields remain robust, NMFS takes credit for managing stocks conservatively under the F_{40%} policy. If a stock fails to equilibrate around the lower B_{40%} target stock biomass assumed by this theory, however, NMFS blames the weather. NMFS must explain how these mutually exclusive theories are reconciled and considered in management decisions, and how the uncertainty in the F_{40%} assumptions are addressed.

Basic assumptions of MSY include assuming that stocks can be managed outside their role in the ecosystem, assuming that density dependence is the main regulating factor in the population dynamics, and assuming that if one simply knows enough about the vital information of the stock, then it is possible to fully control the trajectory of the stock.¹⁶ Despite these assumptions, Bogoslof/Aleutian Basin pollock and crab stock declines are attributed to density independent factors such as the effects of regime shifts.¹⁷ The explanation that a regime shift is the major cause of these changes is irreconcilable with the fact that no theory of regime shift has shown an effect on fish population as profound as that which is assumed in the stock assessment models and theory of MSY, which approximately doubles the estimated annual mortality of stocks such as pollock by design.¹⁸

It seems self-evident that the theoretical assumptions underlying the harvest policy that drives the management system being evaluated in this programmatic document should be rigorously analyzed and that alternative biological reference points and fishing rate controls should be considered.¹⁹ Conservation organizations and members of the public have repeatedly asked NMFS for a clear explanation of this policy's assumptions and the basis for the supposed scientific consensus of the theoretical underpinnings of the policy that is the basis of TAC-setting. NMFS continues to fail to respond.²⁰

III. The draft PSEIS failed to analyze available data

NMFS has made some advancements in this EIS over previous attempts, but still does not provide an

¹⁶ Goodman et al., p. 84.

¹⁷ RDPSEIS I, 2-33.

¹⁸ Field 2002.

¹⁹ See, e.g., Pamela M. Mace and Wendy L. Gabriel. Evolution, Scope, and Current Application of the Precautionary Approach in Fisheries. In: V.R. Restrepo (Ed.), Proceedings of the Fifth National NMFS Stock Assessment Workshop: Providing Scientific Advice to Implement the Precautionary Approach Under the Magnuson-Stevens Fishery Conservation and Management Act, pp. 65-73. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-F/SPO-40 (1999).

²⁰ NMFS, instead of providing this analysis, simply responds that "acceptance or rejection of the MSY concept is beyond the scope of this PSEIS since MSY as a concept remains a part of the MSA and therefore the agency is obligated by law to determine MSY for all target stocks and work to achieve this goal." RDPSEIS IX, G-II-163. This mischaracterizes a basic call for analysis and explanation of a central concept in groundfish management as a call for acceptance or rejection. Even if this was a call for acceptance and rejection of something obligated by the MSA, however, NEPA requires an agency to evaluate alternatives outside of their statutory mandate if they are reasonable. See "Forty Most Asked Questions Concerning CEQ's NEPA Regulations," 46 Fed. Reg. 18026 (March 23, 1981), as amended, 51 Fed. Reg. 15618 (April 25, 1986), Question 2b.

adequate level of disclosure and analysis of key issues pertaining to the ongoing management and prosecution of commercial fisheries in the North Pacific.

Although the North Pacific fisheries have a higher level of observer coverage on boats than any other fishery in the United States, NMFS fails to use this data to perform meaningful analysis in the draft PSEIS. This failure is especially egregious as NMFS considers some of this data to be confidential, and prevents the public from having access to it. Without presenting and analyzing the data collected since the last PEISs, there is no basis for the public and the decisionmaker to determine the impacts of fisheries and policies or make an informed decision when choosing amongst alternative fishery management measures.

Examples of data analyses that should have been undertaken and mapped include:

- Spatial and temporal movements of fisheries efforts for stocks that have experienced region-wide or localized declines. This is necessary because the gross characterizations of assumed healthy stocks at the regional level often masks localized depletions. For example, although overall pollock fishery yields have remained high throughout the period of U.S. management since the early 1980s, intense spatial and temporal concentration of the pollock fisheries have been accompanied by a pattern of fish stock declines indicative of serial depletion similar to that which occurred under the foreign fisheries. Such a pattern has been documented for pollock in the Shelikof Strait (1981-1985), the Bogoslof/Aleutian Basin (1987-1992), and the Aleutian Islands (1990s). Similar patterns exist for Gulf of Alaska Atka mackerel in the 1980s and early 1990s.
- Spatial and temporal concentration of bycatch based upon fishery observer CPUE is not presented and analyzed. This should be undertaken across the board and especially for vulnerable species such as rockfish, who exhibit habitat fidelity and are prone to localized depletions.
- Detailed analysis of fishery removals within Steller sea lion critical habitat, detailed analysis of fishery distribution data relative to important marine habitats of depleted populations of northern fur seals, harbor seals, or baleen whales is missing. No fishery observer data is provided or analyzed concerning the impacts of the Bering Sea pollock fishery in foraging habitats of lactating northern fur seals around the Pribilof Islands. Such analyses must include data from the entire time period since the last FMP EISs were prepared.

NMFS must disclose and consider all relevant factors, including the data and analyses described above and in the attachment, in the final PSEIS.

IV. The draft PSEIS failed to analyze properly incomplete and unknown

NMFS acknowledges the high levels of uncertainty associated with the North Pacific and the need for

more information in every FMP category such as more and better resource survey information²¹ and fishery catch reporting,²² basic information on commercially exploited (“target”) species biology, life history, genetic diversity, habitat needs,²³ and basic information on “non-target” species taken incidentally as bycatch in the directed fisheries.²⁴ These basic pieces of information are necessary to make even the most minimally informed guess at the impacts of industrial fisheries in the North Pacific.

Further examples of incomplete and unavailable information include:

- Very little habitat is mapped, characterized, or quantified.²⁵
- There is too little information for Tiers 4-6 of “managed” stocks to estimate the biological reference points for FMSY of BMSY, without which it is impossible to tell if they are overfished.²⁶
- Genetic diversity is unknown for most species and the potential impacts of fishing on genetic diversity are unknown.²⁷
- Effects on species diversity are unknown, although NMFS claims “insignificant” impacts.²⁸
- The historical or contemporary baseline abundance trends of many of the indicator species in the ecosystem indicate that the range of natural variability are unknown.
- Stock abundance estimates cannot be verified.
- Species with patchy habitat, such as rockfish, cannot be adequately surveyed by the area swept method, leading to large variances (error bounds) around estimates of abundance.²⁹
- Relationships between stock sizes and recruitment is an unverified assumption and cannot be known with any certainty.³⁰
- Basic information on habitat preferences and requirements of target species are poorly known.³¹
- Information on spatial/temporal concentration may have substantial negative effects on target species as well as non-target species, but the effects are uncertain and largely unknown.³²
- Overfishing of vulnerable members of a stock assemblage is possible but would be unknown.³³
- Data is poor for non-target species and difficult to assess how much protection they receive.³⁴
- Total and spawning biomass for BSAI and GOA forage fish is unknown at this time.³⁵

²¹ RDPSEIS IV, 5-15.

²² RDPSEIS I, 2-24; I, 3.5-207; II, 4.5-274, 275; IV, 4.9-225.

²³ RDPSEIS, 3.6-27; II, 4.5-278; IV, 4.9-225; IV, 4.10-4,6,7,8,77,78; IV, 5-16, 117, 24, 25; VIII, F-3-14, 17.

²⁴ RDPSEIS I, 2-24; I, 3.5-207, 217, 218, 219, 224, 225; II, 4.5-153, 154, 160, 162, 254, 275, 281; IV 4.9-232, 234, 235, 236; IV, 4.10-83; VIII, F-3-35.

²⁵ See, e.g., RDPSEIS II, 4.1-13; RDPSEIS VIII, Appendix F, F-3-17,33, 35; RDPSEIS IV, 5-24; RDPSEIS IV, 5-16, 22; RDPSEIS 3.6-27; RDPSEIS II, 4.5-278.

²⁶ RDPSEIS IV, 4.10-6, 7, 8.

²⁷ RDPSEIS II, 4.5-278.

²⁸ RDPSEIS II, 4.5-277.

²⁹ RDPSEIS VIII, F-2.20.

³⁰ RDPSEIS I, 3.10-15.

³¹ RDPSEIS IV, 5-16.

³² RDPSEIS IV, 5-15, 16.

³³ RDPSEIS IV, 5-17; IV 4.9-225.

³⁴ RDPSEIS IV, 4.9-231.

- For the Other Species FMP category generally, changes in total biomass, reproductive success, genetic structure of a population, habitat, or mortality rates under any FMP cannot be determined due to a lack of a baseline condition.³⁶
- Species-specific catch information does not exist for the Other Species category.³⁷
- Little is known about squid, sculpins, and sharks; it is unknown whether the bycatch of skates, sharks or grenadiers is high enough to bring these species below viable population thresholds.³⁸
- Virtually no data exist that would allow any member of the “huge and diverse category” of Non-Specified Species population estimate to be determined.³⁹
- Potential effects on crab habitat cannot be determined.⁴⁰
- There is no analysis of the available time series of fishery observer bycatch CPUE data by gear type and area, including maps and other figures, for incidental catch of prohibited species, target species, other species, forage species and non-specified species.

NMFS does not undertake the requisite discussion of the significance of these unknowns and how they affect the agency’s determination of whether or not various policies either have or will have significant adverse effects on the environment.⁴¹ Although the Fisheries Service admits that some information is incomplete or unavailable, NMFS fails to assess adequately the relevance of this unavailable information by determining its significance and summarizing existing analogous scientific information relevant to evaluating reasonably foreseeable significant environmental impacts of the alternatives or their bookended proxies.

Added together, a pattern of illogical conclusions emerges. The agency admits that it knows relatively little about every aspect of the North Pacific except for minimal information on a few commercially important species. These uncertainties, however, are not incorporated into the agency’s conclusions that the impacts of the status quo and preliminary preferred alternative are “insignificant.”⁴²

V. Where the draft PSEIS does analyze issues, such analysis is inadequate

Compared to the 2001 draft PSEIS, which framed alternatives around single resource categories, NMFS has made some improvements in the analytical framework. The agency’s analysis, which utilizes ten “indicators” to assess direct, indirect, and cumulative effects from an ecosystem perspective, potentially provides a more systematic approach to evaluating the impacts of the groundfish fisheries.

³⁵ RDPSEIS II, 4.5-160.

³⁶ RDPSEIS II, 4.5-154.

³⁷ RDPSEIS IV, 4.9-225.

³⁸ RDPSEIS II, 3.5-217, 218, 225; II, 4.5-275, 277, and 281.

³⁹ RDPSEIS I, 2-24.

⁴⁰ RDPSEIS II, 4.5-153, 154.

⁴¹ See, e.g., 42 C.F.R. Sec. 1502.22.

⁴² Two examples illustrate this point: NMFS states that there is uncertainty surrounding the effects of pollock removal on fur seals at both the global and local scales, RDPSEIS IV, 5-33; RDPSEIS I, 3.8-21, but concludes, despite the fact that pollock removal rates are both designed and expected to outcompete predators such as Northern fur seals, that the effects are “insignificant.” RDPSEIS VI, Table 4.5-110. Similarly, pelagic forage availability is rated “insignificant.” RDPSEIS VI, Table 4.5-110.

These analyses, however, are inadequate. Two types of examples follow – a brief discussion of the limitations of the models used in the analysis, and examples of specific failures concerning various ecosystem components.

The Fisheries Service relies heavily in this draft PSEIS on a handful of models, which have substantial limitations. NMFS fails to explain thoroughly how the limiting assumptions and biases within the models affect the analysis.

The multispecies technical interaction model, for example, is driven by single species management criteria and assumptions. It assumes that average fishing mortality rates and changes in mortality rates occur at the stock-as-a-whole level. This ignores the spatial distribution of stock biomass, the movement of fish, and the effects of fishing on local stock biomass at any given time. Thus the analysis of Steller sea lion prey availability, which is important at the global, regional, and local temporal spatial scales, is dealt with at only the global scale. These failures and inadequacies render the conclusion of “insignificant” impacts unjustifiable.

Similarly, the catch-composition array feature of the multispecies technical interaction model is complicated, subjected to limited inputs (the data is from 1997-2001), and has a poor predictive power.⁴³ The data input limitations, coupled with the absence of any spatial/temporal analysis of bycatch from the fishery observer program since the last PEIS’s in 1978 and 1981, prevent the public or the decisionmaker from being able to understand the true impacts of industrial fisheries since the last PEISs. Even without the analysis, however, NMFS inexplicably rates the bycatch of prohibited species, which is often spatially and temporally concentrated, as “insignificant.”

The habitat analysis model is similarly limited. It focuses on one small subset of habitat, those areas described as Habitat Areas of Particular Concern biota and fails to provide any analysis of any other habitat types in the North Pacific. Again, despite the lack of information, NMFS rates the impacts “insignificant” instead of “unknown.”

While not a model failure, the Fisheries Service’s use of proxies in the analysis is similarly troubling. For example, NMFS arbitrarily uses grenadiers, a species lumped into the “non-specified species” category to determine the significance of the impacts of the alternatives on hundreds of other species. NMFS similarly uses HAPC biota as a proxy for all habitat.

In addition to the limitations of the models and selected proxies, meaningful analyses of several environmental issues of concern seem to be missing from the draft PSEIS. These include:

- Analysis of fishery impacts on harbor seals, “other” pinnipeds, transient killer whales, “other” toothed whales, “other” baleen whales and sea otters
- Important information on Steller sea lion and northern fur seal physiology, reproductive biology, and foraging ecology, which are all energetically expensive and therefore

⁴³ RDPSEIS II, 4.1-44.

vulnerable to declines in prey availability caused by large scale trawl fisheries in the North Pacific

- Analysis of sea lion and fur seal habitat is virtually non-existent, and fishery observer data relevant to issues of prey availability were not analyzed. Neither the quantities of catch in sea lion and fur seal habitats nor the areas and times of year in which fishing occurred are analyzed for any time period.
- A review of the impacts of bottom trawling, especially as they relate to the former Bristol Bay crab pot sanctuary
- A review of the biomass estimates of stocks and how the stock assessment authors have analyzed and adjusted the historical data to arrive at these numbers
- NMFS fails to adequately analyze the northern fur seal declines at the largest reproductive center in the eastern Bering Sea, which coincides with the rise of large-scale trawl fisheries for pollock and other groundfish and point to food shortages as a likely cause.⁴⁴
- NMFS fails to adequately analyze the Prohibited Species Cap management program, which is rife with unknown population estimates and impacts. Furthermore, the bycatch of halibut has not decreased and the bycatch of Chinook salmon and some crab has increased.
- NMFS fails to adequately analyze the Improved Retention/Improved Utilization Program to determine if bycatch has been reduced and avoided or merely converted into fishmeal.

Further examples and details are included in the attachments.

IV. Neither the status quo FMPs nor the nearly identical Preliminary Preferred Alternative (“PPA”) constitute a systematic commitment to ecosystem-based management or reconcile goals for economic production under MSY with objectives for protecting ecosystems

NMFS says the status quo has the *potential* to be considerate of ecosystem needs in the TAC-setting process, but *would need a more formalized decision-making system to explicitly implement*. PSEIS IV, 4.10-9. Although the Fisheries Service says the existing BS/AI FMP (but not the GOA FMP) has “secondary objectives” which “highlight the importance” of minimizing impacts to the environment, the primary management objective of status quo FMPs (analyzed as Alternative FMP 1) is to maximize positive economic benefits. PSEIS I, 2-17.

The lack of a formalized system of commitments to ecosystem-based management and lack of clear guidance in the FMPs on how to integrate ecosystem considerations in management decisions is reproduced in the PPA. As in the status quo, NMFS merely maintains that the PPA would be “consistent with” with ecosystem principles. PSEIS IV, 4.10-75. Clearly NMFS wants to associate the management system with the EPAP (1999) and NRC (1999) recommendations (see PSEIS IV, 4.11, pp. 4-16 for discussion,) but without making any specific commitments to follow them. There are no commitments in this system of management and there is no accountability for decisions made. There are no consequences for failing to comply with any policy when any course of action can be construed loosely as “consistent with” any policy, regardless of its efficacy or sufficiency.

⁴⁴ This is especially troubling because of the disproportionate impacts to cultural, subsistence, and economic livelihoods of Alaska Native populations on the Pribilof Islands. A similar issue arises with regard to fisheries interactions with salmon and the disproportionate impacts on Yukon River Alaska Native and rural communities.

The Fisheries Service says the PPA “takes into account” the ecosystem-based recommendations of the National Academy of Sciences Sustainable Fisheries Policy (NRC 1999), but the PPA represents a continuation of the status quo regulations and makes no formal commitments to address shortcomings in single-species management, only vague promises of future improvements “as necessary” and future incorporation of ecosystem-based considerations “as appropriate,” based on “sound scientific research.” PSEIS I, 2-62, 63, 64, 65, 66. As under the status quo FMPs, the burden of proof remains almost entirely on the environment to demonstrate that damage is occurring before action is even considered to mitigate adverse effects. Actions taken thus far under the status quo FMPs have been wholly inadequate to address ecosystem considerations.

Instead of being more precautionary in the face large uncertainties, the PPA would approve the same massive amounts of fishing year after year through the TAC specification process, based on an assumption of insignificance from an absence of evidence. The burden of proof remains almost entirely on the environment to demonstrate harm from fishing before action is taken. It is simply assumed and taken for granted that fishing has the right to continue as the primary mission unless or until “significant impacts” are demonstrated. PSEIS IV, 4.10-14.

Instead of disclosing and addressing the real differences in policy objectives and operative assumptions between ecosystem-based approaches to fishery management and the yield-based “conventional world view” of “single-species” management described by Goodman et al. (2002), NMFS attempts to paper over the differences with thousands of pages of rationale. Regarding ecosystem-based management, NMFS says there is no roadmap to follow or other examples to emulate. PSEIS IV, 4.11-9. The Oceans Alternative is an attempt to provide that roadmap.